

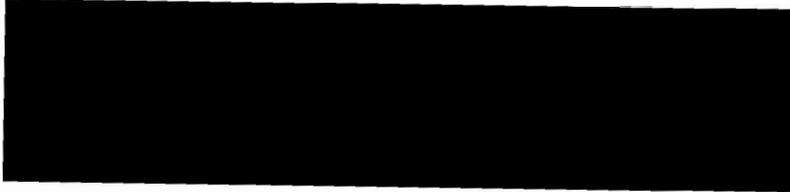
U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
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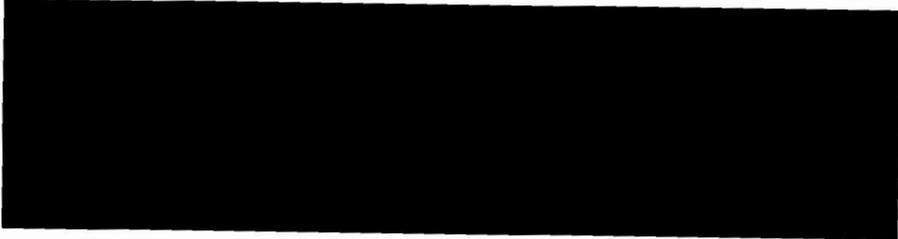
FILE: SRC 04 245 51216 Office: TEXAS SERVICE CENTER Date: MAY 04

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.

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 is a Spanish restaurant that 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; (5) the petitioner's motion to reconsider and supporting documents; (6) the director's response to the motion to reconsider; and (7) Form I-290B, and counsel's appeal brief with new and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner, a Spanish restaurant established in 2001, 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; the petitioner's appeal brief and new and additional documents. According to this evidence, the beneficiary's duties would be as follows:

- Coordinate the work of kitchen staff;
- Direct preparation of meals;
- Check the quality of raw and cooked food products to ensure standards are met;
- Plan and develop recipes and menus;
- Manage employee training and supervision;
- Demonstrate new cooking techniques and equipment to staff;
- Determine how food should be presented and create decorative food displays;
- Plan and manage special catering events outside the restaurant;
- Determine production schedules and staffing requirements necessary to ensure timely delivery of services;
- Plan restaurant menu;
- Estimate amounts and costs of required supplies;
- Inspect supplies, equipment, and work area to ensure compliance with established standards;
- Purchase food and beverage; and
- Check quality and quantity of received products.

The petitioner stated that a candidate for the proffered position must possess a bachelor's degree or its equivalent.

The director determined that the proffered 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 which may be acquired through a variety of ways, including vocational programs. The director found that the proffered position would not require a person with a bachelor's degree.

On appeal, counsel states that the proffered position is a specialty occupation. Counsel narrates the duties of the proffered position, stating they require the level of skill and experience equivalent to a baccalaureate degree. Counsel contends that many of the duties required by the petitioner are unique because the petitioner's restaurant offers unique exotic Spanish dishes in an affluent community, and the chef's position includes supervisory and managerial responsibility. With the appeal, and with the motion to reconsider the director's decision, the petitioner submitted Internet job advertisements to demonstrate the industry requirement for a related bachelor's degree or its equivalent.

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 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. The *Handbook* discloses that the duties of the proffered position are performed by an executive chef, an occupation that does not require a bachelor's degree in a specific specialty. The *Handbook*, at <http://www.bls.gov/oco/ocos161.htm>, reports:

Chefs, cooks, and food preparation workers prepare, season, and cook a wide range of foods—from soups, snacks, and salads to entrees, side dishes, and desserts—in a variety of restaurants and other food services establishments. Chefs and cooks create recipes and prepare meals, while food preparation workers peel and cut vegetables, trim meat, prepare poultry, and perform other duties such as keeping work areas clean and monitoring temperatures of ovens and stovetops.

In general, *chefs* and *cooks* measure, mix, and cook ingredients according to recipes, using a variety of pots, pans, cutlery, and other equipment, including ovens, broilers, grills, slicers, grinders, and blenders. Chefs and head cooks also are responsible for directing the work of other kitchen workers, estimating food requirements, and ordering food supplies.

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. ...

With respect to training and qualifications for executive chefs, the *Handbook* states:

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.

People who have had courses in commercial food preparation may start in a cook or chef job without spending a lot of time in lower-skilled kitchen jobs. Their education may give them an advantage when looking for jobs in better restaurants. ...

The AAO concurs with the director's determination that executive chef positions do not require a bachelor's degree in a specific specialty, as reported in the *Handbook*. Accordingly, the petitioner has not established that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position.

The AAO now turns to a consideration of whether the proffered position may qualify as a specialty occupation under either of the prongs of the second criterion at 8 C.F.R. § 214.2(h)(4)(ii)(A)(2) – the petitioner must establish that a degree requirement is common to the industry in parallel positions among similar organizations, or that the proffered position is so complex or unique that it can be performed only by an individual with a degree.

To establish the first prong of the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - counsel contends that many companies require a baccalaureate degree or its equivalent for an executive chef.

The petitioner submitted 4 Internet job postings with the motion to reconsider, and 21 Internet job postings with the appeal, for chef positions. The advertisements are all from employers in businesses dissimilar to the petitioner's. Of the 4 Internet job postings with the motion to reconsider, one is for a hotel restaurant, one is for a catering and banquet service, and two are for country clubs. None of these advertisements indicate that a 4-year degree is required. Of the 21 postings with the appeal, 16 are from the same fortune 500 company, and the others are from a health care institution, an assisted living facility, a wildlife conservation company, a corporate dining facility, and a university dining service. The majority of these require a bachelor's degree or related culinary degree. No specialty is required for the bachelor's degree.

Further, the duties of the advertised positions are not specific enough to compare with the job duties of the proffered position. Thus, the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. Therefore, the petitioner has failed to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations.

As noted above, the petitioner has described duties normally performed by executive chefs. In its appeal, in addressing the first, second, and fourth criteria, counsel refers to the *Occupational Information Network (O*NET)* to offer a further explanation of the proffered position's duties. The *O*NET* is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. The *O*NET* relies on a specific vocational preparation (SVP) rating, which indicates only the total number of years of vocational preparation required for a particular position. It does not describe how these years are to be divided among training, formal education and experience, and does not specify the particular type of degree, if any, that a position would require. For this reason, the *O*NET* does not support the petitioner's contention that the position requires a degree in a specialty.

The AAO finds the petitioner to have provided no evidence that would support a finding that the job duties are so complex or unique that it can be performed only by an individual with a degree. Therefore, the record also fails to establish that the position qualifies as a specialty occupation under the second prong of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) – the position is so complex or unique that it can be performed only by an individual with a degree.

Accordingly, the petitioner has not established its position as a specialty occupation under either prong of the second criterion.

Nor is there evidence in the record to establish the third criterion 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.

The duties of the proffered position do not exceed the scope of those performed by executive chefs, an occupation that does not require a specific baccalaureate degree. The petitioner indicates that it is planning to open a new Spanish restaurant with an investment of \$1.5 million, which will have substantial impact on the duties to be performed by the executive chef. No evidence of record indicates that the petitioner will be opening a second restaurant. 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)). No evidence in the record satisfies the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4); namely, 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.

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.