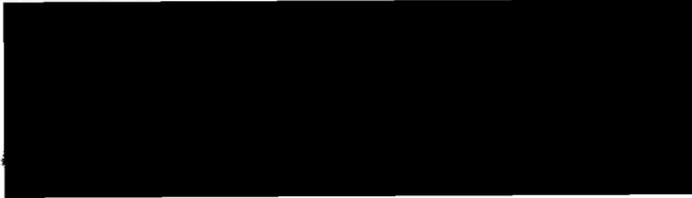




U.S. Citizenship
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Services

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FILE: SRC 04 231 51292 Office: TEXAS SERVICE CENTER Date: JUL 17 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:

SELF-REPRESENTED

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. Wieman, Chief
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 German restaurant that seeks to employ the beneficiary as a specialty chef and to classify him 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 basis that the position was not a specialty occupation and that the petitioner had failed to submit a certified Labor Condition Application (LCA), valid for the dates of intended employment. On appeal, the petitioner submits a letter.

The petitioner submitted a timely Form I-290B on March 2, 2005 and indicated that a brief and/or additional evidence would be submitted to the AAO within 30 days. As of this date, however, the AAO has not received any additional evidence into the record. Therefore, the record is complete.

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 bachelor’s or higher degree, but one in a specific specialty that is directly related to the proposed position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director’s request for additional evidence (RFE); (3) the petitioner’s response to the RFE; (4) the director’s denial letter; and (5) Form I-290B, and the petitioner’s appeal letter. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner, a German restaurant, is seeking the beneficiary’s services as a specialty chef. The petitioner did not provide a list of duties. The petitioner stated that it did not require any specific degree for the position, just experience.

The director determined that the proposed position was not a specialty occupation. Referring to the Department of Labor’s (DOL) *Occupational Outlook Handbook* (the *Handbook*), the director stated that generally restaurant chefs gain their knowledge through experience and training. The director found that the proposed position would not require a person with a bachelor’s degree.

On appeal, the petitioner asserts that the proposed position combines the duties of several occupations: specialty chef, manager, and interpreter. The petitioner asserts that it plans to expand or open an additional restaurant and needs the services of the beneficiary to do so.

The petitioner need only satisfy one of the criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) to establish that a position is a specialty occupation. Upon a thorough review of the record, the AAO concludes that the petitioner has failed to establish that the proposed position meets any of the four criteria outlined in 8 C.F.R. §214.2(h)(4)(iii)(A). Therefore, the proposed position is not a specialty occupation.

To determine 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 bachelor’s degree in a specific field of study as the minimum for entry into the occupation as required by the Act.

The AAO routinely consults the *Handbook* in its consideration of whether or not a position is a specialty occupation and for information about the duties and educational requirements of particular occupations. Based on the petitioner’s description and a thorough review of the *Handbook*, the AAO concurs with the petitioner that the description of the proposed position reflects the duties of a bilingual specialty chef/manager. Notwithstanding this, the AAO finds that the petitioner has not established that the proposed position is a specialty occupation.

The petitioner has failed to establish that the position is one that qualifies as a specialty occupation under the criterion at 8 C.F.R. 214.2(h)(4)(iii)(A)(1), a bachelor’s or higher degree or its equivalent, in a specific field

of study, is normally the minimum requirement for entry into the particular position. To determine whether the proposed position is a specialty occupation under this criterion, the AAO turns to the *Handbook's* discussion of the educational requirements for specialty chefs, managers, and interpreters. The *Handbook* indicates that employers normally do not require bachelor's degrees when hiring chefs or managers. To the extent that the position includes a requirement that the worker be bilingual, the *Handbook* indicates that there is no specific degree requirement for translators or interpreters. In addition, as previously stated, CIS interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any bachelor's or higher degree, but one which is *in a specific specialty* that is directly related to the proposed position. The petitioner stated that it did not require a specific educational background, just experience. The petitioner's lack of an educational requirement establishes that the proposed position does not qualify as a specialty occupation. Accordingly, the AAO concurs with the director's determination that executive chef positions do not require bachelor's degrees in a specific specialty. The petitioner has failed to establish that a bachelor's degree or its equivalent, in a specific field of study, is normally the minimum requirement for entry into the proposed position.

The AAO turns next to the first alternative prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) - a specific degree requirement is common to the industry in parallel positions among similar organizations. To determine if a position is a specialty occupation under this criterion, CIS generally considers whether letters or affidavits from companies or individuals in the industry attest that such companies "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)). The petitioner has not provided any evidence that the requirement of a specific bachelor's degree is common in the restaurant industry in parallel positions among similar German restaurants.

The AAO now turns to the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – the employer normally requires at least a bachelor's degree or its equivalent, in a specific field of study, for the position. To determine if a petitioner has established this criterion, the AAO generally reviews the petitioner's past employment practices, including the histories of those employees who previously held the position, as well as their names, dates of employment, and copies of their diplomas. In the instant case, the petitioner has submitted no evidence to establish its normal hiring practices for the proposed position. In the absence of an employment history for the proposed position, the petitioner cannot establish that its proposed position qualifies as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO turns to the criteria related to the complexity and uniqueness of the proposed position and the specialized nature and complexity of the proposed duties. A petitioner satisfies the second alternative prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) if it establishes that a particular position is so complex or unique that it can be performed only by an individual with a bachelor's degree in a specific field of study. The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) requires a petitioner 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 bachelor's or higher degree in a specific field of study. The employer has not shown that this particular bilingual chef/manager position is so complex or unique that only an individual with a bachelor's degree can perform it. Neither has it distinguished the duties of the proposed position from those

performed by specialty chefs and managers, occupations that do not require specific bachelor's degrees. Although the petitioner indicates that it is planning to expand or open a new restaurant, which will impact the duties to be performed by the chef, the record offers no evidence to support this claim. Going on record without supporting documentary evidence is not sufficient for the purposes of meeting the burden of proof in these proceedings. 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)).

The AAO also notes that the petitioner did not submit a certified LCA at the time of filing, as required by the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B). In response to the RFE, the petitioner submitted an LCA certified on June 11, 2005. The certification post dates the petitioner's filing of the Form I-129 by more than four months. Accordingly, the petitioner has not complied with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).

For the reasons previously discussed, the record does not establish the proposed position as a specialty occupation or that the petitioner complied with the LCA filing requirements. Therefore, the AAO will not disturb the director's denial of the petition.

The burden of proving eligibility for the benefit sought remains entirely 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.