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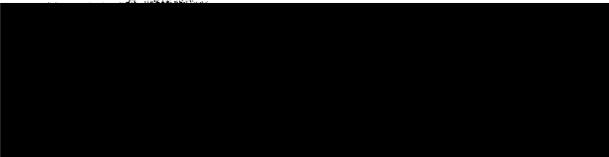


FILE: SRC 04 075 52507 Office: TEXAS SERVICE CENTER Date: **APR 29 2005**

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner is a multiplex restaurant specializing in French and international cuisine. In order to employ the beneficiary as an executive chef, 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 director denied the petition on the basis that the petitioner had failed to establish that the proffered position met the requirements of a specialty occupation as set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A). On appeal, counsel contends, in part, that the director "arbitrarily ignored" expert testimony.

The AAO has determined that the director's decision to deny the petition on the basis of the specialty occupation was incorrect, and also that the proceeding must be remanded to the director for a new decision on whether the beneficiary is qualified to serve in the pertinent specialty occupation. The AAO bases its decision upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the director's request for additional evidence (RFE); (3) the materials submitted in response to the RFE; (4) the director's denial letter; (5) the Form I-290B, with counsel's annotations; and (6) copies of the April 4, 2004 letter and January 26, 2004 biographical sketch from David V. Pavesic, Ph.D, which were submitted as supplemental documentation by counsel's letters of May 1 and May 3, 2004.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in 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.

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.

Consonant 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. (Italics added.)

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) has consistently interpreted 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, CIS 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.

The director’s opinion correctly reflects the fact that, as indicated by the Department of Labor’s *Occupational Outlook Handbook*), executive chefs do not comprise an occupation or class of positions for which the normal minimum requirement is at least a bachelor’s degree or the equivalent in a specific specialty. However, the combination of the proposed duties, extent of the petitioner’s business, the supportive documentation about the caliber of the petitioner’s restaurant, and the evaluations rendered by Carl T. Walter, Ph.D. of the International Education Council (IEC) and by Professor David V. Pavesic, the Graduate Program Director at the Cecil B. Day School of Hospitality Administration of Georgia State University, establish that the proffered position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). That is, the petitioner has established that the nature of the specific duties of the particular position in question is so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in restaurant or hospitality management, culinary arts, or a related specialty.

The petition may not be granted, however, as the evidence of record does not establish that the beneficiary possesses the credentials required to serve in the specialty occupation, as required by the regulations at 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D). As the director has not ruled on this issue, the petition will be remanded for the entry of a new decision.

The documentary evidence of record about the beneficiary's qualifications is limited to copies of: (1) the beneficiary's resume; (2) from the culinary institute Le Cordon Bleu: the beneficiary's diploma in Superior Level Cuisine and his certificates for completion of basic, intermediate, and superior level courses in Cuisine and Enology; (3) the beneficiary's diploma in Economy from the Instituto Tecnológico y de Estudios Superiores de Monterrey (ITESM); (4) a letter generally evaluating the beneficiary's internship at Pavillon LEDOYEN from November 12, 2001 through February 12, 2002; (5) a certification as to the beneficiary's successful performance as a trainee-cook at LA MARRE, from March 4 to April 30, 2002; (6) the IEC evaluation of the beneficiary's education and experience, rendered by Doctor Walther; and (7) comments about the beneficiary in the letter from Professor Pavesic. As discussed below, these documents do not establish that the beneficiary is qualified to perform services in the specialty occupation by possessing education, work experience, and/or training that is the equivalent of at least a U.S. baccalaureate degree in the specific specialty, as required by the Act and the relevant CIS regulations.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The degree referenced by section 214(i)(1)(B) of the Act means one in a specific specialty that is characterized by a body of highly specialized knowledge that must be theoretically and practically applied in performing the duties of the proffered position.

In implementing 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The first two criteria of 8 C.F.R. § 214.2(h)(4)(iii)(C) are not relevant to this proceeding, as the record shows that the beneficiary does not hold either (1) a U.S. baccalaureate or higher degree required by the specialty occupation, or (2) a foreign degree determined to be equivalent to such a U.S. degree. The third criterion is not relevant because licensure is not an avenue for beneficiary qualification here. This leads the AAO to the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) and the related provisions of 8 C.F.R. § 214.2(h)(4)(iii)(D).

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) requires the petitioner to satisfy two criteria, namely, that the beneficiary possesses (1) “education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation,” and (2) “recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.”

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating the beneficiary’s credentials to a United States baccalaureate or higher degree under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) would require one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual’s training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;¹

¹ As noted later in this decision, in compliance with this provision the AAO will accept a credentials evaluation service’s evaluation of *education only*, not experience.

- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. . .

The provisions of 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(2) and (4) are not relevant, as the record contains no evidence relating to college-level equivalency examinations, special credit programs, or certification or registration of competence from a nationally-recognized professional association or society.

None of the documents in the record satisfies 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(1) by being “an evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited [U.S.] college or university which has a program for granting such credit based on an individual’s training and/or work experience.” Neither Doctor Walther writing for IEC nor Professor Pavesic asserted or established such authority. Furthermore, CIS will not accept a faculty member’s opinion as to the college-credit equivalence of a particular person’s work experience or training, unless authoritative, independent evidence from the official’s college or university, such as a letter from the appropriate dean or provost, establishes *both* that the college or university has a program for granting college credit in the pertinent specialty *and* that the official is authorized to grant such academic credit for that institution.

IEC is a credentials evaluation service that specializes in evaluating foreign educational credentials. However, by its express terms, 8 C.F.R. § 214.2(h)(4)(iii)(D)(3) recognizes educational equivalency opinions rendered by such a service only to the extent that it is based on an evaluation of *education alone*. Accordingly, the AAO recognizes only so much of the EIC U.S.-degree equivalency opinion that is based upon the beneficiary’s foreign education, and not on the beneficiary’s work experience as an intern and trainee. It should also be noted that, as the record contains neither a copy of the beneficiary’s academic transcript for the ITESM coursework nor a correlation of that coursework to the skills and competencies required for the proffered position, the petitioner has not established the relevancy of the ITESM degree to the proffered position. A petitioner must demonstrate that there is a direct and close relationship between the beneficiary’s specific course of study and the position in question. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988).

The AAO now turns to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). According to the express terms of this provision, to satisfy this criterion a petitioner must demonstrate three years of specialized training and/or work experience for each year of college-level training the alien lacks. This provision imposes strict evaluation standards, stating:

[I]t must be *clearly demonstrated* [1] that the alien’s training and/or work experience included the theoretical and practical application of specialized knowledge required by the

specialty occupation; [2] that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and [3] that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation²;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

[Italics added.]

The evidence of record to date does not satisfy this regulatory provision.

On remand, the director should afford the petitioner a reasonable time to provide evidence pertinent to the issue of whether the beneficiary possesses the credentials specified at 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D), and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. If the new decision is adverse to the petitioner, the director shall certify it to the AAO for review. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's March 1, 2004 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.

² *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).