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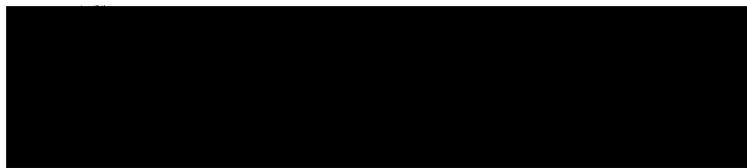


FILE: SRC 03 055 53059 Office: TEXAS SERVICE CENTER Date: MAR 03 2005

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 service center director denied the nonimmigrant visa petition and certified her decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed. The petition will be denied.

The petitioner is a caterer and restaurant. In order to employ the beneficiary as a pastry 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).

On March 12, 2003, the director denied the petition on the basis that the petitioner had abandoned the petition by not filing a reply to a request for additional evidence (RFE) within the time designated by the director. On May 12, 2003, in response to a motion for reconsideration, the director issued a decision that effectively withdrew her previous decision but denied the petition on the basis that the petitioner had failed to establish that the proffered position meets the requirements of a specialty occupation. The petitioner appealed. As the service center did not receive the petitioner's I-290B (Notice of Appeal) until June 27, 2003, which is more than 33 days after this May 12, 2003 decision, it deemed the filing untimely. Pursuant to Citizenship and Immigration Services (CIS) regulations regarding the filing of a late appeal, the service center treated the untimely-filed documents as a motion to reopen or reconsider, and, accordingly, on July 16, 2003, issued an RFE for a copy of all the material that the petitioner had forwarded to the AAO in support of the appeal. On October 20, 2003, counsel responded to the July 16, 2003 RFE in a brief and accompanying documents that counsel styled a Motion to Reopen. On December 23, 2003, the director issued a decision on the motion that (1) denied the petition for failing to establish that the proffered position is a specialty occupation, and (2) certified the decision to the AAO "as the petitioner has already submitted an appeal and a motion to reconsider."

The director was correct in denying the petition in her December 23, 2003 decision, as 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 RFEs; (3) the matters submitted in response to each RFE; (4) the director's denial letters; (5) the Form I-290B, and (5) the brief and documents submitted by counsel as a motion to reopen in October 2003.

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.

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 October 10, 2003 letter, the petitioner described the proposed duties as follows:

- 1) Be responsible for directing and supervise[ing] the work of other kitchens staff[,] and often direct the preparation of a large quantity of a limited number of entrees and desserts[;] prepare a wider selection of dishes, producing Hispanic desserts, and baked goods; prepare daily pizza, dough, bread dough, and cake mixes;

- 2) Observe workers and work procedures to ensure compliance with established standards;
- 3) Train and otherwise instruct cooks and workers [to] cook and prepare food in demand;
- 4) Estimate amounts and costs and requisitions [of] supplies and equipment to ensure efficient operation;
- 5) Determine production schedules and worker-time requirements to ensure timely delivery of services;
- 6) Decide the size of servings, plan menus and buy food supplies;
- 7) Inspect supplies, equipment and work areas to ensure conformance to established standards;
- 8) Record production and operational data, and evaluate and solve procedural problems to ensure safe and efficient operations.

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 AAO recognizes the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of a wide variety of occupations. Accordingly, the AAO considered the relevant information in both the current, 2004-2005 edition of the *Handbook* and in the 2002-2003 edition, to which the director referred. As described in the record, the proffered position substantially comports with the food service manager occupation as described in both *Handbook* editions. Both editions report 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. Furthermore, both *Handbook* editions indicate 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 information on pastry chefs in the DOL's *Dictionary of Occupational Titles (DOT)* is not persuasive. The *DOT* is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. An SVP (Specific Vocational Preparation) rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require.

Counsel correctly notes that the DOL's *Occupational Information Network (O\*NET)* has replaced the *DOT*. However, neither the Job Zone Four designation nor any other *O\*NET* information on the Chef and Head Cook occupation establishes that it is one that normally requires at least a bachelor's degree, or its equivalent, in a specific specialty. Like the *DOT* that it replaces, the *O\*NET* does not evaluate occupations according to the criteria of the Act and its implementing regulations, and it does not categorize occupations in terms that correlate with the requirements of a specialty occupation.

As will be discussed below, neither the job advertisements from other employers nor the letters from two other businesses in the industry are persuasive.

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. The letters from two other employers (Club Caterers, Inc. and the Blue Banquet Hall) do not support the claim of an industry-wide degree requirement, as they identify 12 years of experience as an acceptable substitute for a bachelor's degree. Finally, there are no letters or affidavits from an industry association.

The job vacancy advertisements from other employers are not probative. These documents are too few to establish an industry-wide standard. Their evidentiary value is also diminished because the record does not establish that they are representative of the advertisers' history and usual course of recruiting and hiring for the type of positions advertised. Also, the job vacancy advertisements in the record are not indicative that a bachelor's degree, or the equivalent, in a specific specialty is the normal minimum requirement for the position at hand. The Aramark advertisements specify a bachelor's degree as an attribute of "ideal candidates," but not as a prerequisite for hiring. The Marriott advertisement is inconsistent with an industry-wide standard for at least a bachelor's degree, as it identifies an associate's degree as also acceptable.

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 so much more complex than the normal range of food service management positions that do not require such a degree.

The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) is not a factor in this proceeding, as the petitioner has not attempted to establish a history of 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 any 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 that the evaluator is an official authorized by a U.S. college or university to grant college-level credit for training or experience, as required by 8 C.F.R. §§ 214.2(h)(4)(iii)(C)(1). For this reason also, 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 director's December 23, 2003 decision is affirmed. The petition is denied.