

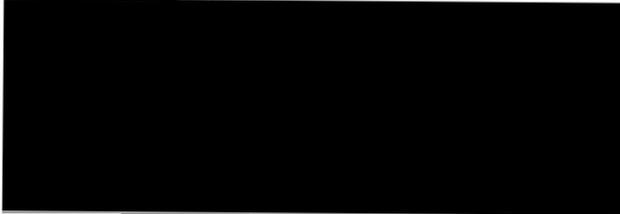
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U.S. Citizenship
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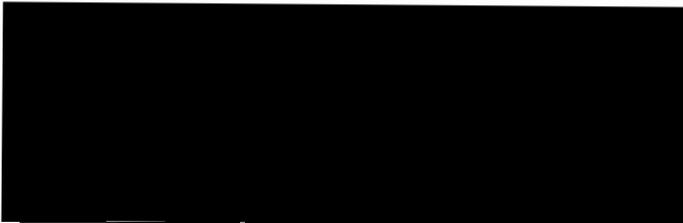
FILE: WAC 04 140 53464 Office: CALIFORNIA SERVICE CENTER Date: JUN 02 2006

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 documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Michael T. Kelly
Robert P. Wiemann, 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 operates a restaurant with 25 employees. It 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 and additional 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 an executive chef. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; and the company support letter. According to this evidence, the beneficiary would perform duties that entail:

- Analysis (25% of time): examining the quality of food products, and ensuring that the quality and quantity meet the established standard and specifications; estimating consumption, preparing requisition for purchase of food products; estimating amounts and costs of required supplies, such as food and ingredients; inspecting supplies, equipment, and work areas to ensure conformance to established standards.
- Development (25% of time): selecting, planning and developing recipes, applying personal knowledge and experience in food preparation, taking into account such factors as seasonal availability of ingredients and the likely numbers of customers; determining how food should be presented, and creating decorative food displays; planning production schedules and staff requirements necessary to ensure timely delivery of services.
- Implementation (50% of time): demonstrating and implementing new techniques and equipment; training workers on the exquisite style of Indian cooking; supervising coordinating and directing the work of the cooks and other kitchen personnel in the preparation of meals, sauces, vegetables and other food; giving instructions as to size portion and methods of garnishing, as well as engaging in cutting, trimming, carving, and boning meat and poultry for cooking.

The petitioner stated that the beneficiary will be leading and coordinating the work of ten kitchen staff employees and noted that the restaurant manager is responsible for hiring, firing, and managing the day-to-day operations of the restaurant and the kitchen in particular. The petitioner stated that the position required a degree in culinary arts, hospitality management, or related field for this job.

The director found that the proffered position was not a specialty occupation. The director referred to the Department Of Labor's *Occupational Outlook Handbook (Handbook)* and noted that it does not indicate that a baccalaureate degree in a specific field of study is required for entry into the occupation of executive chef. The director found that the duties and responsibilities of the proffered position are not any more complex or specialized than those normally found throughout the industry.

On appeal, counsel asserts that the proffered position meets all of the above listed criteria. Counsel refers to the Department of Labor's *Dictionary of Occupation Titles (DOT)* in support of his assertion that the proffered position requires a baccalaureate degree. Additionally, counsel referred to the *DOT* as indicating that the proffered position has an SVP rating of 8. Counsel also submits an excerpt from the Department of Labor's *Occupational Information Network On-Line (O*Net)* as indicating that "most of these occupations require a four-year bachelor's degree."

The AAO notes that the Department of Labor has replaced the *DOT* with the *O*Net*. The AAO notes that 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 education and experience required to perform the duties of that occupation. The *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, the AAO is not persuaded by a claim that the offered position is a specialty occupation simply because DOL has assigned it a specific SPV rating in the *DOT*. Furthermore,

neither the *DOT* nor the *O*Net* evaluate whether executive chefs require at least a bachelor's degree in a specific specialty.

According to Appendix C (Components of the Definition Trailer) of the *DOT*, an SVP rating of 8 equates to an assessment that the rated occupation requires “[o]ver 4 years up to and including 10 years” of special vocational training that “may be acquired in a school, work, military, institutional, or vocational environment,” and “includes: vocational education, apprenticeship training, in-plant training, on-the-job-training, and essential experience in other jobs.” The *O*Net*'s “OnLine Help Center,” accessible at www.online.onetcenter.org/help/, establishes that the Job Zone 4 rating that applies to the occupational category of Chefs and Head Cooks does not equate to a finding that the category requires at least a bachelor's degree in a specific specialty. This rating only groups chefs among occupations of which “most,” but not all, require a four-year bachelor's degree. This does not endorse the executive chef occupation as requiring a bachelor's degree, or as requiring one in a specific specialty.

Counsel asserts that the duties of the position are so specialized and complex that knowledge required to perform them is usually associated with attainment of degree. Additionally, the petitioner submits two letters in support of its assertion that the proffered position is a specialty occupation. The authors are the Dean of Culinary Arts at Johnson & Wales University (J & W) and a professor at the Culinary Institute of America (CIA). However, as discussed below, the letters are not probative.

The J & W dean claimed that he reviewed the duties for the position of chef, food and beverage manager and opined that the requirement of at least a baccalaureate degree is reasonable and well within what he would expect for a restaurant of this caliber. He stated that that he reviewed the job description of the proffered position of chef and food and beverage manager. The author of the letter asserts, but does not substantiate, that the nature of the specific duties of the chef at the petitioner's restaurants is so specialized and complex that the knowledge required to perform the duties is attained through a baccalaureate or higher degree in culinary arts, restaurant or hospitality management. The author of the letter did not indicate that he reviewed the job description in conjunction with the specific operations of the petitioner's business. The job description provided in his letter is different than the one provided by the petitioner. The AAO notes that the author refers to two positions for the petitioner: chef and food and beverage manager. The author does not specifically refer to the proffered position or distinguish the educational requirement of chef and food and beverage manager. His evaluation is conclusory. He does not provide an analysis of how he arrived at his conclusions. He does not provide any corroborating evidence for his assertions that the duties of the proffered position are so complex to require a bachelor's degree in hospitality or culinary arts. The author provides no analysis and no factual foundation for his conclusion that the duties of this particular proffered position require the exercise of knowledge associated with at least a bachelor's degree in a specific specialty. The author is essentially (1) just opining on a generic description of duties, and (2) providing a conclusion with no reference to observations of the particular position at issue, and no empirical discussion.

The CIA professor has not elucidated his qualifications for opining on the educational requirements of the proffered position. Also, he does not provide evidence of the extent, if any, that his professional experience includes evaluations of the educational credential requirements of executive chefs. The AAO notes that this author refers to three positions concurrently: food and beverage manager, restaurant manager, and chef. The author does not distinguish the duties between the three positions or the difference if any in the educational requirements of the positions. No empirical evidence is provided to substantiate his opinion or to confirm the accuracy of the author's assessments about the educational requirements of the positions with which the

author identifies the proffered position. The author has not provided independent evidence to corroborate his assertions. His evaluation is conclusory and lacks supporting analysis.

The letters bear no evidence that the authors observed the operations of the proffered position at the workplace or reviewed business records or other petition-related documents besides lists of duties that are not enclosed with the evaluations or fully quoted in the letters. The duties mentioned in the letters are described in generic and generalized language which does not indicate specific tasks that the beneficiary would perform or any concrete work that would be involved in actual performance of the generalized duties. Therefore, the authors have not provided a factual basis to establish the accuracy and reliability of their conclusions about educational requirements.

As the subject of their evaluations, both of the letters specify job positions that are different than the executive chef position proffered here. Both authors have identified the position evaluated as "Food and Beverage Manager, Restaurant Manager, and Chef." The position evaluated by the J & W dean includes management of a staff of 30. The proffered position does not include such management, which the petitioner states is the job of the distinctly different position, "Restaurant Manager." (Petitioner's letter of response to the request for evidence, at page 2). Further, this author states that the beneficiary will manage a staff of 30, but the petitioner's letter of response to the request for evidence identifies only 10 staff as the beneficiary's responsibility.

For the reasons discussed above, the AAO finds that the letters from the dean and the professor are neither persuasive nor probative. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

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 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 specific 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. 872, 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. The *Handbook* indicates that, to the extent that they are described in the record, the

beneficiary's duties are most similar to those of a chef, an occupation that is not a specialty occupation. The AAO finds that the evidence of record about the president aspect of the position lacks any details that would elevate the educational requirements of the position above that of an executive chef. The *Handbook* states:

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. A *chef de cuisine* reports to an executive chef and is responsible for the daily operations of a single kitchen. A *sous chef*, or sub chef, is the second-in-command and runs the kitchen in the absence of the chef. Chefs tend to be more highly skilled and better trained than cooks. Many chefs earn fame both for themselves and for their kitchens because of the quality and distinctive nature of the food they serve.

The *Handbook* states the following about the training and educational requirements for executive chef positions:

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 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 jointly offered by the school and affiliated restaurants. Professional culinary institutes, industry associations, and trade unions also may sponsor formal apprenticeship programs in coordination with the U.S. Department of Labor. Many chefs are trained on the job, receiving real work experience and training from chef mentors in the restaurants where they work.

Based on the evidence in the record, the AAO cannot conclude that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position, executive chef of a restaurant. The two letters submitted as expert opinions do not address the *Handbook's* information, and, for the reasons noted above, they do not refute the authority or accuracy of the *Handbook's* information that does not support the contention that a bachelor's degree in a specific specialty is required for the proffered position.

There is no evidence in the record to establish the first alternative prong of the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that only an individual with a degree can perform it. Counsel asserts that restaurants of the petitioner's caliber require at least a bachelor's degree in culinary arts or the equivalent to perform the job of executive chef/restaurant chef. Counsel's assertions are not substantiated by independent evidence. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel refers to the

opinion letters as support for his assertions. As noted above, the two opinion letters do not merit sufficient evidentiary weight to substantiate counsel's assertions. Counsel's assertions and the two letters are insufficient to establish that a specific degree requirement is common to the industry.

To the extent that it is described in the record – which is generalized and generic – the proffered position does not appear any more complex or unique than the general range of executive chef positions for which the *Handbook* indicates that a specialty degree is not normally required. The petitioner has not established that the proffered position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Thus, the petitioner fails to establish the second alternative prong of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position. Counsel asserts that the petitioner normally requires at least a bachelor's degree or its equivalent in culinary arts, hospitality management, or related field for this position. In the instant case, the petitioner asserts that eight of its staff hold relevant bachelor's degrees. The petitioner states that it employs [REDACTED] as executive/restaurant chef and submitted a copy of his degree in hospitality management. The petitioner claims that he employs [REDACTED] in a similar position and submitted a copy of his bachelor's degree in culinary arts. Additionally, the petitioner asserts that the junior curry chef/sous chef hold's a bachelor's degree, but did not include a copy of his degree. Additionally, the petitioner submitted educational documents for three other individuals but did not specify if they had been employed by the petitioner or their positions. The petitioner did not specify the period of employment of its degreed employees or confirm that its chefs normally have a bachelor's degree or its equivalent. The evidence is insufficient to establish a history of the petitioner's normally requiring a degree in a specific specialty for the position in question. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Accordingly, the petitioner has not established the proffered position as a specialty occupation under the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner's degree requirement for the proffered position is not evidence of its normal hiring practices.

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. The position is described in exclusively generic and generalized terms that do not convey specific duties. For the reasons earlier described, the opinions of the J & W dean and the CIA professor are not persuasive or probative. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Moreover, neither these two academics nor the petitioner has distinguished the duties of the proffered position from those normally required of an executive chef as described in the *Handbook*, and the *Handbook* indicates that the knowledge requirements usually associated with such a position is less than a bachelor's degree in a specific specialty.

The evidence of record does not satisfy any of the required criteria for classification as a specialty occupation. Therefore, the decision of the director shall not be disturbed. 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.