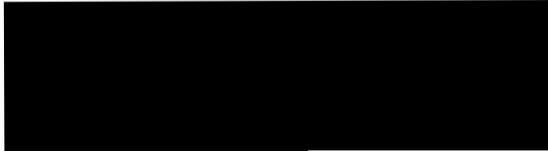


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02

FEB 02 2007

FILE: EAC 05 218 53400 Office: VERMONT SERVICE CENTER

Date:

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 acting 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 Chinese restaurant in Queens, New York, specializing in northern style Chinese food. It seeks to employ the beneficiary as an executive pastry-chef (per the Form I-129, "Executive Pastry Chef - Chinese"). Accordingly, it filed this H-1B petition to attain classification of 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 on the basis that the petitioner had failed to establish that the position meets the definition of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal the petitioner contends that, contrary to the director's decision, the evidence of record establishes that the position here proffered requires at least a bachelor's degree in culinary arts or the equivalent of such degree in experience. In part, the petitioner asserts that the director has misinterpreted the relevant information in the Department of Labor's *Occupational Outlook Handbook (Handbook)*. The petitioner also contends that, to be competitive its executive chef must have a bachelor's degree in culinary arts or the equivalent level of experience.

The director's decision to deny the petition was correct. Accordingly, the appeal will be dismissed and the petition will be denied. The AAO bases its decision upon its consideration of the entire record of proceeding before it, including (1) the petitioner's Form I-129 (Petition for Nonimmigrant Worker) and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the materials submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and the petitioner's September 16, 2005 letter in support of the appeal.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consonant with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation “which [1] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [2] requires the attainment of a bachelor's degree or higher in a 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.

CIS has consistently interpreted 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. Applying this standard, CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer’s self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

In its letter of support submitted with the Form I-129, the petitioner describes itself as one of the best Chinese restaurants in the area of Flushing, Queens. The letter indicates that, at the time petition was filed, the petitioner was in operation for less than a year and employed 16 persons. The letter refers to the duties and

responsibilities of the proffered position as those of a “certified executive pastry-chef-in Chinese food,” and it asserts that the position requires mastery of “extensive theoretical knowledge of pastry art” and demonstration of such expertise by experience in “making several hundred Chinese pastries that are very good in the colour, smell, taste, figure and quality.”

According to the petitioner’s letter of reply to the RFE, the executive pastry-chef would assume duties currently shared by a manager and two pastry chefs. This letter explains that the beneficiary’s general duties would encompass management of the entire kitchen and all its work. This would include supervision, direction, and management of all kitchen operations and the staff performing them. The executive pastry chef would also provide guidance and direction to the subordinate pastry chefs “in their work and skill training, management of raw materials, making Chinese pastry, price, food machine and equipment, cost, development, technique, and so on.”

The petitioner’s letter of response to the RFE also includes the following as “a detail[ed] description of duties and responsibilities”:

1. Management of techniques of making Chinese pastry includes application of new pastry-making technology, setting the standards for making the pastry, and assigning the duties and responsibilities of pastry-chefs. (The percentage of time: 0.5 hour of each day)
2. Management of making pastry includes direction of and work with pastry-chefs to prepare thousands of pastries which are quite good in color, smell, taste, figure and quality, with special emphasis on making sauce, controlling pastry portions, and preparing grand banquets. Also included is coordination and discussions with head pastry-chef in drawing up the grand banquet recipes and individual feast menus, and in prepar[ing] high-grade feasts. (The percentage of time: 2 hours of each day)
3. Management of development includes creating new pastries which are delicious, nutritious, healthful and function to cure and prevent physical illness. Planning, adding, creating, and making new pastry. Producing nutrition and health food. (The percentage of time: 0.5 hour of each day)
4. Management of food quality includes directing the preparation of pastry. This involves determining food sizes, planning menus, controlling costs, and maintaining quality standards for food services to ensure pastry’s uniform quality and presentation. (The percentage of time: 1 hour of each day)
5. Management of food machines and equipment includes buying, operating and maintaining food facilities. (The percentage of time: 0.5 hour of each day)
6. Management of raw materials extends to raw materials operation, food storage procedure, food storage procedure, food materials supplies, and the use of leftovers to minimize waste. This function includes superintending and directing all sections to use and keep materials reasonably, to check the amount of stock, to examine purchases for quality, to keep clear accounts, and to calculate costs well. (The percentage of time: 1.5 hours of each day)

7. Personnel management includes responsibility for hiring and firing pastry-chefs, adjusting pastry-chefs' salary up or down, and assigning and coordinating chefs' work. (The percentage of time: 0.5 hour of each day)
8. Training pastry-chefs in special pastry-making techniques, culinary theory and knowledge to improve their special techniques and operations.

Areas of special-techniques training include: processing raw materials; creating new pastry which will satisfy particular customers' requirements of health, nutrition and diet; carving, decorating, and beautifying food; use and development of new seasoning; and operation and maintenance of food equipment.

Areas for training pastry-chef about theoretical knowledge in culinary art include theory of nutrition, health, Biochemistry, food technology, culinary beautification, food therapy, raw materials, food taboo and collocation.

Documentary evidence submitted to support the proffered position as being a specialty occupation includes copies of: (1) an attestation from a Chinese restaurant in the petitioner's section of Queens, New York about the schooling and experience of its executive pastry-chef; (2) three Internet job announcements (one for a chef; two for executive chefs); and (3) the petitioner's in-house posting for the proffered position as that of a Certified Executive Pastry-Chef. As discussed below, these documents have little evidentiary weight towards establishing the proffered position as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The unsworn "Affidavit" from the Chinese restaurant in the petitioner's locale establishes no more than that this one establishment, founded in 1996, presently employs as its executive pastry-chef a person "who graduated from cookery school of China, and has 15 years making pastry experiences in Chinese food as a pastry-chef." The restaurant's assertion that the experience of its executive pastry-chef is the equivalent of "a baccalaureate degree in culinary art" is not supported by any substantiating evidence. Likewise, the author has provided no evidence to establish the accuracy of his assertion that he knows that a baccalaureate degree in culinary arts "is [the] standard minimum requirement for the position of an executive pastry-chef because this particular position is so complex that it can be performed only by an individual with a degree in the cookery field." 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)).

The Internet job announcements are unpersuasive. None are for the type of position here proffered, namely, that of an executive pastry-chef at a Chinese restaurant. These few advertisements are unaccompanied by evidence establishing them as representative of a normal, industry-wide recruiting and hiring requirement for the specific type of position here proffered. The advertisements' references to culinary degrees do not specify that they must be 4-year or baccalaureate degrees. The advertisements provide no standards by which the employers measure degree equivalency and, therefore, no assurance that their hiring requirement is objectively equivalent to at least a baccalaureate degree. One of the three advertisements only requires 5 years experience and references a degree only as a preference.

The in-house posting reflects the petitioner's desire to hire a person with a baccalaureate degree or its equivalent "in Chinese baking-pastry art or related field" and at least 12 years of cooking experience. However, this is not substantial evidence that the performance of the position requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*.

As the items of documentary evidence addressed above merit no significant evidentiary weight, they will not be further discussed.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which assigns specialty occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

As the AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses, the AAO consulted the 2006-2007 edition of the *Handbook* for information relevant to the proffered position and its duties.¹

To the extent that they are described in the record of proceeding, the proffered position and its duties substantially comport with the occupation of executive chef as discussed in the *Handbook's* section "Chefs, Cooks, and Food Preparation Workers" (pp. 371-374) and especially "Food Service Managers" (pp. 45-48). While indicating that a college degree in restaurant and institutional food service management should have the best job opportunities (see, for example, the first "bullet" statement in the Significant Points at page 45), the *Handbook* does not indicate that such a degree, or its equivalent, is normally a minimum hiring requirement for executive chefs. Further, the evidence of record does not refute the *Handbook's* information to the effect that the proffered position is not a type which normally requires at least a bachelor's degree, or the equivalent, in a specific specialty.

For the reasons discussed above, the petitioner has not satisfied the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

The petitioner has not satisfied either of the alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first alternative prong requires the petitioner to establish that the specialized degree requirement is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by CIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at www.stats.bls.gov/oco/. The AAO's references are to the 2006-2007 print edition of the *Handbook*.

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)).

As discussed above, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for a bachelor's degree in a specific specialty. There are no submissions from professional associations in the restaurant industry. As earlier discussed, the submission from the Chinese restaurant in the petitioner's locale merits little weight, as its assertions are not supported by evidence of record. As also earlier discussed, the job advertisements in the record have no significant evidentiary weight.

The evidence of record does not qualify the proffered position under the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides a petitioner the opportunity to show that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty. The position described in the record of proceeding substantially comports with the executive chef occupation. The evidence of record does not demonstrate that the work of the petitioner's executive pastry-chef would be unique from or more complex than that performed in the general range of positions within the occupation, and the *Handbook* indicates that a baccalaureate or higher degree in a specialty is not normally a requirement for positions in this occupation.

The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) has not been established. The record reflects that this is the petitioner's first instance of offering the proffered position, and that therefore the petitioner has not yet established a recruiting and hiring history with regard to it.

Finally, the evidence does not satisfy the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4) for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. To the extent that they are described in the record, the proposed duties do not exceed those of the executive chef occupation as described in the *Handbook*. There is no persuasive evidence of a usual association between such duties and at least a bachelor's degree in a specific specialty. In this regard, the AAO here incorporates its earlier comments about the deficiencies of the record's documentary evidence. Also, with regard to this and all the other criteria of 8 C.F.R. § 214.2(h)(iii)(A), the AAO discounts, as unsubstantiated by evidence of record, the petitioner's assertions about the proffered position meriting specialty occupation status by virtue of complexity and specialization. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

Beyond the decision of the director, it is noted that the petitioner has not established that the beneficiary is qualified to serve in a specialty occupation in accordance with 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D). The educational equivalency evaluation upon which the petitioner relies depends partly upon an assessment of the beneficiary's work experience. However, there is no evidence to substantiate the evaluator's assertion that he

is an official authorized by a U.S. college or university to grant college-level credit for training or experience, as required by 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(I).² Further, the documentation of record on the beneficiary's training and experience provides insufficient details to merit U.S. college-level credits in accordance with the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(5). According to its express terms, to satisfy this criterion, for each year of college-level training the alien lacks, a petitioner must demonstrate three years of specialized training and/or work experience that meet the following standards:

[I]t must be clearly demonstrated [1] that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; [2] that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and [3] that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation³;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The evidence of record regarding the beneficiary's experience does not meet the above standards and therefore does not merit CIS recognition as equivalent to at least a bachelor's degree in a specific specialty. For this reason also, the petition must be denied.

² CIS will not accept a faculty member's opinion as to the college-credit equivalent of a particular person's work experience or training, unless authoritative, independent evidence from the official's college or university, such as a letter from the appropriate dean or provost, establishes that the official is authorized to grant academic credit for that institution, in the pertinent specialty, on the basis of training or work experience.

³ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

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. Accordingly, the appeal will be dismissed.

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