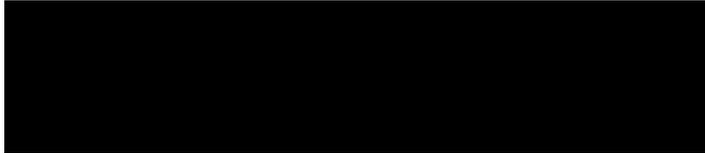


Bb

U.S. Department of Homeland Security
Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass. 3/F
425 I Street N.W.
Washington, D.C. 20536



MAR 12 2004

File:  Office: Nebraska Service Center Date:

IN RE: Petitioner: 
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: 

PUBLIC COPY

Identifying data deleted to prevent disclosure of unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty chef. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL), accompanies the petition. The director determined that that the petitioner had not established that the position was that of a skilled worker, and denied the petition.

On appeal, the petitioner asserts that the position required at least two years experience or a valid Japanese cooking license, which, under Japanese law, is equivalent to two years experience.

Section 203(b)(3) of the Immigration and Nationality Act (the Act) states, in pertinent part:

(A) In general. - Visas shall be made available . . . to the following classes of aliens who are not described in paragraph (2):

(i) Skilled workers. - Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Furthermore, 8 CFR 204.5(1)(3)(ii) states, in pertinent part:

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification.

To be eligible for approval, a beneficiary must have all of the training, education, and experience specified on the labor certification as of the date that the request for labor certification was accepted for processing by DOL. The petitioner's priority date in this instance is July 31, 2001.

The approved ETA 750 which accompanied the petition indicates that the proffered position requires two years experience, or a Japanese cooking license which could substitute for the experience. Counsel submitted a copy of the beneficiary's "Certificate of Cooking License" and a list of school credits, and a copy of the Japanese statute indicating that a person may be issued a cooking license if he has attended a licensed cooking school for at least one year or if he has at least two years experience in the food service industry and passes the cooking license examination.

In a request for evidence (RFE) dated November 18, 2002, the director requested a clarification of how the cooking license could substitute for experience, and evidence that the beneficiary possessed the experience requirements of the labor certification. In response, counsel submitted a letter reiterating the information previously submitted and a letter from the beneficiary's trainer at the cooking school emphasizing the beneficiary's training and that it comports with statute and is fully compatible with two years experience.

The director determined that, since the ETA 750 indicated that a one-year cooking license could substitute for two years experience, the position did not meet the statutory requirements of "skilled worker" because it did not specifically require two years experience. Therefore, the beneficiary could not be found qualified for classification as a skilled worker.

On appeal, counsel states the specific requirements of the Japanese law establish that this position is that of a skilled worker. Counsel also submitted letters from previous employers that establish the beneficiary has the required two years experience in addition to the cooking license. Counsel argues that either of these would suffice to establish that the beneficiary meets the experience requirements of a skilled worker.

The statute provided by counsel permits an individual to obtain a cooking license in Japan without experience in the food service industry if the individual attends a government approved cooking school. Otherwise, the prospective licensed cook must have two years experience and pass the license examination. The wording of the statute clearly implies that a certain degree of skill is required before an applicant can obtain a Japanese cooking license. Thus, the fact that the petitioner indicated that a cooking license could be substituted for experience does not automatically remove it from the skilled worker category.

Without necessarily agreeing with counsel's position regarding the cooking license, the AAO notes that as of the priority date, the

beneficiary did have two years experience as a cook of Japanese food. On appeal and while still arguing for substitution of experience through possession of a cooking license, counsel submitted letters from previous employers, which show that the beneficiary had 14 months full time experience and four years part time experience as a chef. The petitioner has therefore established that the beneficiary had the experience required by the labor certification as of the priority date.

Upon review, it is determined that the petitioner has provided sufficient evidence to overcome the findings of the director in his decision to deny the petition. The petitioner has established eligibility pursuant to section 203(b)(3)(A)(i) of the Act, and the petition will be sustained.

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 met that burden.

ORDER: The appeal is sustained.