

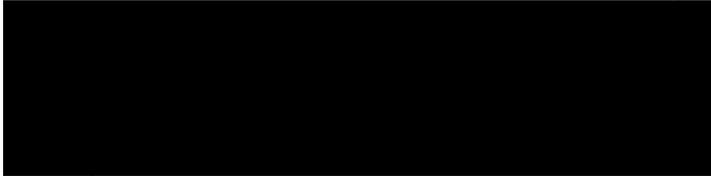
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U.S. Citizenship
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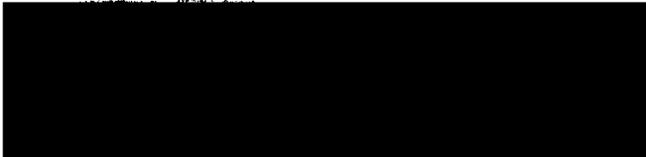
FILE: EAC 04 094 53641 Office: VERMONT SERVICE CENTER Date: JUN 1 2 2006

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.


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.

The petitioner's February 12, 2004 letter of support stated that the duties of the proposed position would include planning and/or participating in the planning of menus; utilizing food surpluses and leftovers, taking into account probable numbers of guests, market conditions, popularity of dishes, and recent menus; estimating food consumption and purchases and requisitions of foodstuffs and kitchen supplies; reviewing menus; analyzing recipes; determining food, labor, and overhead costs; assigning prices to menu items; directing the food apportionment policy so as to control costs; supervising cooking and other kitchen personnel and coordinating their assignments to ensure economical and timely food production; observing methods of food preparation and cooking, sizes of portions, and garnishing of foods to ensure that food is prepared in the prescribed manner; devising special dishes; developing recipes; familiarizing newly-hired chefs and cooks with the practices of the kitchen; overseeing the training of cook apprentices; and establishing and enforcing nutrition and sanitation standards for the commissary.

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. The submitted menus and promotional materials also fail to establish the first criterion.

The AAO does not find persuasive the information submitted by counsel from the Department of Labor's *Dictionary of Occupational Titles (DOT)* and *O*Net*. The *DOT* and *O*Net* are not persuasive sources of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. Their assessments (the SVP rating and the JobZone categories) are meant only to indicate the total number of years of vocational preparation required for a particular position. They do not describe how those years are to be divided among training, formal education, and experience, and do not specify the particular type of degree, if any, that a position would require. As such, the AAO accords no weight to this information.

Accordingly, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Nor does the proposed position 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 job postings submitted by the petitioner, which counsel contends establish the petitioner's degree requirement as the normal minimum entry into the position. 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, there are too few postings in the record to prove an industry-wide standard. Also, while these companies appear to operate in the same general business as the petitioner, the record does not demonstrate that they are substantially similar to the petitioner. For example, there is no evidence that the advertisers are similar to the petitioner in size and scope of operations, business efforts, and expenditures.

Moreover, the information regarding the duties and responsibilities of both the advertised positions and the position proposed in this petition are general and do not support a meaningful comparison of their actual performance and specialty knowledge requirements.

Finally, 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 fourteen postings submitted by counsel, only two state that a bachelor's degree is required. Six state that a culinary degree is required, and six state that either a bachelor's degree or a culinary degree is required.

Thus, while relevant to this proceeding, these job postings submitted by the counsel are insufficient to establish the petitioner's degree requirement as an industry norm, and they do not satisfy the requirements of the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor does the letter from Nazeer Ahmed, submitted as evidence of an industry standard, satisfy the petitioner's burden under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). First, the letter does not identify what position this individual holds within Pongal. While the author does state that an executive chef at Pongal would be required to possess a bachelor's degree, no evidence has been presented to document any of the assertions made in this letter. 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 AAO also concludes that the record does not establish the proposed position as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a showing that the position is so complex or unique that it can only be performed by an individual with a degree. It finds no evidence that would support such a finding, as the position proposed in the petition is very similar to the executive chef position described in the *Handbook*.

Accordingly, the petitioner has not established its proposed position 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.

The submitted evidence fails to establish the third criterion. The petitioner has provided a list of three current employees, all of whom hold degrees. However, none of these current employees are executive chefs. The petitioner conceded in its response to the director's request for evidence that it had never before hired an executive chef, which precludes approval under the third criterion. Thus, the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) has 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. 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.