U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 03 052 50641 Office: TEXAS SERVICE CENTER Date: 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[redacted]

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INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

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DISCUSSION: The director of the Texas Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a restaurant in Katy, Texas employing more than 200 persons. It seeks to hire the beneficiary as a quality management analyst in its kitchen. The director denied the petition because she determined the proffered position did not meet the criteria required for classification as a specialty occupation and that the beneficiary did not qualify to perform services in a specialty occupation. On appeal, counsel submits the Form I-290B.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) the petitioner's response to the director's request for evidence; (3) the director's denial letter; and (4) the Form I-290B. The AAO reviewed the record in its entirety before reaching its decision.

The initial issue before the AAO is the determination of whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one that requires:

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

> An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

(2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(3) The employer normally requires a degree or its equivalent for the position; or

(4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act.

The petitioner has asserted that it is seeking the beneficiary's services as a quality management analyst. Evidence of the beneficiary's duties includes: the Form I-129; a December 3, 2002 support letter from the petitioner accompanying the Form I-129; and the petitioner's July 3, 2003 response to the director's request for evidence.

In its December 3, 2002 letter, the petitioner stated the beneficiary's duties would be to "establish and analyze systems pertaining to quality management" and that he had to be familiar with the details of how to manage food services, have knowledge of operating procedures and efficient methods of accomplishing the services provided, would be required to confer with personnel to insure smooth functioning of newly implemented systems and have practical experience in applying these efficiency methods and operating procedures.

Additional information on the position's duties was provided in the petitioner's response to the director's request for evidence. Here, the petitioner specifically stated that the duties of the position would not include food preparation, nor the management of daily kitchen operations. Instead, the proffered position was described by the petitioner as being focused on observing and analyzing current restaurant operations, and on lowering costs and increasing profits. Beyond the duties noted in its December 3, 2002 support letter, the petitioner also stated that the beneficiary would implement and train on new systems for the restaurant.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(1)* and *(2)*: a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v.*

Reno, 36 F. Supp. 2d 1151, 1165 (D.Min. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

In his May 28, 2003 request for evidence, the director stated that the petitioner's proffered position most closely resembled the occupation of chef, employment that did not qualify as a specialty occupation, and asked the petitioner to submit additional evidence that its position met any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). At the time of her denial on November 25, 2003, the director again noted that the petitioner had failed to establish that its proffered position was a specialty occupation. Following its own review of the duties of the proffered position, the AAO concludes that these duties appear closely aligned to those of food service general managers, as described in the 2004-2005 edition of the *Handbook*.

In contrast to the limited description of the duties of food service managers offered by the petitioner in its response to the director's request for evidence, the *Handbook* provides a description of an occupation with extensive responsibilities, including those associated with the proffered position. According to the *Handbook*:

> Food service managers are responsible for the daily operations of restaurants and other establishments that prepare and serve meals and beverages to customers. Besides coordinating activities among various departments, they oversee the inventory and ordering of food, equipment and supplies and arrange for the routine maintenance and upkeep of the restaurant, its equipment and facilities. Managers generally are responsible for all of the administrative and human-resource functions of running the business, including recruiting new employees and monitoring employee performance and training.
>
> In most full-service restaurants and institutional food service facilities, the management team consists of a general manager, one or more assistant managers, and an executive chef....
>
> One of the most important tasks of food service managers is assisting executive chefs as they select successful menu items.... Managers or executive chefs analyze the recipes of the dishes to determine food, labor, and overhead costs and to assign prices to various dishes....
>
> Managers or executive chefs estimate food needs, place orders with distributors, and schedule the delivery of fresh food and supplies.... They inspect the quality of fresh meats, poultry, fish, fruits, vegetables, and baked goods to ensure that expectations are met.
>
> Managers must be good communicators. They need to speak well, often in several languages, with a diverse clientele and staff. They must motivate employees to work as a team, to ensure that food and service meet appropriate standards....
>
> In addition to their regular duties, food service managers perform a variety of administrative assignments....most general managers retain responsibility for the accuracy of business records.

> Technology influences the jobs of food service managers in many ways, enhancing efficiency and productivity.... To minimize food costs and spoilage, many managers use inventory-tracking software to compare the record of sales...with a record of the current inventory.

The *Handbook* also comments on the educational or training background required of those individuals who wish to work as food service managers:

> Most food service management companies and national or regional restaurant chains recruit management trainees from 2- to 4-year college hospitality management programs. Restaurant chains prefer to hire people with degrees in restaurant and institutional food service management, but they often hire graduates with degrees in other fields who have demonstrated interest and aptitude. Some restaurant and food service manager positions – particularly self-service and fast-food – are filled by promoting experienced food and beverage preparation and service workers. Waiters, waitresses, chefs, and fast-food workers demonstrating potential for handling increased responsibility sometimes advance to assistant manager of management trainee jobs. Executive chefs need extensive experience working as chefs, and general managers need prior restaurant experience, usually as assistant managers.

In response to the director's request for additional evidence, the petitioner has asserted that the size and volume of its restaurant business require the services of a quality management analyst with a bachelor's degree or its equivalent in hospitality management or culinary arts. On appeal, counsel again affirms the petitioner's need for a quality management analyst. However, while the petitioner has clearly stated its desires regarding the proffered position, the AAO notes that it is not the petitioner that dictates whether a position qualifies as a specialty occupation under Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1). That determination can only be made through the application of the four criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree.

Based on its determination that the proffered position is closely aligned to that of food service manager, the AAO withdraws the finding of the director that the proffered position is that of a chef, with additional supervisory responsibilities. However, as the *Handbook* states that entry level jobs for food service manager may be filled by applicants with degrees from two-year or four-year college management programs, the AAO still concludes that the petitioner has failed to establish that its position qualifies under the first criterion – that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

To determine whether the petitioner's position meets the second criterion – that a specific degree requirement is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty – the AAO has reviewed the materials submitted by the petitioner in response to the director's request for evidence and considered counsel's statements on appeal. The submitted evidence does not, however, establish that a baccalaureate or higher degree requirement is an industry norm for food service managers.

On appeal, counsel asserts that the Department of Labor (DOL) materials provided by the petitioner in its response to the director's request for evidence constitute proof that a degree requirement is common to the industry. She states that the SVP and job zone ratings given to the management analyst position by the DOL's *Dictionary of Occupational Titles (DOT)* and *Online Wage Library* respectively support that assertion. However, the AAO has determined that the petitioner's proffered position is not that of management analyst, but of food service manager and, therefore, this material does not reference the petitioner's position. More importantly, neither the *DOT*, nor the *Online Wage Library* is a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. They provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education and experience, and it does not specify the particular type of degree, if any, that a position would require. The job zone rating of 4 given to the position of management analyst by the *Online Wage Library* does not indicate that a bachelor's degree in a specific specialty is required.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)*(3)* and *(4)*: the employer normally requires a degree or its equivalent for the position; and the nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In this case, the petitioner has submitted no evidence that would allow CIS to make a determination as to its normal hiring practices.

In assessing whether the petitioner has met its burden with regard to the fourth criterion, the AAO has, again, reviewed the duties of the proffered position, as described by the petitioner at the time of filing and in response to the director's request for evidence. Although the petitioner has asserted that the duties of the position require "great knowledge, training and experience," the duties, as described, do not lead the AAO to conclude that they are more specialized or complex than those associated with the occupation of food service manager as described in the *Handbook*. As a result, the AAO must conclude that the petitioner has failed to meet the requirements of the fourth and final criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO now turns to the issue of whether the beneficiary whom the petitioner seeks to employ is qualified to perform the duties of the specialty occupation.

In determining whether an alien is qualified to perform the duties of a specialty occupation, CIS looks to the petitioner to establish that the beneficiary meets one of the requirements set forth at Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2) -- full state licensure to practice in the occupation, if such licensure is required; completion of a degree in the specific specialty; or experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Further discussion of how an alien qualifies to perform services in a specialty occupation is found at 8 C.F.R. § 214.2(h)(4)(iii)(C), and requires the individual to:

(1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

(4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The beneficiary in the instant case does not possess any U.S. or foreign degree, or need a license to perform the duties of the proffered position. Therefore, at the time of filing, the petitioner submitted documentation to establish his qualifications to perform a specialty occupation under the fourth of the above criteria, stating that his 34 years of employment experience and training in the culinary arts, and food and beverage service management, and related areas provide him with the equivalent of a U.S. degree.

When a beneficiary is determined to lack the specific degree required by a specialty occupation, the AAO relies upon the five criteria specified at 8 C.F.R. § 214.2(h)(4)(iii)(D) to determine whether the individual may still qualify to perform the proffered position. A beneficiary who does not have a degree in the specific specialty may still qualify for an H-1B nonimmigrant visa based on:

(1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

(2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

(3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

(4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

On appeal, counsel has expressed concern that, in reaching its decision, CIS' consideration of whether the beneficiary is qualified to perform the duties of a specialty occupation was limited to an exploration of the extent to which he could meet the requirements of the last of the above criteria. Counsel is correct in her understanding that the petitioner may use any of the five avenues at 8 C.F.R. § 214.2(h)(4)(iii)(D) to establish the beneficiary's eligibility. The record before the AAO will, therefore, be reviewed to determine whether the petitioner's evidence establishes that the beneficiary may qualify to perform in a specialty occupation based on academic evaluations of his training and work experience, a college-level equivalency or special credit program, certification or registration from a professional association or society, or a CIS determination that his training and employment history are the equivalent of a degree in the specialty occupation.

To establish the beneficiary's qualifications under 8 C.F.R. § 214.2(h)(4)(iii)(D), the petitioner has submitted an academic equivalency evaluation of the beneficiary's work experience. This evaluation, provided by [redacted] Evanston, Illinois, finds the beneficiary's work experience and training to qualify him for a bachelor of arts degree in culinary arts. However, while the opinion of [redacted] relevant to this proceeding, there is no independent evidence in the record of his authority to grant college-level credit for work experience, nor that Kendall College has a program that grants college-level credit based on foreign educational credentials, training and/or employment experience. In the absence of a letter from someone in a position of authority at Kendall College supporting [redacted] assertions, his evaluation cannot serve as evidence that the beneficiary has the equivalent of a U.S. degree as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)*(1)*. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

As the record contains no other documentation that responds to the evidentiary requirements of the above criteria, the AAO next turns to 8 C.F.R. § 214.2(h)(4)(iii)(D)*(5)* – whether the equivalent of a degree in the specialty occupation has been acquired through a combination of education, specialized training and/or work experience in areas related to the specialty and if the beneficiary has achieved recognition of his expertise in the specialty occupation as a result of such training and experience.

When evaluating a beneficiary's qualifications under the fifth criterion, CIS considers three years of specialized training and/or work experience to be the equivalent of one year of college-level training. In addition to documenting that the length of the beneficiary's training and/or work experience is the equivalent of four years of college-level training, the petitioner must also establish that the beneficiary's training and/or work experience has included the theoretical and practical application of specialized knowledge required by

the specialty occupation, and that the experience was gained while working with peers, supervisors, or subordinates who have degrees or the equivalent in the specialty occupation. The petitioner must also document recognition of the beneficiary's expertise in the specialty, as evidenced by one of the following: recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation; membership in a recognized foreign or U.S. association or society in the specialty occupation; published material by or about the alien in professional publications, trade journals, books or major newspapers; licensure or registration to practice the specialty in a foreign country; or achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

However, as already stated in the director's denial, the beneficiary's training and employment history does not qualify him to work in a specialty occupation per the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(D)*(5)*. While the AAO acknowledges that the petitioner has had a significant number of years of employment as a chef and has been promoted in that capacity, these accomplishments do not qualify him to perform the duties of a specialty occupation. The record before the AAO does not establish that the beneficiary's work experience included the theoretical and practical application of specialized knowledge required for the petitioner's self-described specialty occupation. Further, there is no information in the record to indicate that the beneficiary's work experience was gained while working with peers, supervisors or subordinates who have degrees or the equivalent in the specialty; or resulted in any recognition of his expertise in the specialty.

Therefore, for reasons related in the preceding discussion, the petitioner has failed to establish both that the proffered position is a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A) and that the beneficiary is qualified to perform the duties of a specialty occupation per 8 C.F.R. § 214.2(h)(4)(iii)(C). Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.