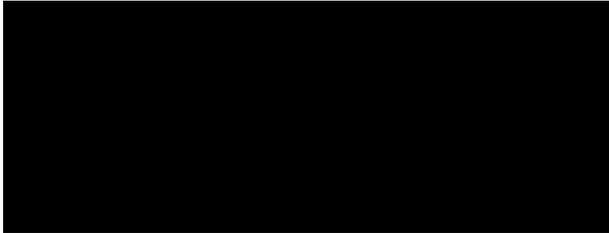


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U.S. Citizenship
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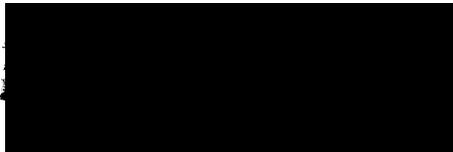
IN RE: Petitioner:



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 materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Michael T. Kelly
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 an Indian restaurant. It seeks to employ the beneficiary as its food service manager and to classify her 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. On July 30, 2004 the AAO summarily dismissed the appeal on the ground that no supporting brief or evidence had been submitted, as counsel had promised within 30 days of the appeal, which was filed on July 8, 2003. The AAO subsequently determined that an appeal brief was timely filed with the service center and is now part of the record. The AAO has the discretion to reopen a proceeding or reconsider a decision *sua sponte* under 8 C.F.R. § 103.5(a)(5). The AAO will exercise that discretion and treat the petitioner's filing as a motion to reopen the proceeding and reconsider the decision under 8 C.F.R. § 103.5(a)(2) and (3). The appeal will be considered on the merits.

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 documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner owns an Indian restaurant called Dawat in New York City. In a letter accompanying Form I-129 the petitioner indicated that the restaurant was established in 1986, taken over by the petitioner in 2002, and had 16 employees at the time the instant petition was filed in 2003. The petitioner seeks to hire the beneficiary as its food service manager, and asserts that she is qualified for the position by virtue of her academic coursework up to 1990 at ██████████ College of Commerce & Economics in Mumbai, India, her "diploma in hotel management & catering technology" from the Maharashtra State Board of Technical Examinations in 1993, and her work experience as restaurant manager from 1995 to 2001 at Chopsticks restaurant in Mumbai, India. In response to the RFE the petitioner listed the duties of the position, and the percentage of the beneficiary's time they would require, as follows:

- Training, instructing, and overseeing sous chefs, banquet chefs, cooks, and other kitchen and service personnel; training kitchen personnel in sanitation practices, refrigeration control points, and other sanitary controls – 35%.
- Controlling food costs by establishing purchasing specifications, storeroom requisition systems, product storage requirements, standardization recipes and waste control procedures; preparing and submitting a detailed budget including payroll and related costs, supplies, repairs and maintenance, linens, utilities, and expenditures; meeting with the executive committee to discuss problems, develop strategies for improvement, and assisting as needed in other areas of the operation – 35%.
- Planning and setting menus; establishing quality standards for all menu items and food preparation practices; working with the chef in developing special dishes for various occasions; working with the chef in researching and preparing new dishes and menus, and instructing the staff on the preparation of new dishes – 20%.
- Conducting and participating in national and local food festivals to promote Dawat Restaurant nationally and locally – 10%.

The director determined that the proffered position was not a specialty occupation. In accord with the petitioner's title for the position, the director found that job duties were those of a food services manager as described in the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)*.¹ The director also found that a baccalaureate level of training, as indicated in the *Handbook*, is not the normal,

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."

industry-wide minimum requirement for entry into the occupation. Nor did another DOL publication – the *Dictionary of Occupational Titles (DOT)* – indicate that a food service manager requires a baccalaureate degree. The record contained a series of job announcements for executive chef and food service manager positions, but the director discounted them as evidence of a degree requirement in the field because it did not appear that the businesses were similar in size and scope to the petitioner. The record also contained letters from four restaurants in the New York City area asserting that a bachelor's degree in food service management or a related specialty was the industry standard for food service managers, but the director found that such a small sampling of restaurants in geographic proximity to the petitioner was insufficient evidence to establish that there is an industry-wide degree requirement for food service managers. The petitioner's restaurant business was new, the director noted, so there was no historical evidence of the petitioner requiring its food service manager, a newly created position, to have a bachelor's degree in a specific specialty. The director concluded that the record failed to establish that a baccalaureate or higher degree, or its equivalent, in a specific specialty is the normal minimum requirement for entry into the position, that the petitioner normally requires such a degree or its equivalent for the position, or that the duties of the position are so specialized and complex that they require baccalaureate level knowledge in a specific specialty to perform them.

Counsel's appeal brief is almost a verbatim copy of its previously submitted response to the RFE. No new legal arguments have been presented on appeal, and the only new evidence submitted in support of the appeal are four additional letters from restaurants employing food service managers and a legal summary of an AAO decision approving an H-1B petition for an executive pastry chef.

Counsel misinterprets the significance of the *DOT's* SVP (Specific Vocational Preparation) rating of 7. As evident in the *DOT's* Appendix C (Component of the Definition Trailer), the SVP component does not indicate whether an occupation requires a bachelor's degree in a specific specialty. Counsel is incorrect in stating that the SVP of 7 establishes that DOL “considers food service manager to be college-level in nature.”

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the DOL *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 Inc. v. Reno, id.*, at 1165-66.

In describing the education and training required of food service managers, the *Handbook* states as follows:

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 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.

For the foregoing reasons, the restaurant manager 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), because the evidence of record does not establish that a baccalaureate degree in a specific specialty, or its equivalent, is the normal minimum requirement for entry into such a position.

As for the second alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), counsel has submitted four additional letters from restaurants as evidence of an industry standard among fine quality restaurants in the New York City area requiring food service managers to have a bachelor's degree or the equivalent in food service management or a related field. One of the letters is from the president of Campus Eatery, Inc. on W. 4th Street in Manhattan, who states that a food service manager requires a bachelor's degree in business management or hospitality management. The Campus Eatery letter does not describe the nature of its business, but the name appears to indicate that it is a different kind of eating establishment than the petitioner's Indian restaurant. Moreover, the letter provides no information as to the identity and educational degree of any food service manager employed by the restaurant. Another letter is from the owner/operator of the [REDACTED] Massachusetts, who states that it is customary among restaurants in the Greater New York City area to require food service managers to have a bachelor's degree in food service management. Like the Campus Eatery letter, however, the Spice Root letter provides no information as to the identity and educational degree of any food service manager employed by the restaurant. A third letter is from the manager of [REDACTED] located at the Port Authority bus terminal on Eighth Avenue in Manhattan, who states that it is customary among restaurants and food caterers in New York City to require food service managers to have a bachelor's degree in management. Like Campus Eatery, Sehera Enterprises appears to be a different kind of food establishment than the petitioner's Indian restaurant, though the precise nature of the business is not described in the letter. Moreover, like the previous two letters the [REDACTED] letter provides no information as to the identity and educational degree of any food service manager employed by the business. The final letter is from the vice president of [REDACTED] located on [REDACTED] which appears to be owned by Sehera Enterprises, Inc. The

██████████ letter states that it is customary among restaurants in New York City to require food service managers to have a bachelor's degree in food service management, and that the restaurant currently employs a food service manager on an H-1B visa who has a bachelor's degree in food service management. The Deli Plus letter is supplemented by a photocopied approval notice from the Vermont Service Center for an H-1B visa to an individual whom ██████████ identifies as its food services manager. The approval notice itself does not identify the beneficiary's employment position, however, and the record contains no other documentary evidence of that individual's position at ██████████ or of his educational degree.

All of the letters from other restaurants in the record, including those submitted prior to the appeal, fail to establish a sufficient factual basis for their opinions on the industry's educational requirements for food service managers. The letters all fail to demonstrate that their authors have acquired such knowledge of industry-wide training and recruiting practices so as to merit deference to the opinions of those persons. CIS may, in its discretion, use as advisory opinions statements from universities, professional organizations, or other sources submitted in evidence as expert testimony. When an opinion is not accord with other information or is in any way questionable, however, CIS is not required to accept or may give less weight to that evidence. *See Matter of Caron International, Inc.*, 19 I&N Dec. 791, 795 (Comm. 1988).

Based on the evidentiary shortcomings discussed above, the AAO concludes that the letters in the record from other enterprises in the restaurant and catering business do not establish that a bachelor's degree in food service management or a related specialty is a common requirement of the restaurant industry in parallel positions among similar organizations, as required for the petitioner's food service manager to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

As for the AAO decision cited by counsel on appeal – *Matter of [name not provided]*, file WAC-02-136-52595 (AAO Dec. 13, 2002) – that case involved an executive pastry chef position at a French restaurant responsible for supervising the pastry department and its three chefs; directing pastry preparation and baking techniques; determining portion sizes and garnishes to conform to French standards; hiring, firing, and training pastry cooks and assistants; and other tasks. In determining that the position qualified as a specialty occupation, the AAO observed that the restaurant was a dining establishment of national renown, that the duties of its executive pastry chef were more complex than those of a food service manager as described in the *Handbook*, and that the petitioner's requirement of a bachelor's degree in hotel and restaurant management was reasonable for the position. Accordingly, the AAO concluded that the executive pastry chef position qualified as a specialty occupation. The proffered position at issue in the instant petition, however, is not at the same level. The evidence of record does not show that the restaurant involved in this case, which the petitioner took over just one year before the petition was filed, has the same sort of renown as that in the above case. Nor does the evidence demonstrate that the duties of the proffered position are unusually complex, like those of the executive pastry chef above, or that they exceed the scope of a typical food service manager in the restaurant industry, for whom a baccalaureate degree in a specific specialty is not normally required. In addition, it appears that the French restaurant, with its three pastry chefs, may operate on a larger scale than the petitioner in this case. For all of these reasons, the AAO concludes that the two cases involve dissimilar positions and organizations. The AAO decision regarding the executive pastry chef was based on the facts peculiar to that case. Accordingly, it does not establish that a degree requirement is common to the restaurant industry in parallel positions

among similar organizations to the petitioner, as required for the food services manager to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The evidence of record does not show that the position proffered by the petitioner is so complex or unique that it can only be performed by an individual with a baccalaureate degree in food service management or a related specialty, as required for the position to qualify as a specialty occupation under the second prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2), or that the specific duties of the position are so specialized and complex that baccalaureate level knowledge of food service management or a related specialty is needed to perform them, as required for the position to qualify as a specialty occupation under 8 C.F.R. § 214.2 (h)(4)(iii)(A)(4). Based on the record the AAO concludes that the duties of the position could be performed by an experienced individual with less than a bachelor's degree or equivalent knowledge in food service management or a related specialty.

Lastly, the proffered position does not qualify as a specialty occupation under 8 C.F.R. § 214.2 (h)(4)(iii)(A)(3) because it is newly created and the petitioner has no hiring history for it. Thus, the petitioner cannot establish that it normally requires a baccalaureate degree or its equivalent in food service management, or a related specialty, for the subject position.

For the reasons discussed above, the proffered position does not meet any of the qualifying criteria of a specialty occupation enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner has not established 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.