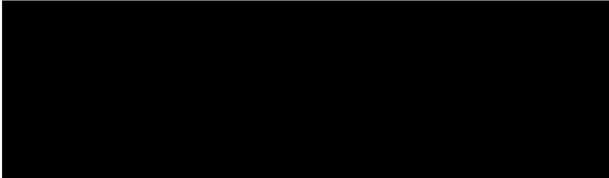




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FILE: WAC 06 800 07589 Office: CALIFORNIA SERVICE CENTER

Date: **NOV 14 2007**

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:

SELF-REPRESENTED

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 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 is a full-service restaurant that seeks to employ the beneficiary as a head 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.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B, with the petitioner's brief. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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:

An 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 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) consistently interprets the term “degree” in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. 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 nor 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.

The petitioner seeks the beneficiary’s services as a head chef. Evidence of the beneficiary’s duties includes: the petitioner’s job description in support of the petition and the petitioner’s response to the director’s request for evidence. As stated by the petitioner, the proposed duties are as follows:

- Prepares or directly supervises the preparation of a wide variety of soups and sauces according to the prescribed recipes;
- Assists the executive chef with inventories, pricing, cost controls, requisitioning, and issuing supplies and equipment for food production;
- Assumes oversight of food production and kitchen personnel in the absence of the executive chef;
- Assists the executive chef with employee supervision, sanitation and safety, menu planning, and related production activities;
- Cleans and maintains work areas, utensils, and equipment;

- Ensures proper staffing for maximum productivity and high standards of quality; controls food and payroll costs to achieve maximum profitability;
- Makes recommendations for maintenance, repair and upkeep of the kitchen and its equipment, and other areas as appropriate;
- Prepares reports and cost menus, makes schedules, and performs administrative duties as assigned;
- Attends to day-to-day problems and needs concerning equipment and food supplies; detects and ensures disposition of spoiled or unattractive food, defective supplies/equipment, and/or other unusual conditions;
- Maintains consistent standards of quality, cost, presentation, and flavor of foods; and
- Performs miscellaneous job-related duties as assigned.

The director found that the proposed lead chef/head chef duties do not require a bachelor's degree. Citing the Department of Labor's (DOL) *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 concluded that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, the petitioner's manager/executive chef states, in part, that the proposed duties require the skill of a degreed individual. He also states that in the culinary arts, a bachelor's degree builds operational and management knowledge to prepare an individual for leadership in and beyond the position of a trained cook in the food-service kitchen. He states further that according to the James Beard Foundation and many other industry-related organizations, it is widely accepted that a bachelor's degree is the minimum qualification for a head chef position.

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 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 AAO does not concur with the petitioner that the proffered position is a specialty occupation. No evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is required for a chef job. Although the *Handbook* indicates that executive chefs and head cooks who work in fine restaurants require many years of training and experience, it does not specify that executive chef and head cook positions require a baccalaureate degree in a specific specialty or an equivalent thereof. The *Handbook*, under the category of Chefs, Cooks, and Food Preparation Workers, indicates:

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. . . . Many chefs are trained on the job, receiving real work experience and training from chef mentors in the restaurants where they work.

The *Handbook* also recognizes: "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."

The AAO observes that the *Handbook* does not specifically discuss lead chef/head chef positions at small, independently owned restaurants but does provide a general understanding of the educational requirements for an individual to perform the duties of a lead chef/head chef. The variety of paths available to enter into a lead chef/head chef position precludes the conclusion that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the proffered position. Accordingly, the petitioner has not established that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the position of a restaurant manager. The petitioner has failed to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

Regarding parallel positions in the petitioner's industry, the petitioner submits Internet job postings for chef-related positions. Only the executive chef listing for Baylor University, however, specifies the requirement of a related bachelor's degree. The proffered position, however, is not that of an executive chef. Moreover, the petitioner has not demonstrated that the proposed duties of the proffered position are as complex as the executive chef duties for Baylor University, which entail training and managing kitchen personnel, overseeing special catering events, participating in management team meetings, and interfacing with vendors and key service users within the client organization.

The AAO also notes the assertion of the petitioner's executive chef/manager that according to the [REDACTED] and many other industry-related organizations, it is widely accepted that a bachelor's degree is the minimum qualification for a lead chef/head chef position. The petitioner's representative, however, does not provide any documentation in support of his assertion. Going on 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

Dec. 190 (Reg. Comm. 1972)).<sup>1</sup> Going on 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 Dec. 190 (Reg. Comm. 1972)).

The record does not include any evidence from firms, individuals, or professional associations regarding an industry standard. In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner has submitted insufficient documentation to distinguish the proffered position from similar but non-degreed employment. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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. As the evidence of record indicates that the proffered position is newly created, and the petitioner does not address this issue on appeal, it will not be discussed further. The evidence of record does not establish this criterion.

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 petitioner's executive chef/manager states, on appeal, that the beneficiary's responsibilities, which entail managing food preparation, cooking, planning menus, preparing the budget, and projecting annual food and labor costs, are so complex as to require a related bachelor's degree. The information in the record about the proposed duties, however, does not establish that they exceed in scope, specialization, or complexity those usually performed by chefs, cooks, and food preparation workers, an occupational category for which the *Handbook* indicates no requirement for or usual association with a baccalaureate or higher degree in a specific specialty. Regarding the proposed duties that relate specifically to knowledge of restaurant/financial management, the petitioner has not demonstrated that these activities elevate the complexity of the proffered position to require a bachelor's degree in a specific specialty. It is further noted that, although information on the petition reflects that the petitioner has 12 employees and a gross annual income of \$300,000, the record does not contain any corroborating evidence in support of these claims, such as quarterly wage reports and federal income tax returns. The petitioner's 2004 federal income tax return reflects \$56,466 paid in "wages, salaries, tips, etc." and \$87,697 in gross receipts or sales. Again, simply going on record without supporting documentary evidence is not sufficient for the purpose 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 Dec. 190 (Reg. Comm. 1972)).

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent,

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<sup>1</sup> The AAO notes that the James Beard Foundation's website at <http://www.jamesbeard.org> does not state that a bachelor's degree in a specialty is normally required for entry into the position.

in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation.

Although the director did not make a specific determination regarding the eligibility of the beneficiary to perform H-1B level services, the AAO observes beyond the decision of the director that the record does not contain an evaluation of the beneficiary's foreign education or other evidence demonstrating the beneficiary's qualifications as required by 8 C.F.R. § 214.2(h)(4)(iii)(C). An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). For this additional reason, the petition will not be approved.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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