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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

D2



Date: **DEC 16 2011** Office: VERMONT SERVICE CENTER

FILE:

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:

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 \$630. 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 Director, Vermont 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 remain denied.

The petitioner operates a restaurant and claims it was established in 1974, and employs 150 personnel. It seeks to employ the beneficiary as a head cook/assistant chef 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 concluding that the petitioner failed to establish that the proffered position is a specialty occupation.

The record of proceeding before the AAO contains (1) the Form I-129, Petition for Nonimmigrant Worker, and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, Notice of Appeal or Motion, supplemental brief, and additional documentation. The AAO reviewed the record in its entirety before issuing its decision.

The primary issue before the AAO is whether the position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment 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 one 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 [1] 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 [2] 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 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 particular positions 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 occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

In this matter, the petitioner seeks the beneficiary’s services as a head cook/assistant chef. In a March 17, 2009 letter in support of the petition, counsel for the petitioner indicated that the

beneficiary was required to “accurately and efficiently manage either the cold or hot line.” Counsel also stated the beneficiary assumed the following duties and responsibilities:

- Permanently maintain a clean and sanitary work station area including tables shelves, grills, broilers, fryers, pasta cookers, sauté burners, convection ovens, flat top range and refrigeration equipment in order to comply consistently with the strict rules of Hygiene implemented by the Petitioner.
- Know and comply consistently with the Petitioner’s standard portion sizes, cooking methods, quality standards and kitchen rules, policies and procedures.
- Handle, store and rotate all products properly.
- Stock and maintain sufficient level of food product at lines stations to assure a smooth service period.
- Portion food products prior to cooking according to standard portion sizes and recipe specifications.
- Prepare a variety of meats, seafood, poultry, vegetables, and other food items for cooking in broilers, ovens grills, fryers and a variety of other kitchen equipment.
- Prepare items for broiling, grilling, frying, sautéing or other cooking methods by portioning, battering, breading, seasoning and/or marinating.
- Follow proper plate presentation and garnish set up for all dishes.

Counsel also noted that the beneficiary may be asked to perform other duties as assigned by the Chef or Manager on duty such as:

- Give personal input in daily menu planning as for the type of pizza, omelet, quiche or risotto of the day.
- Decide and prepare the soup of the day.
- Decide and prepare the special of the day.
- Assist in food preparation assignment during off peak periods as needed.
- Close the kitchen properly and follow the closing checklist for kitchen stations.
- Assist others in closing of the kitchen.

Counsel noted further that the beneficiary may be requested to work on his own or in a team under the supervision of the banquet chef in order to prepare banquets and other dinner events. To perform the duties of the position, counsel indicated that the petitioner required an associate degree from an accredited food management institution or other equivalent professional degree and two to six years of experience.

On June 17, 2009, the director requested additional information from the petitioner to demonstrate that the proffered position is a specialty occupation.

In response to the director’s request for evidence (RFE), counsel for the petitioner provided a list of the petitioner’s current and past employees in the proffered position which included references to their degrees and experience. Counsel also provided resumes of some of the individuals on

the list. Counsel claimed three of the listed employees had culinary bachelor's degrees and various levels of experience; one employee had a culinary associate's degree and ten years of experience; and one individual's resume showed he had an associate's degree in business management and approximately seven years of culinary experience. Counsel also noted that the petitioner had recently offered positions to two additional employees, one as a pastry chef to eventually be an assistant chef/sous - chef/head cook whose resume indicated she held a bachelor's degree in food service management, and a second who had been offered a position as assistant chef/sous - chef/head cook whose resume indicated he had held a culinary associate's degree and four years of work experience. Counsel asserted that all these employees' qualifications met the petitioner's requirement for a specialty occupation by virtue of their degrees or their degrees and experience using a minimum of eight years of experience as the equivalent of four years of a completed academic curriculum.

Counsel also contended that the proffered position is complex and unique and specialty knowledge is required to perform the job, as the job involves:

- Skills in preparation and creativity in proposing a la Carte set up and daily specials and in Seasonal [sic] menu development;
- Skills in financial and accounting analysis in specials costing and general food cost oversight, and in Servesafe representative for Property;
- Skills in restaurant management in daily staffing, management, and Staff Development specific to kitchen operation;
- Skills in food and event planning and inventory control in food orders and End-of-Month inventory with management team;
- Skills in sanitation regulations and compliance in Cleanliness, Orderliness and Sanitation of the Kitchen and food storage areas; and,
- Skills in human resources regulations and management in Leadership of line cooks and general liaison between cooks and Management.

Counsel also noted the petitioner owned an Inn and the associated tavern, and fine dining restaurant.

Upon review, the director denied the petition on October 13, 2009.

On appeal, counsel for the petitioner asserts that the individuals previously or currently employed by the petitioner in a similar position all had education coupled with experience equivalent to a bachelor's degree. Counsel notes that due to a miscommunication between his office and the petitioner he indicated that the petitioner only required an associate's degree and six months experience to perform the duties of the proffered position, but that all the petitioner's employees in the proffered position have held the equivalent of a bachelor's degree. Counsel also refers to the Department of Labor's *Occupational Outlook Handbook's (Handbook)* chapter on chefs and cooks and acknowledges that the *Handbook* indicates a two- or four-year degree is acceptable. Counsel avers that as the *Handbook* lists one avenue of employment as through a

four-year degree, a four-year degree is the normal minimum requirement. Counsel also references the *Handbook's* discussion of experience.

Counsel submits an October 26, 2009 letter signed by [REDACTED] who indicates that it appears the requirement of a baccalaureate degree in culinary arts and/or restaurant management or eight years of experience are common, reasonable and adequate for a restaurant such as the petitioner's; a November 8, 2009 statement prepared by [REDACTED], [REDACTED] who states that a restaurant such as the petitioner's would require its management and first line support staff to have a minimum of a bachelor's degree; and, a November 5, 2009 statement from the petitioner's owner who attests that he "personally request[s]" the minimum requirements of a baccalaureate degree in culinary arts and/or restaurant management or eight years-experience for the position of sous chef in his group of restaurants. In the November 5, 2009 letter signed by the petitioner's owner, he indicates that he has this minimum requirement because of the upscale nature and large size of the restaurant and because the duties of the position itself require a baccalaureate degree.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty 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 in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

Upon review of the description of the proffered position's duties, the AAO agrees that the duties described correspond generally to the duties of a head cook/assistant chef as set out in the *Handbook*. The chapter on the "Chefs, head cooks, and food preparation and serving supervisors" occupational category is addressed in the *Handbook* (2010-11 online edition)¹ which states in pertinent part:

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.

Chefs, head cooks, and food preparation and serving supervisors oversee the daily food service operation of a restaurant or other food service establishment. *Chefs and head cooks* are usually responsible for directing cooks in the kitchen, dealing with food-related concerns, and providing leadership. They are also the most skilled cooks in the kitchen and use their creativity and knowledge of food to develop and prepare recipes.

* * *

All of these workers—chefs, head cooks, and food preparation and serving supervisors—hire, train, and supervise staff, prepare cost estimates for food and supplies, set work schedules, order supplies, and ensure that the food service establishment runs efficiently and profitably. Additionally, these workers ensure that sanitation and safety standards are observed and comply with local regulations. Fresh food must be stored and cooked properly, work surfaces and dishes clean and sanitary, and staff and customers safe from illness or injury to avoid being closed by the health department or law enforcement.

The *Handbook* reports the education and training for the position as follows:

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.

* * *

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.

Handbook, 2010-11 ed., available at <http://www.bls.gov/oco/ocos144.htm> (last accessed December 2011).

Thus, a review of the *Handbook* finds no minimum requirement of a baccalaureate or higher degree in a specific specialty for employment in the proffered position as described. Rather, a head cook/assistant chef occupation accommodates a wide spectrum of educational credentials as well as offering a path to employment in the occupation based only on experience or a two-year degree. Contrary to counsel's averment, the *Handbook's* acknowledgment of a number of disparate paths to employment in the proffered position refutes the claim that a bachelor's degree or higher in a specific discipline is the normal minimum requirement for entry into the profession. As the duties of the proffered position described in the record of proceeding do not indicate that the particular position proffered in this petition is one for which a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

Again, in determining whether there is such a common degree requirement, factors often considered by USCIS 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 at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

As reflected in the discussion above regarding the *Handbook's* information, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement of at least a bachelor's degree in a specific specialty. The AAO acknowledges the letters submitted by [REDACTED] and by [REDACTED], although indicating that a baccalaureate degree in culinary arts and/or restaurant management or eight years of experience is common, reasonable and adequate, does not state that restaurants routinely employ and recruit only degreed individuals in a specific industry. More significantly, [REDACTED] indicates that eight years of experience² is common, reasonable and adequate to perform the duties of the proffered position, a statement that is tantamount to an admission that the proffered position is not a specialty

² For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . It must be 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.

occupation. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). [REDACTED] in her November 8, 2009 statement, although indicating her belief that a restaurant such as the petitioner's restaurant would require its management and first-line support staff to have a minimum of a bachelor's degree, does not state that the degree must be in a specific discipline, a requirement necessary to establish a position as a specialty occupation. The letters from [REDACTED] and [REDACTED] do not attest that there is an industry-wide requirement for a bachelor's degree in a specific discipline to obtain employment in the occupation of a head cook/assistant chef. Moreover, neither [REDACTED] nor [REDACTED] lists the reference materials on which they rely as a basis for their general conclusions. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). The letters provided on appeal do not credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics which does not indicate that a position such as the proffered position requires at least a baccalaureate degree in a specific specialty.

For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Turning to the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the petitioner failed to demonstrate how the duties of its head cook/assistant chef require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. To begin with the petitioner on appeal notes eight years of experience is adequate to perform the duties of the proffered position. As referenced above, eight years of experience is not equivalent to a bachelor's degree in a particular discipline. Moreover, a review of the evidence of record including the nature and size of the petitioner's restaurant business does not establish that this position is significantly different from other large high-end restaurants which employ head cooks/assistant chefs. Again, the information in the record does not refute the *Handbook's* information to the effect that there are a number of avenues to employment as a head cook/assistant chef including associate degrees and advancement through the ranks. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than a head cook/assistant chef or other closely related positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. Consequently, as the petitioner fails to demonstrate how the proffered position is so complex or unique relative to other head cook/assistant chef positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, counsel and the petitioner on appeal assert that the petitioner only hires individuals with a bachelor's degree in a specific discipline or experience commensurate with a four-year degree. Upon review of the information submitted regarding the petitioner's previous and current employees in the proffered position the AAO observes first that the petitioner has not submitted

diplomas or other documentary evidence establishing that the petitioner's employees in the proffered position all possess bachelor's degrees in a specific specialty. Counsel's list of the petitioner's employees and the attached resumes of some of those employees are insufficient to establish that the petitioner only hires degreed individuals with the degree being a baccalaureate or higher degree in a specific discipline or the equivalent. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The AAO acknowledges the petitioner's claim on appeal that the owner personally requests that the position of sous chef in his group of restaurants possess a minimum of a baccalaureate degree in culinary arts and/or restaurant management or eight years-experience and that this minimum is necessary because of the nature and size of the restaurant and the position itself. However, the petitioner does not indicate that the request is a requirement and the petitioner does not establish what duties require the actual theoretical and practical application of a body of highly specialized knowledge that requires the attainment of a bachelor's or higher degree in the specific specialty. Furthermore, while a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation"). Here, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. Here, the AAO incorporates by reference and reiterates its earlier discussion regarding the description of the proposed duties. The petitioner has not identified any specialized or complex duty that requires a specific course of study in a specific discipline to perform the duties of the proffered position. The duties as described do not demonstrate that the proffered position reflects a higher degree of knowledge and skill than would normally be required of individuals in a head cook/assistant chef occupation, an occupation that does not require a baccalaureate or

higher degree in a specific discipline. The AAO, therefore, concludes that the proffered position failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any one of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO shall not disturb the director's denial of the petition.

The appeal will be dismissed and the petition denied. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. § 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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