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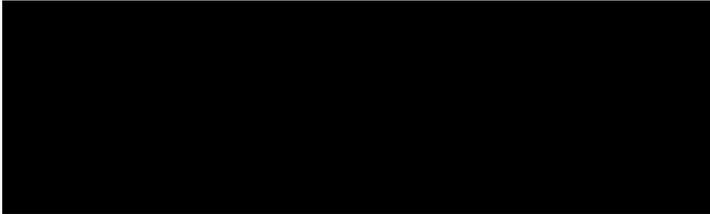
*D2*

FILE: EAC 04 062 52437 Office: VERMONT SERVICE CENTER Date: DEC 01 2005

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, 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 appeal will be dismissed. The petition will be denied.

The petitioner is a corporation engaged in wholesale food distribution that is expanding its operations to include manufacturing and wholesale distribution of additional specialty foods with an emphasis on middle eastern cuisine, including kosher items. In order to employ the beneficiary as its 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 meets the definition of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A). In part, the director summarized information in the Food Service Managers section of the Department of Labor's *Occupational Outlook Handbook (Handbook)*, which the AAO recognizes as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>1</sup> The director also addressed why he was not persuaded by some specific items of evidence.

On appeal, counsel argues that the proffered executive chef position is a food service management position that "requires a bachelor's degree in hotel and restaurant management or culinary arts." To support this contention, counsel submits copies of the following documents: 22 job vacancy announcements posted on the Internet by employers other than the petitioner, and letters from the following: (1) the director of human resources at La Mansión del Rio Hotel; (2) the general manager of APT Restaurant; (3) the executive chef of Bond Street Restaurant; (4) the general manager of Bond Street Restaurant; (5) the president of Pret A Manger *DBA* Sandbox Restaurant; (6) the president of Republic Restaurant; (7) the controller of PK Restaurant LLC; (8) the general manager of Fifth Floor Restaurant; (9) the senior vice president, human resources, of Restaurant Associates; (10) the general manager of The Wheatleigh (a member of the Small Luxury Hotels of the World); (11) the inn manager of Woodstock Inn & Resort; (12) the president of Country House Hotels; (13) the general manager of Madison Avenue Hotel Partners *DBA* The Mark Hotel; and (14) the controller of The River Café.

The petitioner has not established that the proffered position is a specialty occupation. The AAO bases its decision on the entire record of proceeding before it, including: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the matters submitted in response to the RFE; (4) the director's denial letter; (5) the Form I-290B, and counsel's brief and accompanying documents.

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 service 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:

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<sup>1</sup> The AAO consulted the 2004-2005 edition of the *Handbook*.

- (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.

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.

In its December 29, 2003 letter of support that was filed with the Form I-129 (Petition for Nonimmigrant Worker), the petitioner provided this general information about its operations:

[The petitioner] was established in 2002 to provide wholesale food distribution. We are now expanding our operations to include manufacturing and wholesale distribution of specialty foods emphasizing middle eastern cuisine including kosher items. We currently employ 2 people plus subcontractors and are hiring 5 additional personnel to initially man our manufacturing operations. Our gross income is \$758,338. An integral part of our new operations will be the management of [the] manufacturing kitchen. [The petitioner] prides itself on the professional quality of its work and staff and the rigorous requirements needed for employment at our company.

After the above paragraph, the letter of support commented upon the proffered position as follows:

The position of Executive Chef therefore requires a professional with a strong background in the culinary environment. This position is responsible for the development of our food manufacturing operations. The duties of this highly specialized position includes [sic]: Oversee all food operations. Plans food preparation taking into account probable orders, marketing conditions, and popularity of various items. Estimates consumption and purchases foodstuffs and kitchen supplies. Reviews menus, analyzes recipes, determines food, labor, and overhead costs, and assigns prices to menu items. Directs foodstuff apportionment policy to control costs. Observes methods of foodstuffs preparation and cooking, sizes of portions, and garnishing to ensure dishes are prepared in [the] prescribed manner. Tastes foodstuffs. Develops recipes. Hires and discharges employees. Familiarizes newly hired Chefs with practices of [the] kitchen. Maintains time and payroll records. Establishes and enforces nutrition and sanitation standards. Supervises and coordinates activities of chefs and other workers engaged in preparing and cooking foodstuffs. Gives instructions to chefs in fine points of cooking.

In her letter replying to the RFE, counsel repeated the above information about the proposed duties and added:

The Executive Chef will supervise 5 chefs. The majority, over 90%, of the Executive Chef's time will be spent performing the above management duties, as opposed to performing the actual cooking.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which assigns specialty occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

The *Handbook* section "Chefs, Cooks, and Food Preparation Workers" indicates that a bachelor's degree or its equivalent in a specific specialty is not a normal minimum requirement for chefs. However, to the extent that it is described in the record, the proffered position more closely comports with the higher-echelon

occupation of food service manager occupation as described at pages 42-45 of the 2004-2005 edition of the *Handbook*. The “Significant Points” introducing this section of the *Handbook* includes this concise statement of DOL’s finding that a bachelor’s degree or its equivalent in a specific specialty is not a normal requirement for food service manager positions:

Many experienced food and beverage preparation and service workers are promoted into managerial positions; however, applicants with a bachelor’s or an associate degree in restaurant and institutional food service management should have the best job opportunities.

The *Handbook* not only reports that applicants with an associate degree in restaurant and institutional food management should share the best job opportunities with those who have bachelor’s degrees in those areas, but it also indicates that some food service manager jobs are filled by promoting experienced food and beverage preparation and service workers without a bachelor’s degree in a job-related field, and that even restaurant chains, which generally prefer a degree in institutional or restaurant food management, often hire persons with degrees in other fields who have demonstrated interest and aptitude. In sum, the *Handbook* does not indicate that the proffered position is one for which the normal minimum entry-level requirement is a bachelor’s degree or its equivalent in a specific specialty.

The facts that employers in the hotel and food service industry recruit persons with bachelor’s degrees and that many colleges and universities now offer baccalaureate or higher degrees in fields related to food service management, though informative, are not evidence that the position proffered here requires such a degree.

The record’s job vacancy announcements of other employers are not probative. Only two of the advertisements relate to food manufacturing. One is from “a food processing leader with a proven track record of unprecedented success and growth,” and the other is from an unnamed company that lists its industry as manufacturing and seeks a person with a “food science degree” to work as a contractor providing “ingredient evaluations,” reviewing “raw materials” and “coordination of consolidation exercises,” working with “dry blends and wet blends,” with an ability “to develop sauces and dry blends at bench level.” However, the information about both the advertised food manufacturing positions and about the one proffered here is insufficient for a reasonable comparison of their duties and educational requirements.

As counsel acknowledges, most of the job vacancy announcements “are not in the [petitioner’s] manufacturing field but are instead in the hotel and restaurant field.” Counsel asserts, but provides no evidence to establish, that those announcements “encompass the same duties and responsibilities as the current position.” 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Furthermore, the number of advertisements are not sufficient to refute the DOL *Handbook* information to the effect that a bachelor's degree in a specialty occupation or its equivalent is not a normal minimum hiring requirement for food service managers. Also, not all of the advertisements require at least a baccalaureate degree. Some only identify a baccalaureate degree as preferred, not required; and some specify a "degree" requirement, but without stating whether only a baccalaureate degree would qualify, and without stating a specialty.

The letters from persons in the restaurant and hotel industries are inconsequential. Neither the authors nor their firms engage in the petitioner's industry, food manufacturing. There is no evidence in the letters or elsewhere in the record of proceeding that the authors are familiar with the petitioner's particular business operations and have sufficient knowledge about them to compare the proffered position with positions in their industries. There is no evidence that the authors have expertise in or sufficient knowledge about the petitioner's industry to render opinions on it that merit deference or significant weight. The authors provide no factual basis for their opinions. The letters do not sufficiently establish a degree requirement for the position, and they conflict with the *Handbook's* information to the effect that a baccalaureate degree in a specific specialty is not normally required for food service management positions. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Because the evidence of record does not establish that the proffered position is one for which the normal minimum entry requirement is at least a bachelor's degree, or the equivalent, in a specific specialty closely related to the position's duties, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Also, the petitioner has not satisfied either of the alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first alternative prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by CIS include: whether the *Handbook* reports that 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 petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for a bachelor's degree in a specific specialty. There are no submissions from individuals, firms, or professional associations in the petitioner's industry. For the reasons related in the discussion of the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the letters from persons in the hotel and restaurant industries have little relevance to any issue on appeal. Furthermore, the letters fall outside the scope of the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for two separate reasons: first, their

authors are not in the petitioner's industry; second, the evidence of record does not establish that the positions about which they opine are parallel to the proffered position. As already discussed, the record's job vacancy advertisements from other employers are not probative. Also, these advertisements are too few to establish an industry-wide standard.

The AAO also finds that the evidence of record does not qualify the proffered position under the second alternative prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2), which provides an employer the opportunity to show that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty. The evidence of record does not demonstrate this performance requirement, as it fails to establish how the proffered position is unique from or more complex than food service management positions that do not require such a degree.

As this is the first time that the proffered position has been offered, the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) is not a factor in this proceeding. There is no history of the petitioner's normally requiring at least a baccalaureate degree or its equivalent in a specific specialty.

Finally, the evidence does not satisfy the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4) 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. The evidence of record does not demonstrate that the proposed duties are more specialized and complex than those associated with the food service management occupation in general, which the *Handbook* indicates does not normally require a degree in a specific specialty.

Beyond the decision of the director, it is noted that the petitioner has not established that the beneficiary is qualified to serve in a specialty occupation in accordance with 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D). The educational equivalency evaluation upon which the petitioner relies depends partly upon an assessment of the beneficiary's work experience. However, there is no evidence, such as a letter from the institution's provost or dean, establishing that the evaluator is presently an official authorized by a U.S. college or university to grant college-level credit for training or experience in the particular specialty upon which he has opined, pursuant to an established program for granting college-level in that specialty, as required by 8 C.F.R. §§ 214.2(h)(4)(iii)(C)(1). Furthermore, the documentary evidence of the beneficiary's experience is skeletal and lacks sufficient detail to support the evaluator's particular findings and conclusion about the educational equivalency of the beneficiary's experience. For these reasons too, the petition must be denied.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

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. Accordingly, the appeal will be dismissed.

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