

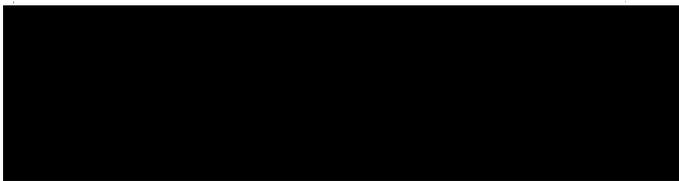
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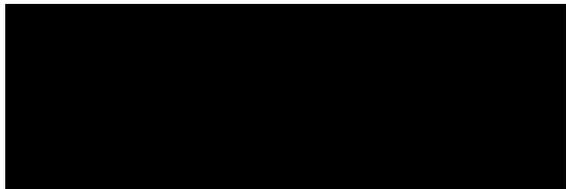


FILE: LIN 04 032 50907 Office: NEBRASKA SERVICE CENTER Date: JAN 30 2006

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.

*for Michael T. Kelly*  
for 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 operates a bakery with five employees. It seeks to employ the beneficiary as president and executive chef. The petitioner, therefore, 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 brief and additional evidence.

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 president and executive chef. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; and the company support letter. According to this evidence, the beneficiary would perform duties that entail continuous development, evaluation and revision of recipes and menus; creation of artistic, complex and unusually beautiful confections, cakes and other pastries for the bakery; managing and supervising the cost-effective operation of day-to-day business of the petitioning company; directing the culinary operations, overseeing and enforcing the petitioner's critically important and high standards of nutrition and sanitation; and hiring of staff and training of pastry chefs in the complex artistry of the confections. The petitioner contended that the position requires a degree in culinary arts.

On February 25, 2004, the director requested additional information. The director noted that the record did not demonstrate that a president of a pastry shop with five employees would require the attainment of a bachelor's degree. The director requested evidence that the proffered position meets one of the above listed criteria. Additionally, the director requested pictures of the petitioner's dining area and copies of the beneficiary's most recent pay stubs.

On June 2, 2004 the director issued a notice indicating that the petitioner was given 87 days in which to submit additional evidence in support of its petition. The director found that in accordance with 8 C.F.R. §103.2(b)(13), the application or petition was denied due to abandonment. The director noted that there was no appeal from this decision but the petitioner could file a new application or a motion to reopen. On July 7, 2004 the petitioner filed a motion to reopen a petition due to abandonment. Counsel for the petitioner asserted that it was the petitioner's position that the requested evidence was not material to the issue of eligibility since the evidence that was submitted was adequate in the initial petition.

The director granted the motion to reopen the proceedings. Counsel asserted that the director ignored the title and duties of the proffered position, which is president and executive chef. Counsel asserted that the director dismissed the main duties and requirements of the proposed position and the material portion of the evidence that was submitted with the initial petition. Counsel noted that the beneficiary was previously approved for an H-1B as an assistant executive chef for an employer other than the petitioner here. Counsel asserts that the duties and responsibilities of the proffered position are greater than his previous position. Additionally, counsel referred to the Department of Labor (DOL) *Dictionary of Occupational Titles (DOT)* as indicating that the proffered position has an SVP rating of 8.

The director denied the petition and notes that although the beneficiary was approved for an H-1B with a different petitioner, the facts of this case are not the same as the prior petition. The director stated that the case would be adjudicated on the evidence submitted in relation to the petition only. The director addressed counsel assertions based on the *DOT*. The director noted that DOL has replaced the *DOT* with the *Occupational Outlook Network (O\*Net)*. The director correctly noted that both the *DOT* and *O\*Net* provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training education and experience required to perform the duties of that occupation. The DOL *Occupational Outlook Handbook (Handbook)* provides a more comprehensive description of the nature of a particular occupation and the education, training and experience normally required to enter into and advance within an occupation. For this valid reason, the director stated that he was not persuaded by a claim that the offered position is a specialty occupation simply because DOL has assigned it a specific SPV rating in the *DOT*.

The director referred to the *Handbook's* section on chefs, cooks and food preparation workers. The director noted that the *Handbook* did not indicate that a bachelor's degree is required to become a president or executive chef of any food operation. The director found that the petitioner did not submit evidence that the attainment of a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position; that the degree requirement is common in the industry in parallel positions among similar organizations; or, that the particular position was so complex or unique that it could be performed only by an individual with a degree. The director found that the petitioner did not submit any evidence that the employer normally requires a degree or its equivalent for the position.

On appeal, counsel asserts that the proffered position is a specialty occupation and notes that the position requires business and management expertise as well as culinary expertise. Counsel contends that because the proffered position has additional duties and complexities compared to the beneficiary's current H-1B position that the proffered position is a specialty occupation.

The petitioner noted that CIS approved other petitions that had been previously filed on behalf of the beneficiary. The director's decision indicates that each filing is evaluated on its individual merits. The director does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position; a specific 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. 872, 1102 (S.D.N.Y. 1989)).

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The *Handbook* indicates that, to the extent that they are described in the record, the beneficiary's duties are most similar to those of a chef, cook and food preparation worker, an occupation that is not a specialty occupation. The AAO finds that the evidence of record about the president aspect of the position lacks any details that would elevate the educational requirements of the position above that of an executive chef.<sup>1</sup> The *Handbook* states:

*Executive chefs and head cooks* coordinate the work of the kitchen staff and direct the preparation of meals. They determine serving sizes, plan menus, order food supplies, and oversee kitchen operations to ensure uniform quality and presentation of meals. The terms chef and cook often are used interchangeably, but generally reflect the different types of chefs and the organizational structure of the kitchen staff. For example, an *executive chef* is in charge of all food service operations and also may supervise the many kitchens of a hotel, restaurant group, or corporate dining operation. A *chef de cuisine* reports to an executive chef and is responsible for the daily operations of a single kitchen. A *sous chef*, or sub chef, is the second-in-command and runs the kitchen in the absence of the chef. Chefs tend to be more highly skilled and better trained than cooks. Many chefs earn fame both for themselves and for their kitchens because of the quality and distinctive nature of the food they serve.

The *Handbook* states the following about the training and educational requirements for executive chef positions:

Executive chefs and head cooks who work in fine-dining restaurants require many years of training and experience and an intense desire to cook. Some chefs and cooks may start their training in high school or post-high school vocational programs. Others may receive formal training through independent cooking schools, professional culinary institutes, or 2- or 4-year college degree programs in hospitality or culinary arts. In addition, some large hotels and restaurants operate their own training and job-placement programs for chefs and cooks. Most formal training programs require some form of apprenticeship, internship, or out-placement program jointly offered by the school and affiliated restaurants. Professional culinary institutes, industry associations, and trade unions also may sponsor formal apprenticeship programs in coordination with the U.S. Department of Labor. Many chefs are trained on the job, receiving real work experience and training from chef mentors in the restaurants where they work.

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<sup>1</sup> It should be noted that the *Handbook's* section on top executives indicates that a bachelor's degree in a specific specialty is not a normal requirement for company president positions.

Based on the evidence in the record, the AAO cannot conclude that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position, president and executive chef of a bakery.

There is no evidence in the record to establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that only an individual with a degree can perform it.

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. Counsel indicates that he provided a comparison between the beneficiary's previous position of assistant executive chef and the proffered position of president and executive chef to emphasize the complex duties. Counsel notes that the previous H-1B approval was only for the day-shift and the proffered position is responsible for the day-to-day operations. The petitioner has not distinguished the duties of the proffered position from those normally required of an executive chef as described in the *Handbook*, and the *Handbook* indicates that the knowledge requirements usually associated with such a position is less than a bachelor's degree in a specific specialty. The petitioner has not shown, in relation to its business, a pastry shop with five employees, that the duties of the proffered position are so complex or unique that they can be performed only by an individual with a degree in a specific specialty.

The proposed duties and stated level of responsibility failed to establish that the position offered met any of the required criteria for classification as a specialty occupation. Again, the evidentiary record depicts the duties of the proffered position as an executive chef, an occupation that does not require a degree in a specific specialty.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.

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