

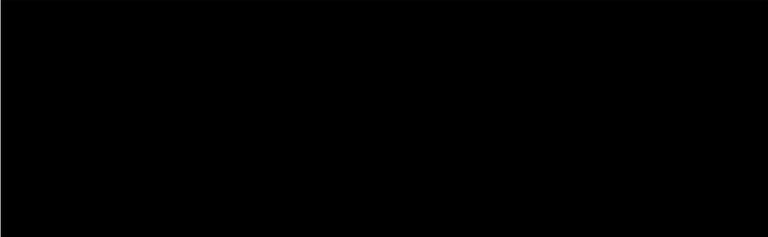
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U.S. Citizenship
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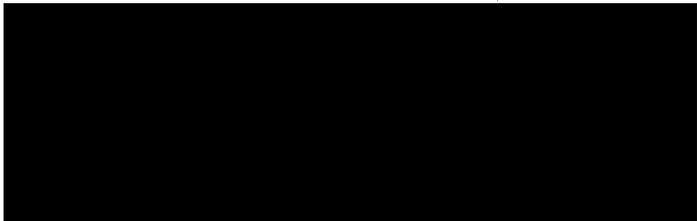


FILE: EAC 02 204 50287 Office: VERMONT SERVICE CENTER Date: **JUN 7 2004**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 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

DISCUSSION: The director of the 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 that seeks to employ the beneficiary as an executive chef. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition because the proffered position is not a specialty occupation. On appeal, counsel submits a brief.

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.

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 criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the

director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as an executive chef. Evidence of the beneficiary's duties includes: the Form I-129 [REDACTED] letter accompanying the Form I-129; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would manage the kitchen staff and perform duties that entail, in part: coordinating and overseeing the activities of chefs, cooks, and other kitchen workers and directing the training of these workers; planning menus; estimating food consumption; purchasing foodstuffs and kitchen supplies; observing food preparation; devising special dishes and developing recipes; participating in food festivals; and determining food, labor, and overhead costs to price menu items. The petitioner stated that a candidate must possess a bachelor's degree or its equivalent in food service management, business, or commerce and have relevant work experience.

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director was not persuaded that the beneficiary would perform duties requiring a bachelor's degree or its equivalent given that the labor condition application (LCA) contained two slots for executive chefs, and the petitioner already had four officers. Rather, the director concluded that the beneficiary would prepare meals for customers.

On appeal, counsel states that the proffered position qualifies as a specialty occupation. Counsel states that the position contains executive chef and managerial duties. The four officers, counsel maintains, are not employees involved in the day-to-day operations of the business. They are policy makers; the beneficiary will perform the daily operations. Counsel cites a case in which the AAO had allegedly held that a position as an executive chef was far more complex than the description provided in the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*); consequently, it found that the requirement of a bachelor's degree in hotel and restaurant management was a reasonable requirement. According to counsel, the *Handbook's* description of an executive chef substantiates the petitioner's degree requirement, and counsel contends that an executive chef's duties are highly specialized and complex, requiring in-depth knowledge of food service management, business, and finance. Counsel furthermore contends that the *Dictionary of Occupational Titles* (DOT) assigns an executive chef position an SVP of eight, reflecting that it requires at least four years of college education and training. According to counsel, the petitioner normally requires that a candidate possess a bachelor's degree in the related field. Counsel refers to letters from two restaurants and job postings seeking executive chefs to demonstrate an industry-wide degree requirement. Finally, counsel states that according to the credential evaluation from Morningside Evaluations and Consulting, the beneficiary holds the equivalent of a bachelor's degree in food service management.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

First, the AAO considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position; 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 in a specific specialty. Factors often considered by CIS when determining these criteria 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." 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)).

Counsel claims that the petitioner satisfies the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). According to counsel, the proffered position is a specialty occupation because it has been assigned a specific SVP rating in The Department of Labor's *DOT* (4th Ed., Rev. 1991). However, the *DOT* is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. The Department of Labor has replaced the *DOT* with the *Occupational Information Network (O*Net)*. Both the *DOT* and *O*Net* 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. The Department of Labor's *Handbook* provides a more comprehensive description of the nature of a particular occupation and the education, training, and experience normally required to enter into and advance within an occupation. For this reason, CIS is not persuaded by a claim that the proffered position is a specialty occupation simply because the Department of Labor has assigned it a specific SVP rating in the *DOT*.

The AAO finds that the *Handbook* reports that the duties of proffered position are indeed performed by an executive chef, and that this occupation does not require a bachelor's degree. The *Handbook* states that executive chefs coordinate the work of the kitchen staff and direct the preparation of meals. They determine serving sizes, plan menus, order food supplies, and oversee kitchen operations to ensure uniform quality and presentation of meals.

According to the *Handbook*, executive chefs who work in fine restaurants require many years of training and experience. Some chefs start their training in high school or post-high school vocational programs. Others receive formal training through independent cooking schools, professional culinary institutes, or 2- or 4-year college degree programs in hospitality or culinary arts. In addition, some large hotels and restaurants operate their own training and job-placement programs for chefs and cooks. Most formal training programs require some form of apprenticeship, internship, or out placement program that are jointly offered by the school and affiliated restaurants. Professional culinary institutes, industry associations, and trade unions also sponsor apprenticeship programs in coordination with the U.S. Department of Labor. Many chefs are trained on the job. Thus, the *Handbook* unequivocally explains that a bachelor's degree is not required for an executive chef position. As such, a bachelor's degree or its equivalent in a specific specialty is not the normal minimum requirement for entry into the proffered position.

Another of counsel's assertions is that CIS has already determined that the proffered position is a specialty occupation since CIS has approved another, similar petition in the past. This record of proceeding does not,

however, contain all of the supporting evidence submitted to the service center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the counsel's assertions are not sufficient to enable the AAO to determine whether the prior petition is parallel to the instant H-1B petition. Moreover, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

If the other nonimmigrant petition was approved based on identical facts that are contained in the current record, the approval would be in violation of paragraph (h) of 8 C.F.R. § 214.2, and would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. [REDACTED]. It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. [REDACTED]

To establish the second criterion - that a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations - counsel refers to letters from two restaurants and job advertisements.

The AAO finds that this evidence is insufficient in establishing the second criterion, however. The letter from [REDACTED] stated that the food service industry in New York customarily requires that candidates for food service manager positions possess at least a bachelor's degree in a related field. According to the letter from Dawat, the job duties associated with the position of executive chef are professional in nature, requiring a person with at least the equivalent of a bachelor's degree in food service. The letter furthermore stated that in the fine dining restaurant industry in the New York City this requirement is the industry norm. The AAO finds that the letter writers fail to substantiate their claims with independent corroborating evidence. [REDACTED]. Thus, the evidentiary value of the letters is diminished. Another noticeable deficiency is that the letter from Akbar Restaurant, Inc. discusses a "food service manager" position instead of the proffered position of executive chef position.

The postings are deficient in a number of ways. The petitioner is dissimilar in nature to the organizations. For example, the [REDACTED] large hotel with a restaurant, lounge, and service room. [REDACTED] an outsourcing service company, and [REDACTED] is a contract food service company. Next, the requirements of the positions differ from the proffered position. The postings from [REDACTED] prefer, but do not require, a bachelor's degree. [REDACTED] posting does not indicate that it requires a bachelor's degree. [REDACTED] - but does not require - a culinary degree or certification. The four postings from [REDACTED] state that ideal candidates will possess a bachelor's degree or related culinary degree; the posting did not mention that a specific bachelor's degree is required. [REDACTED] posting does not indicate that a bachelor's degree in a specific specialty is needed [REDACTED] and the executive chef position with the reference code of ECLA01 require a culinary arts degree - which is not required by the petitioner [REDACTED]

Management Company requires a BS/AAS or a degree from a post-secondary culinary arts training program; Sodexo prefers, but does not require, a degree in food service management or a related field or a culinary degree. Accordingly, the postings fall short of establishing that a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty.

There is no evidence in the record to demonstrate that the petitioner has a past practice of requiring a bachelor's degree or its equivalent in a specific specialty. 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. According to counsel, an executive chef's duties are highly specialized and complex, requiring in-depth knowledge of food service management, business, and finance.

Based on the evidence in the record, counsel's claim is weak. The *Handbook* reveals that the beneficiary's duties mirror those of an executive chef, a position that the *Handbook* plainly evinces does not require a bachelor's degree. The letters from restaurants and the postings fail to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. Consequently, the petitioner cannot establish the fourth criterion.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. 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.