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U.S. Citizenship
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FILE: SRC 05 208 50449 Office: TEXAS SERVICE CENTER Date: **MAR 07 2007**

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:
[Redacted]

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 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 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 on two grounds: (1) that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation, and (2) that the petitioner had failed to establish that the beneficiary qualifies to perform the duties of a specialty occupation.

The record of proceeding before the AAO contains (1) the 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) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

Section 214(i)(1) of the Immigration and Nationality Act (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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n occupation which 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 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.

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 proposed position.

According to the petitioner's July 13, 2005 letter of support, the duties of the proposed position would include coordinating activities; training chefs and other restaurant personnel involved in food preparation; planning menus based on the patron's references, market research, the popularity of certain dishes, and trends; reviewing the menu based on season and recent trends; analyzing recipes; preparing food tasting; assigning costs to menu items; estimating food consumption, purchases, or requisitions of kitchen supplies; screening job applicants; recommending the hiring of new employees; recommending promotions, transfers, or dismissals; conducting orientation training of new chefs and/or (current) chefs in establishing workplace procedures, timely preparation and demonstrating the use and maintenance of kitchen equipment and appliances; observing methods of food preparation, sizes of portions and garnishing so as to ensure that food is prepared within an established manner; creating special dishes and developing recipes and cataloguing them by date, preparation time, and ingredients so that the petitioner can keep the catalogue as a guide after the beneficiary's tenure ends.

In determining whether a proposed 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 Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

The *Handbook* discusses the duties and educational qualifications of executive chefs in two places: first, in its discussion of food service managers, and second, in its discussion of chefs, cooks, and food preparation workers.

In its discussion of the duties of food service managers, the *Handbook* states that an executive chef "is responsible for all food preparation activities, including running kitchen operations, planning menus, and maintaining quality standards for food service."

In its discussion of the duties of chefs, cooks, and food preparation workers, the *Handbook* states the following:

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. . . .

In that the duties of an executive chef as discussed in these two sections of the *Handbook* are similar to those of the proposed position as set forth in the petition, the AAO next turns to the *Handbook's* discussion of the educational qualifications required for entry into the field.

In its discussion of the educational requirements for food service managers, the *Handbook* offers the following information:

Executive chefs need extensive experience working as chefs, and general managers need prior restaurant experience, usually as assistant managers.

A bachelor's degree in restaurant and food service management provides particularly strong preparation for a career in this occupation. Almost 1,000 colleges and universities offer 4-year programs in restaurant and hospitality management or institutional food service management; a growing number of university programs graduate degrees in hospitality management or similar fields. For those not interested in pursuing a 4-year degree, community and junior colleges, technical institutes, and other institutions offer programs in the field leading to an associate degree or other formal certification. Both 2- and 4-year programs provide instruction in subjects such as nutrition, sanitation, and food planning and preparation, as well as accounting, business law and management, and computer science. Some programs combine classroom and laboratory study with internships providing on-the-job experience. In addition, many educational institutions offer culinary programs in food preparation. Such training can lead to a career as a cook or chef and provide a foundation for advancement to an executive chef position. . . .

The statement that a bachelor's degree is "strong preparation" for a position is not synonymous with the "normally required" standard imposed by the regulation. This passage also makes clear that a 2-year degree is sufficient preparation for a career as an executive chef.

In its discussion of the educational requirements for chefs, cooks, and food preparation workers, the *Handbook* states the following:

Executive chefs and head cooks who work in fine 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 that are 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.

As such, the *Handbook* explains unequivocally that a bachelor's degree is not the normal minimum requirement for entry into the proposed position. The *Handbook's* findings do not support counsel's

contention that a bachelor's degree is required for entry. Accordingly, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO now turns to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion set forth at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

The proposed position does not qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. The AAO has reviewed the three job postings submitted by counsel. Counsel, however, has failed to consider the specific requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for establishing a baccalaureate or higher degree as an industry norm. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in parallel positions among similar organizations.

First, the AAO notes that these job postings do not establish the petitioner's degree requirement as an industry norm. Most of the job postings require a "culinary degree." As reported by the *Handbook*, a "culinary degree" is not always a four-year degree. Of the thirteen postings submitted by counsel, only three¹ state that a bachelor's degree is required.

Counsel has submitted no evidence to demonstrate that any of these three job postings are from companies "similar" to the petitioner, a Spanish restaurant with 17 employees and stated net annual income of \$613,731.² For example, there is no evidence that the advertisers are similar to the petitioner in size and scope of operations, business efforts, and expenditures. Simply 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)).

¹ The AAO disagrees with the director's finding that the job posting from LSG Sky Chefs requires a bachelor's degree. The posting specifically states that the company would find acceptable a culinary degree, a bachelor's degree, American Culinary Apprenticeship Certification, or equivalent experience. Thus, a bachelor's degree is not a requirement; rather, it is one of several types of training that the company would find acceptable.

² Counsel's citation of *Young China Daily v. Chappell*, 742 F. Supp. 552 (N.D. Calif. 1989) regarding the director's finding that the petitioner had not satisfied the first prong of the second criterion in this matter is misplaced. While the size of a company does not, in and of itself, determine its need for a given position, its size, scope, and scale of operations do have a direct and substantial bearing on the question of whether it is "similar" to another organization. Moreover, the AAO notes that the court in *Young China Daily* made only the narrow ruling that the duties of a graphic designer at a small newspaper do not necessarily differ from those at a major newspaper. This does not lead to the general conclusion that the skills required to be an executive chef at a small company are necessarily the same as those required to be a manager at a large company. See --- F.Supp.2d ---, 2006 WL 3770781 (E.D. Mich. 2006).

Aramark Corporation provides food and facilities management services to health care institutions, universities and school districts, stadiums and arenas, international and domestic corporations, and also provides uniform and career apparel. It has 242,500 employees and serves clients in twenty countries. The petitioner did not submit any evidence to establish that the petitioner is similar to [REDACTED]. Nor does the record establish that Focus on Foods is similar to the petitioner: the record establishes that it is a 300-employee grocer.

Moreover, even if the AAO were to find that these three companies were similar to the petitioner, three job postings are too few to establish an industry-wide standard, particularly in light of the fact that the petitioner itself submitted job postings from ten companies that do not require a bachelor's degree. Also, the information regarding the duties and responsibilities of the advertised positions is general and does not support a meaningful comparison of their actual performance and specialty knowledge requirements to those of the proposed position. Thus, while relevant to this proceeding, these job postings submitted by counsel are insufficient to establish the petitioner's degree requirement as an industry norm in parallel positions among similar organizations, and they do not satisfy the requirements of the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor do the letters from [REDACTED] satisfy this prong. The authors of these letters submit no evidence to establish that their establishments are similar to the petitioner. Nor does either author state that he has himself required applicants for similar positions to possess bachelor's degrees. Both authors' personal opinions conflict with the industry-wide data contained in the *Handbook*, as well as the ten job postings submitted by the petitioner which do not require a bachelor's degree. Neither author offers industry surveys or other data to support his assertion. Again, 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)).

Moreover, neither author has established an adequate factual foundation to support his opinion. Neither author notes the location or size of the petitioner. Nor does either author indicate whether they reviewed company information about the petitioner, visited its site, or interviewed anyone affiliated with the petitioner. While some positions may require a bachelor's degree as a prerequisite for employment, neither author gives sufficient details about the complexity of the details of the proposed position or similar positions within their own organization to substantiate their conclusions, which differ from those in the *Handbook*. 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).

Therefore, the proposed position does not qualify as a specialty occupation under the criteria set forth at the first prong of the second criterion.

The second prong of the second criterion requires that the petitioner prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. However, there has been no demonstration that the proposed position is more complex or unique than the general range of executive chef positions in other, similar organizations, which would not require a degreed individual. The *Handbook* indicates that such positions generally do not normally require at least a baccalaureate degree in a

specific specialty; and the evidence of record does not establish the proposed position as unique from or more complex than the general range of such positions.

Therefore, the petitioner has not established that the proposed position qualifies for classification as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO next turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires that the petitioner demonstrate that it normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas.

No such evidence has been presented. Accordingly, the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) has not been satisfied.

The fourth criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), requires the petitioner to establish that the nature of the proposed position's 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 the specialty occupation. The evidence of record, as discussed above, does not establish that the nature of the duties is specialized and complex. A review of the duties of the proposed position does not lead to a conclusion that they would require the beneficiary to possess a higher degree of knowledge and skill than that normally expected of executive chefs in other, similar organizations.

The proposed position does not qualify for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4). As the proposed position is not a specialty occupation, the beneficiary's qualifications to perform its duties are immaterial. Accordingly, the AAO will 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.