

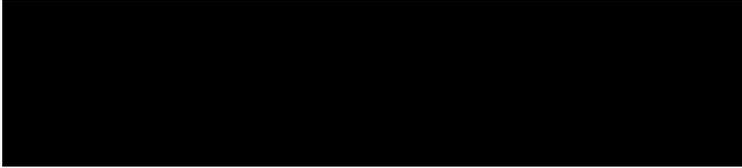
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U.S. Citizenship
and Immigration
Services



D1

FILE: EAC 03 266 53085 Office: VERMONT SERVICE CENTER Date: 12/20/05

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: Self-represented

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner owns and operates a French restaurant. It seeks to employ the beneficiary as a management trainee and to classify him 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 ground that the record failed to establish that the proffered position qualifies as 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.

As provided in 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 proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision; and (5) Form I-290B, counsel's appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner owns a French restaurant called L'Espalier in Boston, Massachusetts, with approximately 50 employees and gross annual income of over \$3 million in 2001. In a letter accompanying Form I-129 the petitioner's financial manager stated that the management trainee position, proffered to the beneficiary, was created to assist the food and beverage manager in controlling control costs and employees. The duties of the position, and the percentage of time required by each duty, were described as follows:

- Making sure that food items entering the restaurant are best quality at lowest possible cost – 20%.
- Reviewing expenditures with the general manager or financial manager to determine if cost/price ratios are suitable; working with the financial manager to ensure that costs are kept within budget – 30%.
- Supervising, training, tasting and advising new employees to preserve the restaurant's "unique innovative cuisine" and assisting in daily briefings of the waiter staff – 20%.
- Assisting in the production of food, working in all areas of the kitchen preparation and organizing storage areas – 10%.
- Supervising and developing new methods – 5%.
- Scouting and training new cooks – 5%.
- Maintaining a spotless and sanitary kitchen by setting up a cleaning schedule and supervising cooks, cleaning personnel, and waiter staff – 5%.
- Assisting in the development of new menus and menu items, and helping research different ingredients on the market – 5%.

The petitioner asserted that the beneficiary was qualified for the job based on his experience as a restaurant cook and his education at the Culinary Institute of America, in Hyde Park, New York, where he earned a degree entitled "bachelor of professional studies in culinary arts management" on November 8, 2002. In response to the RFE the petitioner submitted an additional, detailed job description of the management trainee position, which listed the duties as follows:

- Comparing prices between various suppliers on a weekly basis.
- Working in all restaurant departments: Hot-apps, cold, vegetable station, prep, pastries, grill, sauté, and front of the house (waiter staff).
- Analyzing price versus quality and making appropriate purchase decisions in accordance with the standards of the restaurant.
- Working with the chef and sous-chef to establish and maintain food costs.
- Maintaining all food storage areas.
- Establishing and maintaining par stock levels of all products.
- Daily ordering and inventory for the entire restaurant.
- Promoting and maintaining a spotless and sanitary kitchen at all times.
- Assisting in the management and training of line cooks, dishwashers, and waiter staff.

The job description indicated that a qualified candidate for the position must have a bachelor's degree from an accredited culinary school or comparable experience of approximately twelve years in a similar type of restaurant operation.

The director determined that the proffered position is not a specialty occupation. The director quoted an excerpt from the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)* indicating that a baccalaureate level of education in a specific specialty is not the normal, industry-wide minimum requirement for entry into management trainee positions in food service establishments. Though the proffered position involves some managerial duties, the director declared, the record did not establish that the duties are so complex or unique that they require a bachelor's degree in a specific field of study. The director concluded that the position does not qualify as a specialty occupation under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

On appeal the petitioner submits letters from its financial manager and its chef/proprietor, along with documentary evidence of the restaurant's high quality ratings by the Mobil Travel Guide and the AAA (American Automobile Association). The financial manager quotes the restaurant's job announcement for the proffered position and asserts that all 25 of its food and beverage managers have had a bachelor's degree or at least 15 years of experience, while the chef/proprietor states that the restaurant's management trainee must have considerable specialized knowledge because he functions independently and is the acting manager when the chef/proprietor or the sous-chef/food and beverage manager are not on duty.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the *Handbook, supra*, as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; 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*, 764 F.Supp. 1095, 1102 (S.D.N.Y. 1989)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti, id.*, at 1165-66.

As indicated by the director in his decision, the proffered position in this case falls within the *Handbook's* occupational category of food service managers.¹ The AAO agrees with the director that a baccalaureate degree in a specific specialty is not the normal minimum requirement for entry into a management position in the food service industry. As explained in the *Handbook's* description of the training and education required of food services managers:

Most food service management companies and national or regional restaurant chains recruit management trainees from two- and four-year college hospitality management programs. 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 interest and aptitude. Some restaurant and food service

¹ As described in the *Handbook*, 2004-05 edition, at page 42: "Food service managers are responsible for the daily operations of restaurants and other establishments that prepare and serve meals and beverages to customers [T]hey oversee the inventory and ordering of food, equipment, and supplies and arrange for the routine maintenance and upkeep of the restaurant, its equipment, and facilities. Managers generally are responsible for all of the administrative and human-resource functions of running the business, including recruiting new employees and monitoring employee performance and training."

manager positions – particularly self-service and fast-food – are filled by promoting experienced food and beverage preparation and service workers. Waiters, waitresses, chefs, and fast-food workers demonstrating potential for handling increased responsibility sometimes advance to assistant manager or management trainee jobs [G]eneral 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. A number of colleges and universities offer four-year programs in restaurant and hotel management or institutional food service management. For those not interested in pursuing a four-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.

Handbook, 2004-05 edition, at 44. What the *Handbook* makes clear is that, even if many food service managers have baccalaureate degrees in restaurant or food service management, there is ample opportunity to enter the occupation with credentials short of a four-year baccalaureate degree in the specific specialty. Accordingly, the management trainee position at issue in this petition does not meet the first alternative criterion of a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

As for the second alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), there is no documentation in the record showing that a bachelor's degree in a specific specialty is common to the restaurant industry in parallel positions among similar organizations. Nor does the record establish that the management trainee position is so complex or unique that it can only be performed by an individual with a bachelor's degree in a specific specialty. Accordingly, the proffered position does not qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The proffered position does not meet the third alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), because the record does not demonstrate that the restaurant normally requires its management trainee to have a bachelor's degree or its equivalent. There is no evidence of any previous hiring of a management trainee, which appears to be a newly-created position. The newspaper advertisement of the position and the detailed job description submitted in response to the RFE both state that a bachelor's degree from an accredited culinary school or equivalent experience in the restaurant industry is required. Equivalent work experience does not satisfy the requirement of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), however, since the "or its equivalent" language of the regulation (and the Act) only comes into play if there is no degree offered in a specific specialty and the employer therefore requires a degree or its equivalent in a limited field of related specialty areas. *See Tapis International v. INS*, 94 F.Supp. 2d 172, 176 (D.Mass. 2000). That is not the situation in the instant petition, in which a baccalaureate degree is offered in the field of hospitality management and the petitioner does not require a degree in that specialty area for its management trainee position. Thus, the record does not establish that the petitioner normally requires a bachelor's degree or its equivalent in a specific specialty for the proffered position.

Finally, the record does not establish that the specific duties of the management trainee position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree. The job description states that the proffered position, though it entails some management duties, is subordinate to three other positions in the restaurant – the executive chef, the

sous-chef, and the general manager. It is also subordinate to the chef/proprietor. Thus, the management trainee is not a high-level management position. The job description also states that the knowledge base required to perform the work of a management trainee could be acquired through suitable experience in the restaurant industry. The evidence of record does not demonstrate that the experience required for the proffered position involves baccalaureate-level knowledge in a specific specialty. The AAO concludes that the duties of the position could be performed by an experienced individual without baccalaureate-level knowledge in a specific specialty. Accordingly, the proffered position does not meet the fourth alternative criterion of a specialty occupation at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(4).

For the reasons discussed above, the record does not establish that the management trainee position qualifies as a specialty occupation under any of the criteria enumerated in 8 C.F.R. § 214.2(h)(4)(iii)(A). The record does not establish that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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