



U.S. Citizenship
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Services

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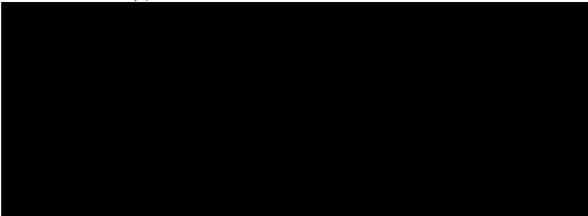


FILE: WAC 04 230 50923 Office: CALIFORNIA SERVICE CENTER Date: JAN 30 2009

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 food establishment that seeks to employ the beneficiary as a master baker/executive pastry 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 and additional and previously submitted evidence.

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 a food and beverage director/executive chef. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner's support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would use knowledge of food science and nutrition and marketing to perform duties that entail advising owners on baked goods, pastries, confections, and delicacies for a store which will specialize in providing high quality European pastry products, sandwiches, and coffee/espresso drinks – targeting the Korean community by marketing with Crown Bakery Co. Ltd. (Crown Bakery); assisting owners and working directly with Crown Bakery in using and handling Crown Bakery frozen dough products; and creating and having responsibility for the quality of baked goods, pastries, confections, and delicacies and for products made using Crown Bakery frozen dough. The beneficiary will also plan and recommend products to be made for sale at the store and will advise on whether to expand imports of Crown Bakery products; teach owners and assistant bakers about handling and preparing Crown Bakery's frozen dough products and baked goods, pastries, confections, and delicacies; order ingredients, supplies, and equipment for bread and pastry making; ensure that sufficient products are available for customers and that baked goods are not wasted by overproduction; prepare receipts for products; keep abreast of new advances in handling frozen dough products; and manage five employees. The petitioner requires a baccalaureate degree in food science/culinary arts or a related field and certification from Crown Bakery for the proposed position.

The director stated that the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*) reveals that chefs, cooks, and food preparation workers do not require a baccalaureate degree for entry into their occupations. The director found that the submitted evidence did not show that the petitioner normally requires a baccalaureate or higher level degree in the field for the proposed position. The proposed duties and stated level of responsibility, the director stated, do not indicate complexity or authority that is beyond what is normally encountered in the occupational field and that the evidence in the record did not persuasively show that the job offered could not be performed by an experienced person whose educational training falls short of a baccalaureate degree.

On appeal, counsel states that the petitioner established the third and fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). According to counsel, the submitted exclusive distributorship agreement with Crown Bakery requires the petitioner to have a baker who has the ability to handle Crown Bakery frozen dough products and who possesses a bachelor's degree with at least five years of experience in the baking and confectionery industry; or an associate's degree in food cooking or food science and at least ten years of experience in the baking and confectionery industry. Counsel maintains that the submitted advertisement indicates that the petitioner requires a baccalaureate degree in food science for the offered position. Counsel asserts that the proposed duties are more complex than those of a baker as described in the *Handbook*, and that the *Handbook* indicates that certain baker positions may be complex enough to require a baccalaureate degree. To show the complexity of using frozen dough counsel references publications and seminars and the index of a book by Gwang Jae Yu.

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 first 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. 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.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

Based on the petitioner's job description, the submitted evidence, and the *Handbook's* information, the proposed duties are encompassed within the description of an executive chef who prepares, seasons, and cooks a wide range of foods; coordinates the work of the kitchen staff; ensures uniform quality; and orders food supplies.

An executive chef does not normally require a baccalaureate degree. 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; some large hotels and restaurants operate their own training and job-placement programs. Thus, based on the *Handbook's* information, the proposed duties, which involve baked goods, would not require a baccalaureate degree in a specific specialty for entry into the occupation.

The translation of the Agreement of Supply with Crown Bakery does not state that the proposed position must have a baccalaureate degree in a specific specialty, which is the requirement of the Act. The agreement reads as follows:

- Bachelor degree with 5 years and above of experience in [the] baking and confectionery industry
- or [a]ssociate[']s degree of food cooking or food science and 10 years and above of experience in [the] baking and confectionery industry.

In addition, the agreement allows for an associate's degree in food cooking or food science and 10 years of experience. The AAO notes that educational equivalency, such as an associate's degree in food cooking or food science and 10 years of experience, is considered by CIS only when a specific degree does not exist in an occupational field. *Tapis Int'l vs. INS*, 94 F.Supp. 2d 172 (D. Mass. 2000). Because the *Handbook* reveals that there are specific 4-year college degree programs in hospitality or culinary arts for chefs, the AAO will not consider educational equivalency in determining whether the proposed position qualifies as a specialty occupation.

The AAO's conclusion, from the evidence to which it has referred, is that the petitioner fails to establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position.

Job postings are furnished to establish the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) - that a specific degree requirement is common to the industry in parallel positions among similar organizations. For various reasons, this evidence is not persuasive. The job posting from Delaware Valley College is from an organization that differs from the petitioner, a food establishment; and the posting from [REDACTED] does not indicate whether the company is similar in size and scope to the petitioner. Thus, the job postings fail to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations.

The petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) as no evidence in the record shows the offered position as so complex or unique that it can be performed only by an individual with a degree in a specific specialty. The submitted brochure about Crown Bakery discusses the growth of the company, and the articles and publications in the record concerning frozen dough discuss the physical and chemical properties and characteristics of frozen dough and the result of experiments and research on frozen dough. None of this evidence states that a chef, such as the beneficiary, that uses frozen dough in bread-making and pastry recipes must have a baccalaureate degree in a specific specialty. As already discussed, the *Handbook* conveys that an executive chef, an occupation that parallels the proposed position, does not require a bachelor's degree in a specific specialty. The petitioner, therefore, fails to establish the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

No evidence in the record establishes the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3): that the petitioner normally requires a degree or its equivalent for the position. Although the record contains the petitioner's invoices for advertising the proposed position, this does not negate that the proposed position is newly created. This evidence is insufficient to establish that the petitioner has a past practice that extends beyond the immediate position, of requiring a degree or its equivalent.

To satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), the petitioner must establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The *Handbook* reveals that the proposed position corresponds to an executive chef, and that this occupation does not require a bachelor's degree in a specific specialty. The evidence in the record does not suggest that the proposed

duties are specialized and complex, requiring knowledge that is associated with a baccalaureate or higher degree in a specific specialty such as food science/culinary arts. As such, the petitioner fails to establish this last criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.