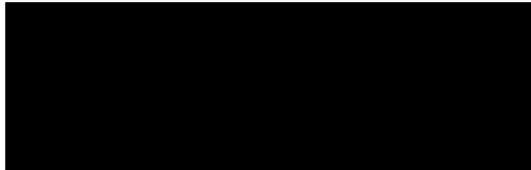




U.S. Citizenship  
and Immigration  
Services

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FILE: EAC 05 133 53121 Office: VERMONT SERVICE CENTER

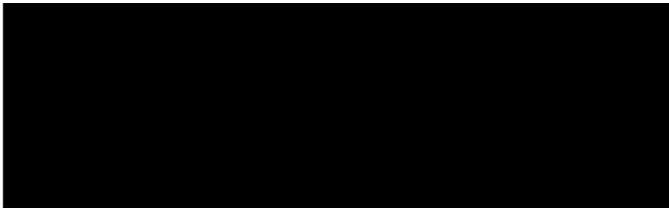
Date: NOV 30 2009

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

The petitioner is a restaurant that seeks to employ the beneficiary as an 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 because the proffered position does not qualify as a specialty occupation. On appeal, counsel submits a brief stating that the position qualifies as a specialty occupation.

The issue to be discussed in this proceeding is whether the proffered position qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n occupation which 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 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.

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 are 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) the Form I-129 and supporting documentation; (2) the director's request for evidence; (3) the petitioner's response to the director's request for evidence; (4) the director's denial letter; and (5) the Form I-290B and accompanying brief. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as an executive chef. Evidence of the beneficiary's duties was set forth in the Form I-129 petition with attachment. According to this evidence the beneficiary would:

- Plan menus taking into account the probable number of guests, marketing conditions, and popularity of various dishes;
- Estimate consumption and purchase foodstuffs and kitchen supplies;
- Review menus, analyze recipes, determine food, labor, and overhead costs;
- Assign prices to menu items;
- Direct foodstuffs apportionment policy to control costs;
- Observe methods of foodstuffs preparation and cooking, sizes of portions, and garnishing of dishes to ensure dishes are prepared in the prescribed manner;
- Taste foodstuffs, devise special menus and develop recipes;
- Hire and discharge employees;
- Familiarize newly hired chefs with the practices of the restaurant kitchen;
- Maintain time and payroll records;
- Establish and enforce nutrition and sanitation standards;
- Oversee fashioning of tables and dish decorations;

- Supervise and coordinate activities of chefs and other workers engaged in preparing and cooking foodstuffs;
- Give instructions to chefs in fine points of cooking; and
- Cook and carve meats and prepare dishes, such as sauces during rush periods and for banquets and other social functions.

The petitioner finds the beneficiary qualified for the proffered position by virtue of his foreign education and prior work experience which has been determined by a credentials evaluation service to be equivalent to a bachelor's degree in hotel and restaurant management with a concentration in culinary arts.

The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations. The duties of the proffered position are essentially those noted for chefs. In the *Occupational Outlook Handbook*, 2006-07 edition, the Department of Labor describes, in part, the duties of an Executive Chef as follows:

*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 duties associated with the proffered position are similar to those listed above. The *Handbook* notes that 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. Many chefs are trained on the job, receiving real work experience and training from chef mentors in the restaurants where they work. The number of formal and informal culinary training programs continues to increase to meet demand. Formal programs, which may offer training leading to a certificate or a 2 - or 4 - year degree, are geared more for training chefs for fine-dining or upscale restaurants. It is, therefore, apparent that a baccalaureate degree or its equivalent is not the minimum requirement for entry into the proffered position. The petitioner has failed to establish the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner asserts that a degree requirement is common to the industry in parallel positions among similar organizations and in support of that assertion submits copies of job advertisements, several opinion letters from other restaurants, and an opinion letter from [REDACTED] who provided an evaluation of the beneficiary's education and work experience on behalf of the International Education Council. None of the advertisements, however, appear to be from restaurants similar in nature and scope to that of the petitioner. Several are from a management services company which operates on an international basis (Sodexo), and several more are from a large managed services company which provides food, facility and other support services and uniform and career apparel (Aramark). While many of the advertisements require a culinary or related degree, some indicate that a degree is preferred, not required. The job advertisements submitted are of little evidentiary value and do not establish that a degree in a specific specialty is common to the industry in parallel positions among similar organizations.

The petitioner also submitted statements from several other restaurants indicating that they require a culinary arts degree for chef positions, and that the requirement of such a degree is common in the industry. None of the opinion statements, however, provided proof of the degreed status of any of their chef positions. Nor did the opinion writers provide any basis for their opinions concerning the industry educational standard for chef positions, such as reference to an industry labor market survey or study, or some other source of authoritative information. Likewise, [REDACTED] states that it is his "experience and understanding" that the educational prerequisite to most managerial-level positions in specialized, high-standard hotel and restaurant corporations in the United States is almost always a four-year college degree, and in many cases a master's degree. Again, however, [REDACTED] did not provide any basis for his opinion such as a labor market survey or study. Simply going on the 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 190 (Reg. Comm. 1972)). Dr. Walther did not indicate that he reviewed the duties of the proffered position, and did not state that the position at issue requires a four-year rather than a two-year degree. As he did not review the particulars of the position in the context of the petitioner's business operations, his opinion does not establish that a four-year degree in a specialty is required for the position. Citizenship and Immigration Services (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). The petitioner has not established the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner states that it normally requires a degree or its equivalent for the proffered position noting that it employs another chef ([REDACTED]) who holds a culinary degree from the California Culinary Academy. The petitioner did not, however, provide corroborative evidence in support of this statement such as employment records or copies of [REDACTED] diploma from the California Culinary Academy.<sup>1</sup> Simply going on the 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*

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<sup>1</sup> The AAO notes that the California Culinary Academy (CCA) offers an associate's degree in culinary arts and in hospitality and restaurant management, and a certificate in baking and pastry arts. It does not appear that CCA grants a four-year degree in the field. See <http://www.baychef.com>, accessed November 27, 2006.

*Treasure Craft of California*, 14 I&N 190 (Reg. Comm. 1972)). Further, CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act.<sup>2</sup> To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id* at 388. The petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the petitioner has not proven, and the record does not establish, that the duties of the offered position are so complex or unique that they can only be performed by an individual with a degree in a specific specialty, or that the nature of the position's duties is so specialized or complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The duties detailed appear to be routine for executive chefs in the industry, which, as noted in the *Handbook*, do not require a baccalaureate degree in a specific specialty. Both the petitioner and [REDACTED] point to the fact that many colleges and universities offer four year degrees in hospitality management, culinary arts and related fields, and that some offer advanced degree programs. The existence of an educational program does not establish that the duties of the position at issue require a baccalaureate degree. The record does not distinguish the duties of the position as those requiring a 4-year rather than a 2-year degree. The petitioner has failed to established the referenced regulatory criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) or (4).

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 in this regard.

Beyond the decision of the director, the record does not establish that the beneficiary is qualified to perform the services of a specialty occupation. The petitioner submits a credentials evaluation that considers both the beneficiary's educational credentials and work experience. The record does not establish that the evaluator, Dr. Walther, is 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, as required by 8 C.F.R. § 214.2(h)(4)(iii)(d)(I). Thus, the opinion does not establish that the beneficiary has the equivalent of a bachelor's degree in hotel and restaurant management. For this additional reason, the petition may not be approved.

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<sup>2</sup> The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.

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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 and the appeal shall accordingly be dismissed.

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