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FILE: SRC 04 131 52959 Office: TEXAS SERVICE CENTER

Date: **AUG 15 2006**

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

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a restaurant. It seeks to employ the beneficiary as an executive chef and to continue his classification 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 on the grounds that the record failed to establish that the proffered position qualifies as a specialty occupation or that the beneficiary qualifies to perform services in a specialty occupation.

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.

As provided in 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 evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner describes itself as an Indian restaurant that provides both dining and catering services. In a letter accompanying the Form I-129 the petitioner's general manager indicated that the petitioner's predecessor restaurant - [REDACTED] - commenced operations in 1994 and hired the beneficiary as an H-1B nonimmigrant on March 28, 2002 to work as its executive chef. The validity period of the beneficiary's H-1B status ran until November 27, 2004. The current restaurant - Dakshin, Inc. - opened for business on February 7, 2003, after which the Far Pavilion was closed on August 1, 2003. The general manager indicated that the current restaurant has the same ownership, management, and employees as the old restaurant. The beneficiary was transferred to the new restaurant on August 12, 2003 and the instant petition seeks to continue his H-1B status, at an annual salary of \$26,000, until the end of his originally approved time period. The beneficiary's job duties are described as follows in the general manager's letter:

[The beneficiary] will continue to plan menus, devise recipes and create innovative dishes and desserts, be responsible for hiring and training chefs and kitchen personnel, supervise and manage chefs and kitchen management including the purchase of ingredients and supplies, maintain inventory, determine new offerings and prepare complex sauces and dishes. He will continue to work 40 hours a week, Wednesday to Sunday from 9:00 a.m. to 6:00 p.m. where he will spend approximately:

- 12 hours/week cooking, preparing appetizers, and desserts; devising recipes, preparing complex sauces and dishes and creating innovative dishes and desserts.
- 10 hours/week managing the kitchen personnel including other chefs or cooks.
- 5 hours/week planning catering menus and events.
- 5 hours/week maintaining inventory of ingredients and kitchen supplies and placing orders for purchasing ingredients and supplies.
- 4 hours/week planning menus.
- 4 hours/week observing and planning for market changes to determine new offerings.

According to the petitioner, it is both an industry standard in the United States and its own hiring policy to require a bachelor's degree in food technology, food science, restaurant management and/or culinary arts for the executive chef position. The beneficiary is qualified for the proffered position, the petitioner declares, based on a combination of vocational studies and work experience in the food service industry.

In her decision the director cited information on executive chefs in the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)*, as well as its *Dictionary of Occupational Titles (DOT)*, neither of which indicates that a bachelor's degree in a specific specialty is the normal minimum educational requirement for entry into such a position. Nor did the evidence of record show that the petitioner has an established policy of requiring a specialty degree for its executive chef position. The director determined that the evidence of record failed to establish that the proffered position qualifies as a specialty occupation under the Act. The director also found that the beneficiary is not qualified to perform the services of a specialty occupation because the documentation of record, including an opinion letter from a university professor, failed to establish that the beneficiary's vocational training and work experience is equivalent to a bachelor's degree in culinary arts from a U.S. college or university.

On appeal counsel asserts that the petitioner's business has grown to a full-time staff of eight and a gross annual revenue of \$480,000, and requires the beneficiary's services as the executive chef. Counsel submits a series of internet job announcements for executive chef positions, as well as an evaluation from a college

professor and an affidavit from a restaurant executive, as evidence of the educational standard for the position in the restaurant industry. Counsel also submits a new evaluation of the beneficiary's education, training, and experience.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the DOL *Handbook* as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; 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.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 764 F.Supp. 1095, 1102 (S.D.N.Y. 1989)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti, Inc. v. Reno, id.*, at 1165-66.

Executive chefs are included in the DOL *Handbook's* occupational category entitled chefs, cooks, and food preparation workers. The duties of the occupation are described in the *Handbook*, 2006-07 edition, at 371:

Executive chefs and head cooks 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. The terms chef and cook often are used interchangeably, but generally reflect the different types of chefs and the organizational structure of the kitchen staff. For example, an executive chef is in charge of all food service operations and also may supervise the many kitchens of a hotel, restaurant group, or corporate dining operation Chefs tend to be more highly skilled and better trained than cooks

With regard to the educational requirements for the occupation, the *Handbook* states as follows:

Executive chefs and head cooks who work in fine-dining restaurants require many years of training and experience and an intense desire to cook. Some chefs and cooks may start their training in high school or post-high school vocational programs. Others may receive formal training through independent cooking schools, professional culinary institutes, or two- or four-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 Many chefs are trained on the job, receiving real work experience and training from chef mentors in the restaurant where they work.

Id. at 372. What the *Handbook* makes clear is that, even if some executive chefs have baccalaureate degrees in hospitality or culinary arts, there is ample opportunity to enter the occupation with credentials short of a four-year baccalaureate degree in a specific specialty, such as an associate degree, vocational schooling and/or work experience. Accordingly, the executive chef position at issue in this petition does not meet the first alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), because a baccalaureate or higher degree in a specific specialty is not the normal minimum requirement for entry into the position.

As for the second alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), a series of internet advertisements has been submitted on appeal, most of them from a managed services company called [REDACTED] for executive chef positions in a variety of companies including convention centers, sports stadia/arenas, and a zoo. None of those organizations is in the same line of business as the petitioner and none of them have a similar scale of operations. Moreover, all of the Aramark advertisements state that “the ideal candidate will possess a bachelor’s degree or related culinary degree.” This language does not indicate that such a degree is required. Other advertisements have been submitted from a Hilton Hotel, LSG Skychefs, the Brookfield Zoo (Chicago), and Stanford Dining. None of these organizations are similar to the petitioner in their line of business or scale of operations. In addition, none of the advertisements states that a bachelor’s degree in a specific specialty is required for the job. One states that a bachelor’s degree is required, without identifying a specialty field, and the others indicate that a bachelor’s degree in the culinary field or relevant work experience, or a combination of the two, will suffice for the position. The AAO concludes that the internet job advertisements in the record do not establish that a bachelor’s degree in a specific specialty is a standard industry requirement for parallel positions among similar organizations, as required for the proffered position to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner has submitted on appeal an evaluation of the educational requirements of the proffered position [REDACTED] an associate professor of baking and pastry arts at [REDACTED] states his “belie[f] that it is a general practice among leading, dynamic restaurants to hire an individual in a position such as an Executive Chef, with a bachelor’s-level educational background in culinary arts or a related field.” The professor does not explain his criteria for determining what makes a “leading, dynamic restaurant” or how the petitioner qualifies as one. Nor does he state that such restaurants exclude individuals without a culinary or related degree from consideration for executive chef positions. Furthermore, the professor does not provide any examples of particular restaurants that require their executive chefs to have a bachelor’s degree in culinary arts or a related field, or cite any authoritative industry or trade data.

The petitioner has also submitted on appeal an affidavit from the president of a French restaurant in New York City, [REDACTED] who states that he has worked in the restaurant industry for 18 years and “believes that the position of an executive chef is required to rely on bachelor’s-level academic concepts in performing his required duties.” [REDACTED] language does not state that a baccalaureate degree in a specific specialty is required for executive chefs. Nor does the record demonstrate the expertise [REDACTED] to evaluate the educational requirements of the restaurant industry at large in hiring executive chefs. [REDACTED] states that the two executive chefs who have worked in his restaurant both have bachelor’s degrees from a U.S. university, one in food science and one with courses in management and marketing. The AAO notes that the two degrees cited [REDACTED] not appear to be in related fields. Nor does [REDACTED] state that applicants without those credentials are not considered for executive chef positions in his restaurant. Moreover, neither of the executive chefs is identified [REDACTED] letter and no evidence has been provided of their educational degrees and their employment by his restaurant. Simply going on record without supporting documentation does not satisfy the petitioner’s burden of proof. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

CIS may, in its discretion, use as advisory opinions statements from universities, professional organizations, or other sources submitted in evidence as expert testimony. When an opinion does not accord with other information or is in any way questionable, however, CIS is not required to accept or may give less weight to

that evidence. See *Matter of Caron International, Inc.*, 19 I&N Dec. 791, 795 (Comm. 1988). The AAO determines that the foregoing evaluation [REDACTED] and affidavit from [REDACTED] are not persuasive evidence that a bachelor's degree requirement in a specific specialty is common to the petitioner's industry in parallel positions among similar organizations, as required for the proffered position of executive chef to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Counsel asserts that the proffered position meets the third alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), because the petitioner normally requires a specialty degree for the position. In the appeal brief counsel identifies two individuals who previously served as executive chefs in H-1B status for the petitioner's original restaurant, and states that "both completed bachelor's degrees in culinary arts, food science, restaurant management, or a related academic discipline." No evidence has been submitted documenting the academic degrees of the two individuals or their employment at the petitioner's restaurant. Going on record without supporting documentation does not satisfy the petitioner's burden of proof. See *Matter of Soffici*. Nor does the record show that they were the only two executive chefs employed by the petitioner since its first restaurant opened in 1994, or that the petitioner has only hired individuals with specialty degrees during its years of operation. Based on the evidence of record, the AAO determines that the proffered position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) because the record does not establish that the petitioner normally requires a baccalaureate degree in a specific specialty or its equivalent for the proffered position.

Finally, the record does not establish that the proffered position and its specific duties are so unique, specialized or complex that a baccalaureate degree in a specific specialty or equivalent knowledge is required to perform them. As far as the record shows, the duties of the position do not exceed the scope of those performed by an executive chef, which the *Handbook* indicates do not require baccalaureate level knowledge in a specific specialty. The evaluation submitted by [REDACTED] on appeal recites the duties of the position as described by the petitioner, but does not distinguish the proffered position from that of any other executive chef. Neither [REDACTED] nor the French restaurant president, [REDACTED] states that a baccalaureate degree in culinary arts or a related specialty is required for the proffered position. Therefore, the proffered position does qualify as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) or under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons discussed above, the petitioner has failed to demonstrate that its restaurant manager position meets any of the criteria enumerated in 8 C.F.R. § 214.2(h)(4)(iii)(A) to qualify as a specialty occupation. The record does not establish that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

As previously discussed, the director also determined that the beneficiary is not qualified to perform the services of a specialty occupation. Since the beneficiary's credentials are relevant only if the proffered position is found to be a specialty occupation, which is not the case here, the AAO will not further address counsel's arguments with respect to the beneficiary's qualifications.

The petitioner bears the burden of proof in these proceedings. See section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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