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U.S. Citizenship
and Immigration
Services

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FILE:  Office: CALIFORNIA SERVICE CENTER Date: **MAR 15 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, Director
Administrative Appeals Office

DISCUSSION: The service center director 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 The director's decision will be withdrawn and the matter remanded for entry of a new decision.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 resort and spa that seeks 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).

The director denied the petition because the proffered position is not a specialty occupation. On appeal, counsel submits a statement.

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.

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) 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 additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a pastry chef. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's November 5, 2002 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: planning and production for the pastry department, to create quality products that are timely and fresh, and meet the quantity needs of banquets and restaurants; developing new recipes using international dessert and pastry methods and styles, sugar and chocolate modeling, bread making, and large volume dessert and pastry production techniques; training pastry department staff to create new recipes; estimating consumption to ensure appropriate levels of ingredients, supplies and equipment, and order as needs; implementing cost control measures and maintaining production records; managing five pastry/baking cooks, including hiring, firing, training and performance review; liaising with all resort departments to ensure the quality of pastries; and implementing and enforcing resort policies within the pastry department. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in culinary arts or restaurant and hotel management or a related discipline.

The director found that the proffered position was not a specialty occupation. Citing to the Department of Labor's *Occupational Outlook Handbook (Handbook)*, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states that the duties of the proffered position are sufficiently complex to establish it as a specialty occupation. Counsel also states that the AAO had previously determined that an executive pastry chef qualified as a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree.

Factors often considered by CIS when determining these criteria 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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The *Handbook* entries for food service managers and for chefs clearly indicate that a baccalaureate or higher degree, or its equivalent, is not required for entry into the occupation.

Regarding parallel positions in the petitioner's industry, the petitioner submitted a position description for the position the beneficiary filled at a competitor chain, along with evidence of the approval of the petition. The AAO notes that the position description does not state an educational or experience requirement and it is for a different location of the same chain than the petition and approval notice that were submitted. According to

the beneficiary's resume, she worked at both sites, but this evidence does not establish that a degree requirement is common to the industry.

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. The petitioner stated that it would not hire someone for the proffered position who did not have a bachelor's degree or its equivalent, but provided no evidence regarding its previous hiring practices. The petitioner has not met its burden of proof regarding the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

The duties of the proffered position include a significant level of management relating to staff, production and supplies for a large, high-end resort and spa. The beneficiary would be supervising five pastry cooks, including hiring, firing and training. In addition, she would oversee the pastry department, which supplies baked goods for banquets, three restaurants, a general store, an ice cream parlor, and the employee cafeteria. The duties of the proffered position are so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence establishes that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

However, the petition still may not be approved at this time. The director has not addressed the issue of the beneficiary's qualifications. The petitioner submitted a credentials evaluation, which stated that the beneficiary possessed the equivalent of a bachelor's degree in hotel and restaurant management with a concentration in culinary arts. The evaluation was based on the beneficiary's education, training and experience. 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 shall be determined by 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;
- (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 evaluator stated, "Since 1979 I have held teaching positions at accredited universities in the United States with the authority to grant college-level credit." He also stated that from 1978-1983 and 1988-1993, he was academic student advisor and adjunct foreign admission advisor and that both positions "included granting college-level credit to students based on foreign education experience." This background does not meet the terms of the regulations which state that the evaluation be from an official who **has** authority to grant credit, not one who has ever had that authority, and that the credit be based on training and/or work experience, not on foreign education. The evaluator provided no evidence to establish that his current faculty position allows him to grant credit for training and/or work experience and that his employing university has a program for doing so. The AAO also notes that the petitioner has not clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; 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 that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation required by the regulations.

In addition, Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that a petitioner applying for classification of a beneficiary as an H-1B nonimmigrant worker must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, **and** recognition of expertise in the specialty through progressively responsible positions relating to the specialty. 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(i)-(v) provide guidance within the context of that particular section of the regulation, as to how a "recognition of expertise" is to be determined. As noted above, there is no evidence in the record establishing that the beneficiary has recognition of expertise in the specialty occupation.

The director must afford the petitioner reasonable time to provide evidence pertinent to the issues of the beneficiary's qualifications to perform a specialty occupation. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. 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 matter is remanded to the director for further action and entry of a new decision in accordance with the above discussion, which, if adverse to the petitioner is to be certified to the AAO for review.