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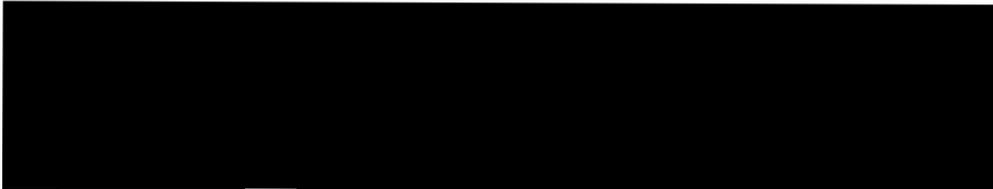
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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U.S. Citizenship
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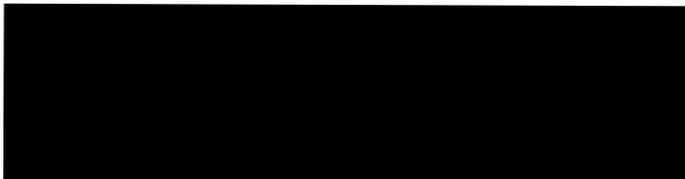


FILE: EAC 07 048 50789 Office: VERMONT SERVICE CENTER Date: JAN 16 2008

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:



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, Vermont 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 an Indian restaurant and catering service. It seeks to employ the beneficiary as a specialty chef. Accordingly, the petitioner 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 record of proceeding before the AAO contains: (1) the Form I-129 filed December 8, 2006 and supporting documentation; (2) the director's December 21, 2006, request for evidence (RFE); (3) counsel's January 12, 2007, response to the director's RFE and supporting documents; (4) the director's January 26, 2007 denial letter; and (5) the Form I-290B and counsel's brief in support of the appeal. The AAO reviewed the record in its entirety before reaching its decision.

On January 26, 2007, the director denied the petition determining that the record did not establish that the proffered position is a specialty occupation. The issue before the AAO is whether the petitioner has established that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

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

An 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

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.

The petitioner states that it is seeking the beneficiary's services as a specialty chef. In a December 4, 2006 letter appended to the petition, the petitioner stated:

The specific duties of the position will include but are not limited to the following: Direct the preparation, seasoning, and cooking of salads, soups, fish, meats, vegetables, desserts, or other European dishes. Plan and price menu items, order supplies, and keep records and accounts. Participate in cooking.

In response to the director's RFE, the petitioner provided a list of duties and the percentage of time spent on the duties as:

- Prepare and cook European foods on a regular basis. (25%)
- Supervise and coordinate activities of cooks and workers engaged in food preparation. (15%)
- Collaborate with other personnel to plan and develop recipes and menus, taking into account such factors as seasonal availability of ingredients and the likely number of customers. (10%)
- Check the quality of raw and cooked food products to ensure that standards are met. (5%)
- Check the quantity and quality of received products. (5%)
- Demonstrate new cooking techniques and equipment to staff. (5%)
- Determine how food should be presented, and create decorative food displays. (5%)

- Determine production schedules and staff requirements necessary to ensure timely delivery of services. (5%)
- Estimate amounts and costs of required supplies, such as food and ingredients. (5%)
- Inspect supplies, equipment, and work areas to ensure conformance to established standards. (5%)
- Assist with the menu planning, cost control, keeping good communication with all departments, and committing responsibilities. (10%)
- Gauging storage needs, maintains temperature logs for refrigerators, blast chillers and final cooking temperatures of foods. (5%)

Also in response to the director's RFE, the petitioner provided a list of ten employees and indicating that the operations manager, the Indian menu chef, two cashiers, and the president held bachelor's degrees. The list did not specify the field of study and the record did not include copies of diplomas and transcripts for the employees holding the bachelor's degrees.¹ Counsel asserted that the job position is far more complex than that of just being a cook. Counsel notes the beneficiary's bachelor's of science degree in hotel management and contends that this level of education has provided the beneficiary with administrative and managerial skills in restaurant and kitchen management.

On January 26, 2007, the director denied the petition. The director referenced the Department of Labor's *Occupational Outlook Handbook (Handbook)* report that chefs need extensive experience working as chefs but noted that the *Handbook* does not indicate that a bachelor's degree is the minimum requirement for the position. The director acknowledges counsel's assertion that the proffered job is complex but found no evidence had been submitted to lend support to this assertion.

On appeal, counsel for the petitioner asserts that the proffered position is a specialty occupation as a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the position and that the employer in this matter normally requires a degree or its equivalent for the position. Counsel references the petitioner's list of duties and contends that the proffered position involves leadership as the beneficiary will supervise others; plan, develop, and make alterations to recipes and menus; demonstrate new cooking techniques and equipment; and maintain the cleanliness and freshness standards. Counsel also provides an excerpt from the Department of Labor's *O*NET Online (O*NET)* on the position of a chef and head cook that indicates the position has a JobZone rating of four and a Specific Vocational Preparation (SVP) rating of seven. Counsel asserts that the Department of Labor states that most head chef positions require a four-year bachelor's degree, although some do not, an indication that the majority of head chef positions in the United States do require a bachelor's degree.

Counsel's assertions are not persuasive. The AAO turns first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. The AAO routinely consults the Department of Labor's

¹ The record includes a copy of a diploma of a Bachelor's of Science degree issued to ██████████ from Mahatma Gandhi University, who may be the same as ██████████ the petitioner's chef, Indian menu. The degree identifies ██████████'s field of study as physics, mathematics, and chemistry.

Handbook for its information about the duties and educational requirements of particular occupations. The *Handbook* states the following with regard to the employment of food service managers:

In most full-service restaurants and institutional food service facilities, the management team consists of a *general manager*, one or more *assistant managers*, and an *executive chef*. The executive chef is responsible for all food preparation activities, including running kitchen operations, planning menus, and maintaining quality standards for food service.

* * *

Managers or executive chefs estimate food needs, place orders with distributors, and schedule the delivery of fresh food and supplies.

Regarding the educational requirements of food service managers, the *Handbook* states:

Experience in the food services industry, whether as a full-time waiter or waitress or as a part-time seasonal counter attendant, is essential training for a food services manager. Many food service management companies and national or regional restaurant chains recruit management trainees from 2- and 4-year college hospitality management programs which require internships and real-life experience to graduate. Some restaurant chains prefer to hire people with degrees in restaurant and institutional food service management, but they often hire graduates with degrees in other fields who have demonstrated experience, interest and aptitude.

Although the *Handbook* reports that a bachelor's degree in restaurant and food service management provides particularly strong preparation for a career in this occupation, the *Handbook* also recognizes that community and junior colleges, technical institutes, and other institutions offer programs in the field leading to an associate's degree or other formal certification. The *Handbook* notes that both two and four-year programs provide similar instructional courses and emphasizes that most employers have rigorous in-house training programs for management employees. Thus, the AAO concurs with the director's determination regarding the *Handbook's* report that food service managers do not require a bachelor's degree in a specific specialty. Instead, the *Handbook* recognizes several avenues leading to employment as a food service manager.

Moreover, upon a review of the *Handbook's* report on various occupations, the AAO finds that the description of the proffered position corresponds most closely to the *Handbook's* description of an executive chef or head cook under the section Chefs, Cooks, and Food Preparation Workers. The *Handbook* provides:

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.

Regarding the training of these individuals, the *Handbook* indicates:

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 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. . . . Many chefs are trained on the job receiving real work experience and training from chef mentors in the restaurants where they work.

Again, the *Handbook* recognizes several avenues leading to employment as a chef or head cook and many of those avenues are available to individuals who do not have a bachelor's or higher degree in a specific discipline. The *Handbook* does not report that the normal minimum requirement for an individual performing the duties of a chef or a head cook is that of a baccalaureate or higher degree.

The AAO acknowledges counsel's reference to the *O*NET*; however, the AAO does not consider the *O*NET* to be a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. The *O*NET* provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. The *O*NET* does not proscribe a normal minimum requirement of a baccalaureate or higher degree in a specific discipline to perform the duties of a chef or a head cook.

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 petitioner has failed to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Counsel does not assert and the petitioner has not offered substantive evidence to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations as required by the first prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Neither does the record contain evidence that shows the proffered position is so complex or unique that only an individual with a degree could perform the duties of the position. The description of the duties of the proffered position is that of a chef or a head cook, an occupation that does not require a bachelor's degree in a specific specialty. Although counsel asserts that the position involved leadership responsibilities, counsel does not identify any "leadership" responsibilities that require knowledge attained through a four-year course of study at the university or level. A review of the evidence of record finds it insufficient to establish the proposed duties as a position that is identifiable with an industry-wide educational standard, or distinguishable, by its unique nature or complexity, from similar but non-degree-requiring positions. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor is there adequate 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. The AAO acknowledges the

petitioner's list of employees and an indication that its Indian cuisine chef has a bachelor's degree. As footnoted above, however, the name on the diploma submitted to evidence the bachelor's degree is not the same as shown on the petitioner's list. In addition, the diploma submitted does not reveal that the individual has studied in a discipline that is relevant to the duties of a chef. Further, the AAO notes that while a petitioner may believe that a proffered position requires a degree, that opinion cannot establish the position as a specialty occupation. Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

The duties of the proffered position do not exceed the scope of those performed by a chef or head cook, an occupation that does not require a specific baccalaureate degree. There is no evidence in the record sufficient to satisfy 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. The *Handbook* reveals that the occupation of a chef or head cook is an occupation that does not require a specific baccalaureate degree as a minimum for entry into the occupation. The petitioner has provided a general description of the duties associated with the proffered position but has not explained how or offered documentary evidence to substantiate that the nature of the duties is specialized and complex, beyond the routine duties of a chef or head cook. The AAO again acknowledges counsel's claim that the beneficiary's position will include leadership duties. However, supervising a staff, learning new techniques and equipment to train staff, planning, developing, and revising recipes and menus, as well as ensuring cleanliness and freshness standards are met, do not involve tasks that require the attainment of a bachelor's or higher degree. The petitioner has not described a position or otherwise provided evidence that the proffered position's duties require the services of anyone other than a non-degreed employee to perform the routine tasks of a chef/head cook. The petitioner has not established that the proffered position is a specialty occupation based on the criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Therefore, for the reasons related in the preceding discussion, 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 petition will be denied and the appeal dismissed for the above stated reason. 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.