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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
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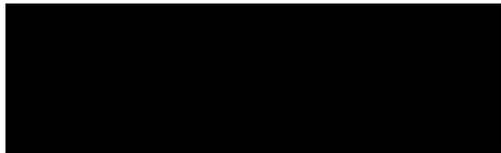
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FILE: EAC 07 157 51010 Office: VERMONT SERVICE CENTER Date: **OCT 08 2009**

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)

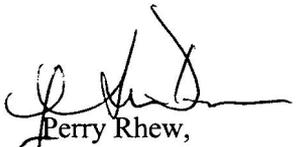
ON BEHALF OF PETITIONER:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew,
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 a restaurant business. It was established in 1999 and claims to employ 11 persons, to have a gross annual income of \$800,000, and a net annual income of \$150,000. It seeks to employ the beneficiary as an Indian 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).

On October 15, 2007, the director denied the petition, determining that the record did not establish that the proffered position is a specialty occupation. On appeal, counsel for the petitioner submits a Form I-290B, Notice of Appeal, and statement asserting the director misapplied the definition of specialty occupation to the proffered position.

The record includes: (1) the Form I-129, Petition for a Nonimmigrant Worker, and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial decision; and, (5) the Form I-290B and counsel's statement in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

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.

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.

Consistent 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 also 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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

To determine whether a particular job qualifies as a specialty occupation, United States Citizenship and Immigration Services (USCIS) 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. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Defensor v. Meissner*, 201 F. 3d 384. 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.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently 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. Applying this standard, USCIS 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.

On the Form I-129, the petitioner stated that the proffered position is that of an "Indian Specialty Chef." In the petitioner's March 26, 2007 letter appended to the petition, the petitioner stated:

[The beneficiary] will be responsible for managing all aspects of a multi-unit Indian restaurant chain including planning and pricing menu items; ordering supplies; keeping records and accounts; supervising cooks; maintaining quality control in the kitchen; and determining production schedules and staff requirements. This job requires the expertise of someone with highly developed culinary skills, and a Bachelor's degree in commerce/economics as supply and demand principles must be understood and implemented.

The petitioner further noted that the beneficiary's duties would include:

- Plan and Price Menu Items
- Order Supplies
- Oversee Records and Accounts
- Supervise activities of cooks engaged in food preparation
- Ensure that quality control standards are met
- Determine production schedules and staff requirements
- Arrange the procurement of the Indian spices and ingredients of the ethnic cuisines of India; Improvise recipes when required spices cannot be obtained
- Create and continuously update Indian restaurant menus and recipes
- [The beneficiary] will be responsible for assuring that cooks are able to achieve successful results in every dish prepared through the art of Dum Pukht. Dum Pukht means 'to breathe' and 'to cook.' The cuisine owes its excellence to the fact that the food, sealed in a dish, is cooked in its own juices and retains all its natural aromas and flavors. The laws of physics are delicately challenged in the preparation of each dish, as even the slightest aberration in the pressure-water

combination can ruin a meal. [The beneficiary's] college education allows him to understand the basics of science, and approach Dum Pukht with more than just the perspective of a culinary artist.

- [The beneficiary] will also use his understanding of scientific principles for overseeing the making of naan, a popular Indian bread, and dosas, a delicacy from South India. Dosas are made from fermented ground lentils, and [the beneficiary] is well acquainted with the needed combination of lentils, water, and heat required to achieve the desired result every time.

On July 30, 2007, the director requested further evidence to establish that the proffered position is a specialty occupation. In an August 29, 2007 response, the petitioner noted that it did not have another Indian specialty chef in the organization and that its two other chefs, a curry chef and a tandoor chef, had years of experience but did not have bachelor's degrees. The petitioner contended that the proffered position is more complex and specialized than the positions of its two other chefs as the specialty Indian chef position required knowledge in several areas. The petitioner noted that the specialty Indian chef would create training programs and train additional chefs, would match spices and aroma to particular wines from around the world, would educate customers and critics through participation in food shows on radio and television, would prepare menus including costs, and monitor sales. The petitioner indicated that these skills/duties required an individual with not only a bachelor's degree but someone with a bachelor's degree in culinary arts.

The petitioner provided a copy of its advertisement for the proffered position that indicated only that it required an individual with two to five years of experience in Contemporary Indian Cuisine. The petitioner also submitted Internet job announcements for: (1) a chef manager for a company with approximately 240,000 employees serving clients in 18 countries that indicated the ideal candidate would possess a bachelor's degree or related culinary degree; and (2) a chef de cuisine, *sous* chef for a subsidiary company of the company in the first advertisement that served over 250 facilities and indicated that the ideal candidate would possess two to three years of post high school education, preferably a culinary degree.

The petitioner also submitted an August 28, 2007 position evaluation prepared by [REDACTED] Assistant Professor of Culinary Science, California State University, Fresno, California. [REDACTED]

[REDACTED] opined: "a bachelor's-level background in culinary arts or a related discipline is necessary for the Specialty Indian Chef to plan recipes and menus, devise and implement cooking procedures, direct kitchen personnel and kitchen operations, manage quality control and operating efficiency, maintain adherence to sanitary codes, and monitor development in the food industry."

[REDACTED] further opined: "[a] bachelor's degree in Culinary Arts, or the equivalent thereof gained through progressive experience, teaches culinary professionals to analyze restaurant strategies, plan menus and cuisines, develop cooking and kitchen procedures, direct the operations of the kitchen, supervise kitchen personnel, manage kitchen operations efficiently while maintaining quality control, plan new developments to enhance the business of the restaurant, and apply in a practical setting the concepts and issues involved in the operations of the restaurant." [REDACTED].

based on his review of the job duties, concluded:

[T]he specialized nature and the level of sophistication of the responsibilities of the position necessitate that the incumbent have the background and analytical expertise required to assess and analyze complex food service matters from the perspective of various food service, business, financial, marketing, and operations issues” and that the “complexity of the job duties necessitates that a candidate be well-versed in the theoretical and academic concepts taught in bachelor’s-level classes in Culinary Arts, Food Theory, Nutrition, Food Cost Control, Culinary Techniques, Catering Management, Food and Beverage Service Management, Quality Management, Organizational Behavior, and Personnel Management, such that he would have the ability to analyze, synthesize and apply academic and business issues in the planning, development, and management of kitchen and restaurant operations.

found: “that the subject position of ‘Specialty Indian Chef’ cannot be performed without at least bachelor’s-level training in Culinary Arts and related areas.”

Upon review of the evidence in the record, the director denied the petition determining that the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel for the petitioner asserts that the director’s decision is erroneous. Counsel contends that the proffered position is a specialty occupation and that the director failed to understand the merits and complexity of Indian Specialty cooking. Counsel cites an unpublished decision rendered by the AAO in 2002 and references the Department of Labor’s *Occupational Outlook Handbook (Handbook)* and its report that executive chefs obtain training, in part, through two- or four-year college programs. Counsel asserts that the director did not properly consider the job announcements submitted and the position evaluation prepared by _____ Counsel avers that the proffered position requires the theoretical and practical application of a body of highly specialized knowledge, such as the art of Indian cooking, that the job is highly complex in nature, and that it requires supervisory and management related duties.

Upon review of the petitioner’s description of duties, the AAO finds that the proffered position is a position that requires skill and specialized knowledge relating to the art of Indian cooking, but does not find that these requirements are obtainable only through a four-year university-level education resulting in a baccalaureate degree. Thus the proffered position, as described, is not a specialty occupation position. The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations in an effort to determine whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position and thus satisfies the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

In this matter, the AAO finds that the description of duties of the proffered position most closely resembles the occupation of executive chef. As counsel and the director both noted, the *Handbook* does not report that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into an executive chef position. Rather, the *Handbook* states:

When hiring chefs and others in advanced cooking positions, however, employers usually prefer applicants who have training after high school. These training programs range from a few months to 2 years or more. Vocational or trade-school programs typically offer basic training in food handling and sanitation procedures, nutrition, slicing and dicing methods for various kinds of meats and vegetables, and basic cooking methods, such as baking, broiling, and grilling. Longer programs leading to a certificate or a 2- or 4-year degree train chefs for fine-dining or upscale restaurants.

A growing number of chefs participate in these longer training programs through independent cooking schools, professional culinary institutes, 2- or 4-year college degree programs in hospitality or culinary arts, or in the armed forces.

The AAO concurs with the director and notes the petitioner's acknowledgment that the *Handbook* does not report that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the position of executive chef. Instead the *Handbook* confirms that there are many different paths for entry into the position of executive chef, including experience, two-year degrees, as well as four-year degrees. As there are a variety of ways to enter into the proffered position's profession, other than a four-year degree in a specific discipline, the petitioner has not established the requisite requirement that of a four-year degree in a specific discipline is the normal minimum requirement to enter into the position.

The AAO has reviewed the position evaluation prepared by [REDACTED] Although [REDACTED] clearly indicates that it is his opinion that the minimum educational requirement for the occupation of an executive chef is a baccalaureate degree, the record does not establish his authority to speak to national hiring practices. The AAO acknowledges [REDACTED] statements that he has taught courses in food science and food service management and is familiar with employers' application of the knowledge and skills of university students in hotel and restaurant management, and has observed industry hiring practices. However, his statements are not supported by documentary evidence. [REDACTED] does not include the results of formal surveys, research, statistics, or any other objective quantifying information to substantiate his opinion. 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 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). The *Handbook*, which offers an overview of national hiring practices, draws on personal interviews with individuals employed in the occupation or from websites, published training materials and interviews with the organizations granting degrees, certifications, or licenses in the field, to reach its conclusions regarding the nation's employment practices. [REDACTED] opinion regarding the proffered position is insufficient to overcome the *Handbook's* finding that there are a myriad number of ways to enter into employment as an executive chef, not just through the award of a baccalaureate degree in a specific discipline.

The AAO next considers the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), whether a degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, is so complex or unique that it can be performed only by an individual with a degree. Factors considered by the AAO when determining these criteria include: whether the *Handbook* reports 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)). As discussed above, the *Handbook* does not report that the restaurant industry normally requires a bachelor's or higher degree for the position of an executive chef. The AAO has also reviewed the two job announcements the petitioner submitted and finds that neither job announcement states that it requires its chef manager or its chef de cuisine, *sous* chef to possess a bachelor's degree in a specific discipline. The advertisement for a chef manager indicates that an ideal candidate would possess a bachelor's degree or a related culinary degree but does not indicate that this is required and does not indicate that the bachelor's degree must be in a specific discipline. Moreover, as the director noted, the businesses advertising the positions are not similar to the petitioner in size, number of employees, or level of business. There is nothing in either job announcement that establishes that businesses similar to the petitioner in the restaurant industry require a bachelor's degree in a specific discipline as a minimum entry requirement.

In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree will be able to perform the work associated with the position. In the instant petition, the petitioner has noted that the successful candidate should have knowledge of many Indian spices and will use scientific principles to make naan and dosas. However, the AAO finds that such knowledge is primarily gained through experience, not a bachelor's degree in a specific discipline. The petitioner in this matter has submitted insufficient documentation to distinguish the proffered position from similar but non-degreed employment. Again, the AAO acknowledges the position evaluation of [REDACTED] but does not find any evidence that [REDACTED] has reviewed company information about the petitioner, visited the restaurant, or interviewed the petitioner in detail in regards to the proffered position. The AAO is not persuaded that the nature of the specific duties of the proposed position is more specialized and complex than that of a typical executive chef, an occupation that is not a specialty occupation. The opinion of [REDACTED] does not establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

A review of the evidence of record finds the evidence 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).

The petitioner acknowledges it has not previously employed a chef with a bachelor's degree in a specific discipline, thus the record does not establish that the petitioner normally requires a degree or

its equivalent in a specific specialty for the position as set out in criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO finds that the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved 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. In assessing whether the petitioner has met its burden with regard to this criterion, the AAO considers the duties of the position, not the occupation, or the industry-wide standard associated with the occupation. As reflected in the earlier discussion of the description of the proffered duties, the petitioner has failed to establish that there are specific duties that are more specialized and complex than the routine duties found in other chef positions; duties that are usually associated with a degree in a specific specialty. The petitioner has not provided sufficient documentary evidence that the duties of the proffered position contain elements different from that of any other executive chef. Neither does the position, as described, represent a combination of jobs that would require the beneficiary to have a unique set of skills beyond those of a typical executive chef. Again, the AAO has reviewed the opinion of [REDACTED] but does not find that the opinion establishes that the duties of an Indian Specialty Chef is different than or more complex and specialized than the duties of an executive chef, an occupation that is not a specialty occupation.

Upon review of the totality of the record, the petitioner has not provided evidence that the proffered position is a specialty occupation. 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.