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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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Dr

FILE: [Redacted] Office: VERMONT SERVICE CENTER

Date: JUL 01 2010

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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.

On the Form I-129 visa petition the petitioner described its type of business as a "Restaurant and Food Industry – software developer." On the I-290B appeal form counsel stated, "Petitioner has Indian Cuisine Restaurant and applying for Executive Chef's position, it has nothing to do with software development. USCIS is mistaken about this petition." The AAO finds that it is more likely than not that counsel included the phrase "software developer" on the Form I-129 petition in error, and that the petitioner only operates as an Indian Restaurant.

To employ the beneficiary in a position designated as an Executive Chef, the petitioner endeavors to classify him 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, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director had not adequately considered the evidence provided. Counsel also submitted evidence on appeal.

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief and attached exhibits in support of the appeal.

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. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would be employing the beneficiary in a specialty occupation position.

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.

Consistent 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.”

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also 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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in a particular position meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently 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. Applying this standard, USCIS 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.

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.¹ Although it recognizes the *Handbook* as authoritative, the AAO does not solely rely on the job title or the extent to which the petitioner's descriptions of the position and its underlying duties correspond to occupational descriptions in the *Handbook* to determine whether a particular job qualifies as a specialty occupation position. Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the alien will likely perform for the entity or entities ultimately determining the work's content.

The *Handbook* covers the position of executive chef in the section entitled Chefs, Head Cooks, and Food Preparation and Serving Supervisors.

The *Handbook* states:

Executive chefs, head cooks, and chefs de cuisine, are primarily responsible for coordinating the work of the cooks and directing the preparation of meals. Executive chefs are in charge of all food service operations and also may supervise several kitchens of a hotel, restaurant or corporate dining operation.

As to the education and training necessary to those position, the *Handbook* states,

While most chefs, head cooks, and food preparation and serving supervisors have some postsecondary training, many experienced workers with less education can still be promoted. Formal training may take place at a community college, technical school, culinary arts school, or a 2-year or 4-year college with a degree in hospitality. A growing number of chefs participate in training programs sponsored by independent cooking schools, professional culinary institutes, 2-year or 4-year colleges with a hospitality or culinary arts department, or in the armed forces. Some large hotels and restaurants also operate their own training and job-placement programs for chefs and head cooks. Executive chefs, head cooks, and sous chefs who work in fine-dining restaurants require many years of training and experience.

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online, accessed June 30, 2010.

For students in culinary training programs, most of their time is spent in kitchens learning to prepare meals by practicing cooking skills. They learn knife techniques and proper use and care of kitchen equipment. Training programs also include courses in nutrition, menu planning, portion control, purchasing and inventory methods, proper food storage procedures, and use of leftover food to minimize waste. Students also learn sanitation and public health rules for handling food. Training in food service management, computer accounting and inventory software, and banquet service are featured in some training programs. Most formal training programs also require students to get experience in a commercial kitchen through an internship, apprenticeship, or out-placement program.

Although formal training is an important way to enter the profession, many chefs are trained on the job, receiving real work experience and training from chef-mentors in the restaurants where they work. Others enter the profession through formal apprenticeship programs sponsored by professional culinary institutes, industry associations, and trade unions in coordination with the U.S. Department of Labor. The American Culinary Federation accredits more than 200 formal academic training programs and sponsors apprenticeship programs around the country. Typical apprenticeships last 2 years and combine classroom training and work experience. Accreditation is an indication that a culinary program meets recognized standards regarding course content, facilities, and quality of instruction.

That passage does not indicate that an executive chef position normally requires a minimum of a bachelor's degree in a specific specialty or the equivalent. Rather, it indicates that numerous different paths may lead to an executive chef position.

With the visa petition counsel submitted a letter, dated February 26, 2008, from the petitioner's owner. That letter stated the duties of the proffered position as follows:

Direct the preparation of meals and coordinate the activities of the kitchen staff engaged in preparing and cooking foods to ensure an efficient and profitable food service. Price menu items and plan utilization of food surpluses and leftovers. Interview, hire train, and discharge cooks and other kitchen workers. Maintain time and payroll record. Estimate food consumption, and purchases of food stuffs and kitchen supplies. Review menus, analyze recipes, determine food, labor, and overhead costs and assign prices to menu items. Direct food Apportionment policy to control costs. Supervise cooking and other Kitchen personnel and coordinate their assignments to ensure economical and timely food production. Observe methods of food preparation and cooking sizes of proportions and garnishing of foods to ensure food is prepared in prescribed manner. Tests [sic] cooked foods by tasting and smelling them. Devise special dishes and develop new recopies. [sic] Establish and enforce nutrition and sanitation standards for our Restaurant.

Counsel also submitted an undated letter from [REDACTED] on the letterhead of the Sindhu Indian Cuisine restaurant in Lansing, Michigan. [REDACTED] stated that he owns that restaurant, that his restaurant seats 85 people and is similar in size to the petitioner's restaurant, and that his restaurant has employed an executive chef for 12 years and that the petitioner needs to do the same.

However, counsel submitted no evidence with the visa petition to show that the duties of the proffered position require a minimum of a bachelor's degree or the equivalent in a specific specialty. The service center, therefore, issued a request for evidence requesting, *inter alia*, evidence that the proffered position qualifies as a position in a specialty occupation.

In response, counsel submitted various documents. None of those documents, however, indicate that the proffered position is in a specialty occupation, that is, none of the documents indicate that the proffered position requires a minimum of a bachelor's degree in a specific specialty or the equivalent.

The RFE specifically requested, "Submit a copy of the job posting that you used to solicit applicants for the current position offered." In response, counsel did submit what purports to be such a posting of the proffered position, including the description of duties set out above. That posting, however, contains no educational requirement. That posting was ostensibly used in an attempt to fill the proffered position. That it contains no educational requirement strongly suggests that none exists.

The director denied the visa petition, finding that the evidence does not demonstrate that the proffered position is in a specialty occupation.

On appeal, counsel stated "USCIS has totally ignored [sic] the expert letter submitted by the petitioner indicating that the job of Executive Chef is complex enough and are [sic] professional in nature, thereby requiring a Bachelor's degree." With the appeal, counsel provided a letter dated March 25, 2009. The letter is on the letterhead of the Sindhu Indian Cuisine restaurant in Lansing, Michigan, and the signature on that letter appears to be that of Reddy Urupaka, who signed the previous letter. The letter identifies the signer as the president of the restaurant.

That letter states,

We are pleased to certify that the requirement for an individual to fill the position of Executive Chef, in a business of home health care [sic], would be bachelor's degree in Culinary art or Cooking or its equivalent. A bachelor's degree would suffice to perform the job duties in an adequate manner. Bachelor's degree in such field or its equivalent prepare a person for practically and administratively in judgment. [sic]

It is necessary because only a person with a Bachelors [sic] degree can perform the usual job duties of Executive Cook [sic] like:

Direct the preparation of meals and coordinate the activities of the kitchen staff engaged in preparing and cooking foods to ensure an efficient and profitable food

service. Price menu items and plan utilization of food surpluses and leftovers. Interview, hire train, and discharge cooks and other kitchen workers. Maintain time and payroll record. Estimate food consumption, and purchases of food stuffs and kitchen supplies. Review menus, analyze recipes, determine food, labor, and overhead costs and assign prices to menu items. Direct food Apportionment policy to control costs. Supervise cooking and other Kitchen personnel and coordinate their assignments to ensure economical and timely food production.

Observe methods of food preparation and cooking sizes of proportions and garnishing of foods to ensure food is prepared in prescribed manner. Tests [sic] cooked foods by tasting and smelling them. Devise special dishes and develop new recopies. [sic] Establish and enforce nutrition and sanitation standards for our Restaurant.

All the above-mentioned duties require research, statistics, administration, and supervision, which is achieved only if a person has earned [the] equivalent of [a] bachelor's degree. It is our policy to employ [sic] our Executive Cook [sic] with such experience or equivalent of a Degree in cooking.

That letter is the only evidence in this case that suggests that the proffered position requires a minimum of a bachelor's degree in a specific specialty or the equivalent. The AAO notes that, contrary to counsel's assertion on appeal, the date of that letter shows that it was not in the record when the director issued the decision of denial.

Neither the duties of the proffered position taken as a whole, nor any one of them individually, appears to require a minimum of a bachelor's degree in a specific specialty or the equivalent, the conclusory statement in the March 25, 2009 letter notwithstanding.

The *Handbook* does not support that entry into the position of executive chef normally requires a minimum of a bachelor's degree in a specific specialty or the equivalent, and the petitioner has not provided any other evidence to demonstrate that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The single letter provided, even if it were deemed credible, would be insufficient to show a normal requirement across an entire industry. The petitioner has not demonstrated that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar companies, and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of the first clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record contains no evidence that the petitioner has ever previously hired anyone to fill the proffered position, and the petitioner has not, therefore demonstrated that the proffered position

qualifies as a position in a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Nothing about the duties the petitioner described suggests that they require a minimum of a bachelor's degree in a specific specialty or the equivalent. The single letter from a single restaurant president has not convinced the AAO that the described duties require such a degree or equivalent. The petitioner has submitted no other evidence on point. The petitioner has not, therefore, demonstrated that the proffered position or its duties are so complex, unique, or specialized that they can only be performed by a person with a minimum of a bachelor's degree in a specific specialty or the equivalent or that performance of the duties is usually associated with a minimum of a bachelor's degree in a specific specialty or the equivalent. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) or the criteria of the second clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO finds that the director did not err in his determination that the record before him failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the evidence and argument submitted on appeal have not remedied that failure. Accordingly, the director's decision to deny the petition shall not be disturbed.

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. The appeal will be dismissed and the petition denied.

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