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U.S. Department of Homeland Security
Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
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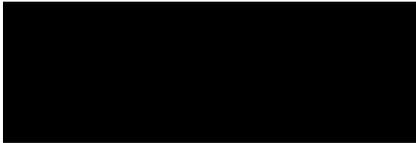


File: EAC 02 095 50023 Office: VERMONT SERVICE CENTER Date: **JAN 27 2004**

IN RE: Petitioner: 
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:



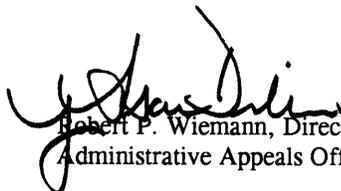
INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, 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 with 13 employees and a gross annual income of \$871,000. It seeks to temporarily employ the beneficiary as a sous chef. The director determined that: (1) the proffered position was not a specialty occupation; and (2) the beneficiary was not qualified to perform the duties of the proffered position.

On appeal, counsel submits a brief and copies of documentation already on the record. Counsel asserts that the position of sous chef is a specialty occupation, and that the beneficiary is qualified to perform the duties of a specialty occupation.

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 an occupation 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:

[A]n occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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.

The first issue in this proceeding is whether the petitioner has established that the proffered position is a specialty occupation. In the original petition, the petitioner described the duties of the proffered position as follows:

- Supervise and coordinate activities of Cooks and other workers engaged in preparing and cooking foodstuffs.
- Observe workers engaged in preparing, portioning, and garnishing foods to ensure that methods of cooking and garnishing and sizes of portion[s] are as prescribed.
- Give instructions to cooking personnel in fine points of cooking.
- Cook and carve meats and prepare dishes, such as sauces, during rush periods and for banquets and other social functions.
- Assume responsibility for kitchen in absence of Executive Chef.

The petitioner also supplied an academic evaluation prepared by The Trustforte Corporation which states that the beneficiary's foreign education is the equivalent of a U.S. bachelor's degree with a dual major in political science and hotel and restaurant management.

On March 15, 2002, the director issued a request for evidence in which he asked for further information with regard to whether the proffered position was a specialty occupation. The director also requested a copy of all the beneficiary's educational transcripts, documentation which pertains to the beneficiary's qualifications to perform a specialty occupation.

In response, the petitioner expanded on the job duties of the proffered position as follows:

- Manage, [s]upervise and [c]oordinate the activities of the kitchen personnel, and orient them in accordance with the department rules, policies and procedures;
- Plan and set prices for menus, establish portion sizes and standards of service for all the menu items;
- Control food cost by establishing purchasing specifications, storeroom requisition systems, product storage requirements, standardization recipes and waste control procedures;

- Train kitchen personnel as to safe operating procedures for all equipment, utensils[,] machinery, sanitation practices[,] stock rotation schedules[,] refrigeration temperature control points, etc.;
- Hire and schedule kitchen employees in conjunction with business forecasts, predetermine budgets and maintain payroll records for submission to the payroll department;
- Personally cook and carve Indian delicacies, sauces, and traditional dishes for banquet halls, social functions, and catering orders;

The petitioner submitted a letter from Professor Klaus Tenbergen of Kendall College of Culinary Arts. Professor Tenbergen stated in his letter that, in his opinion, the position of sous chef requires a bachelor's degree in culinary arts or a related field. The petitioner also included several job postings for chef positions.

On August 13, 2002, the director denied the petition. The director determined that the evidence failed to establish that the duties of the proffered position required a minimum of a bachelor's degree. The director also concluded that the record did not include documentation to show that the beneficiary was qualified to perform the duties of a specialty occupation whether the qualifications were based on education, work experience, or a combination of the two.

On appeal, counsel states that the discussion of the position of chef found in the Department of Labor's *Occupational Outlook Handbook* (*Handbook*) supports counsel's assertion that a bachelor's degree is the normal minimum requirement for the proffered position. Counsel also claims that the beneficiary is qualified to perform the duties of a specialty occupation by virtue of his education alone, and that it is unnecessary to consider his work experience.

It is noted that the petitioner provided an expanded list of job duties in responding to the director's request for evidence. This expanded list attributed substantially greater responsibility to the proffered position than as the position had been described in the original petition. When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated responsibilities. The petitioner must establish that the position that was offered to the beneficiary at the time the petition was filed merits classification as a specialty occupation. *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. Therefore, the analysis of this criterion will be based on the job duties initially listed in the

petition.

Upon review of the record, the petitioner has not articulated a sufficient basis for classifying the proffered position as a specialty occupation. In evaluating whether the proffered position is a specialty occupation, each of the four criteria listed at 8 C.F.R. § 214.2(h)(4)(iii)(A) will be considered separately below.

I. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position - 8 C.F.R. § 214.2 (h) (4) (iii) (A) (1) .

Citizenship and Immigration Services (CIS) often looks to the *Handbook* when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position. Regarding the educational background required to enter into the proffered position, the *Handbook* on page 307 states that many years of experience are necessary to become an executive chef or cook in a fine restaurant. The *Handbook* also indicates that an increasing number of chefs obtain training in high school, vocational programs, or two or four year colleges. However, the *Handbook* does not state that a bachelor's degree or its equivalent in a specific specialty is necessary to perform the duties of a sous chef. Without more persuasive evidence, the petitioner has not established the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

II. 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 - 8 C.F.R. § 214.1(h)(4)(iii)(A)(2)

A. Degree Requirement is Common to the Industry

Factors often considered by CIS when determining the industry standard include: whether the *Handbook* reports that 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." *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)).

The educational requirements for the position of sous chef as described in the *Handbook* were discussed above and will not be repeated here. In the instant petition, to establish the industry standard, the petitioner submitted several vacancy announcements for chefs. There is no evidence, however, that the entities that issued the vacancy announcements are similar in size or nature to the petitioner's restaurant. Moreover, the majority of the announcements that call for a bachelor's degree do not specify that

the degree must be in any particular field. The petitioner submitted no documentation that any professional restaurant association has made a bachelor's degree in a specific specialty a requirement for entry into the field, nor has it submitted letters or affidavits from firms or individuals in the industry which attest that such firms "routinely employ and recruit only degreed individuals." Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

B. Complexity and Uniqueness of the Proffered Position

In the alternative, the petitioner may show that the proffered position is so complex or unique that it can be performed only by an individual with a degree. In the instant petition, counsel asserts that the position is complex and unique; however, no documentary evidence is provided to support this assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 534 (BIA 1988). Without more persuasive testimony, the petitioner has not established this criterion.

III. The employer normally requires a degree or its equivalent for the position - 8 C.F.R. § 214.2(h)(4)(iii)(A)(3)

There is no evidence on the record with regard to the petitioner's educational requirements for former or new sous chefs. Without more persuasive evidence, the petitioner has not established this criterion.

IV. 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 - 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

On appeal, counsel refers to the letter from Professor Tenbergen, who states that, in his opinion, the duties of the proffered position are so complex that the incumbent must have a bachelor's degree or its equivalent in culinary arts or a related field. As described in the original petition, however, the duties do not differ from the duties found in other sous chef positions. Without specific evidence regarding the claimed complex nature of the proffered position, the petitioner has not met the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner has failed to establish that any of the four criteria enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

The second issue in this proceeding is whether the beneficiary is qualified to perform the duties of the proffered position.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

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.

With regard to judging whether practical experience or specialized training is equivalent to the completion of a college degree, 8 C.F.R. § 214.2(h)(4)(iii)(D) states:

[E]quivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

- (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 of 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 [CIS] 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. For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college level training the alien lacks. For equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least five years of experience in the specialty. If required by a specialty, the alien must hold a Doctorate degree or its foreign equivalent. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

(i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;

(ii) Membership in a recognized foreign or United States association or society in the specialty occupation;

(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;

(iv) Licensure or registration to practice the specialty occupation in a foreign country; or

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

In the initial petition, the petitioner submitted copies of the beneficiary's bachelor's degree in political science and his "craft certificate" for completion of a course in hotel management (food and beverage). The petitioner also submitted an educational equivalency document from The Trustforte Corporation. The evaluation states that, based upon copies of the beneficiary's unspecified documents, the beneficiary had attained the equivalent of a bachelor of arts degree with a dual major in political science and hotel and restaurant management from an accredited U.S. university.

In his request for further evidence, the director specifically asked the petitioner for copies of the beneficiary's transcripts. In response, the petitioner submitted a record of the beneficiary's grades for courses completed in his studies of "food craft." The response did not include transcripts from the University of Calicut, where the beneficiary obtained his bachelor's degree.

Considering the criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(C), regarding the equivalency of the beneficiary's foreign education, the statement of educational equivalency issued by The Trustforte Corporation is regarded as insufficient documentary evidence. The record contains only a "barebones" list of the beneficiary's cookery courses and grades. The record is devoid of any supplemental information with regard to such training courses, such as their duration and academic level. Furthermore, there is no information regarding the applicant's university studies, other than a copy of a diploma. Without such supplemental information, it is not possible to determine how the evaluator reached his conclusion that the beneficiary had the equivalent of a United States university degree in political science and hotel and restaurant management.

CIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 820 (Comm. 1988). Accordingly the educational equivalency document submitted by the petitioner with the original petition is given no weight in this proceeding. Without such an evaluation, the petitioner has not satisfied the regulatory criterion outlined in 8 C.F.R. § 214.2(h)(4)(iii)(C)(2). The first and third criteria are not applicable to the instant petition.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), for the purposes of § 214.2(h)(4)(iii)(C)(4), CIS can evaluate whether the beneficiary has acquired the equivalent of a baccalaureate degree through a combination of education, specialized training, and/or work experience in areas related to the specialty and whether the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. The record is insufficient with regard to both the beneficiary's educational equivalency and his work experience. There is no documentation of his expertise in the field. CIS is unable to make a determination as to whether the beneficiary possesses the equivalent of a U.S. bachelor's degree in the specific specialty.

Without more persuasive testimony, the petitioner has not established that the beneficiary is qualified to perform the duties of a specialty occupation.

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. Accordingly, the appeal will be dismissed.

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