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U.S. Citizenship
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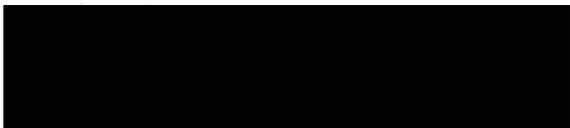


FILE: EAC 03 126 51684 Office: VERMONT SERVICE CENTER Date: FEB 03 2005

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 service center director 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 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 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 I-129 petition; the petitioner's undated letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: overseeing the daily kitchen operations by planning and creating menus taking into account dietary, nutrition, and health considerations; overseeing other professionals in the cooking of foodstuffs and sauces with correct portion sizes and garnishes; enhancing the food product that is presented to the guest and making changes that respond to the market place and to guests' needs, both present and anticipated; conducting and utilizing market research to develop new products; maintaining quality of food product and ensuring consistency in food delivery standards; controlling the elements that determine profit and loss; maintaining statistical records and formulating food consumption projections based on those records for use in ordering and pre-service preparation, setting margins and managing the business based on those projections based on statistical analysis; reviewing menus and analyzing recipes to determine labor and overhead costs, and assigning prices to menu items; making decisions that relate to profit and loss and assuming general responsibility for the financial management of the operations; giving direction and taking responsibility for the implementation of plans and monitoring effectiveness and introducing changes in response to the market place; monitoring labor costs in the restaurant and keeping a daily productivity log and creating effective schedules based upon business projections derived from statistical analysis of past sales and in accordance with restaurant standards, policies and procedures; overseeing professionals as they work with culinary school graduates and students that are undergoing internships; overseeing professionals as they train culinary staff, planning, assigning and directing their work; addressing complaints and resolving problems in accordance with set restaurant standards; formulating and ensuring that a proper sanitation program is maintained, including food hazard critical control points, food temperature danger zones, cross-contamination hazards, personnel hygiene, proper receiving, storage, preparation, cooking and expediting of food safely and in accordance with the Serve Safe Food Safety Program, state, and federal health requirements; providing exceptional customer service at all times; and meeting with prospective clients in order to increase business in the restaurant, banquet and catering operations segments. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in culinary arts or restaurant management.

The director found that the proffered position was not a specialty occupation. Citing to the Department of Labor's *Occupational Outlook Handbook (Handbook)*, 2002-2003 edition, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states that the duties of the proffered position are sufficiently complex to establish it as a specialty occupation. Counsel also states that the petitioner previously submitted two expert opinions that determined the position was a specialty occupation. Counsel asserts that Department of Labor (DOL) sources, other than the *Handbook*, indicate that the proffered position is a specialty occupation. Specifically, counsel refers to the DOL's *O*Net*, which states that both food service managers and chefs and head cooks are "Job Zone 4" occupations, with SVP ratings of 7, which according to counsel, require a degree to enter into the positions. Finally, counsel asserts that the *Handbook* states that there are more than 160 colleges and universities offering degrees in restaurant and hotel management or food service management, which indicates that the position is in transition industry-wide.

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.

The AAO turns first 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; 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 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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. While counsel is correct in stating that the *Handbook* indicates that a bachelor's degree is "particularly strong preparation" for a career as a food service manager, the AAO does not concur that this indicates that the career is one in transition, and therefore warrants approval. The *Handbook* entries for food service managers and for chefs clearly indicate that a baccalaureate or higher degree, or its equivalent, is not required for entry into the occupation.

Counsel's reference to and assertions about the relevance of information from *O*Net* are not persuasive. Counsel asserts that the information in the *Handbook* conflicts with that in *O*Net*, and that CIS cannot rely on one and discount the other. The AAO disagrees. Neither the SVP rating nor a Job Zone category indicates that a particular occupation requires the attainment of a baccalaureate or higher degree, or its equivalent, in a specific specialty as a minimum for entry into the occupation. An SVP rating and Job Zone category are meant to indicate only the total number of years of vocational preparation required for a particular position. Neither classification describes how those years are to be divided among training, formal education, and experience, nor specifies the particular type of degree, if any, that a position would require.

Regarding parallel positions in the petitioner's industry, the petitioner submitted Internet job postings for executive chefs. There is no evidence, however, to show that the employers issuing those postings are similar to the petitioner, or that the advertised positions are parallel to the instant position. The majority of the advertisements are for large universities serving thousands of meals each day. One listing was for Applebee's, a national restaurant chain. Thus, the advertisements have little relevance.

The record includes two expert opinion letters, one from the Restaurant Association of Maryland and the other from an associate professor in the hospitality management program at Rochester Institute of Technology. While the individual from the Restaurant Association of Maryland states that the organization "supports the need for college-educated personnel for maintaining the food quality standards in modern restaurants," she does not say that it is an industry requirement. She does state that the proffered position should be considered a specialty occupation, but in the absence of evidence that a bachelor's degree is an industry standard, her opinion is unsubstantiated. The associate professor from Rochester Institute of

Technology states his opinion that an individual with only an associate's degree would not have adequate education to perform the proffered position. The attention of CIS is drawn to the remarkable similarity of the language in the two letters. Although counsel's letter in response to the director's request for evidence states that the letters "were drafted by the respective parties," the letters appear to have been drafted by the same person. CIS must question whether they represent the true testimony of the avowed authors. CIS may, in its discretion, accept letters and advisory opinion statements as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm., 1988). The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. Counsel and the petitioner state that the petitioner has always required a bachelor's degree for the proffered position. The petitioner appears to be a new business without any employment history. The petitioner is part of a corporation, however, with another restaurant in Maryland. The petitioner provided information regarding the executive chef at the Maryland location, including his resume and a credentials equivalency evaluation indicating that his education is equivalent to a bachelor's degree in restaurant and hotel management. Hiring one previous employee with a degree does not indicate a pattern or establish the employer's 'normal' hiring practices. In addition, the evaluation that was submitted to establish the individual's educational background provides information that is different from that on his resume. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has not met its burden of proof regarding the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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.