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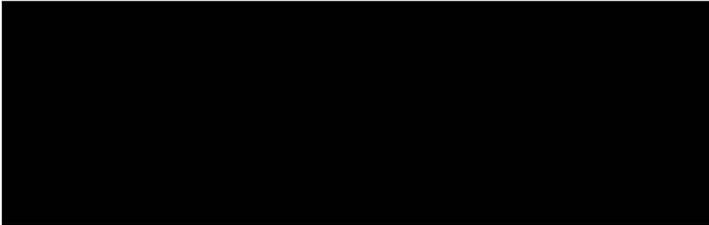
U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: SRC 05 255 51909 Office: TEXAS SERVICE CENTER Date: DEC 27 2006

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:

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.

for Michael T. Kelly
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 restaurant that also provides catering services. It seeks to employ the beneficiary as an executive 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 on the basis that the proffered position did not meet the definition of a specialty occupation. Counsel submits a timely appeal.

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.

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) 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) 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 and the appeal 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 includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner's response to the RFE; and the petitioner's support letter. According to this evidence, the beneficiary would be in charge of all aspects of the Indian cuisine restaurant including supervising food preparation and presentation, developing the menu, and obtaining and preparing the food product. He will check quality and quantity, develop new cooking techniques and presentations, supervise staff, and estimate costs. The petitioner's September 29, 2005 letter indicates that the executive chef position requires a bachelor's degree or the equivalent.

The director stated that the information from the *Occupational Information Network OnLine (O*Net OnLine)*, the approval notices, and the letter from the attorney did not prevail in establishing the proposed position as a specialty occupation. According to the director, the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*) reveals that the proposed position is encompassed within the occupational classification "Chefs, Cooks, and Food Preparation Workers," which are occupations generally not requiring a baccalaureate degree. The director concluded that no evidence in the record indicates that the proposed position would require a baccalaureate degree.

On appeal, counsel contends that the beneficiary is responsible for supervising the creative end: food preparation, presentation, menu development and cooking techniques. According to counsel, the petitioner is a start-up company that seeks to become a cutting edge fusion restaurant in a competitive market. Counsel states that the DOL information indicates that executive chefs are required to hold a bachelor's degree. Counsel refers to a letter submitted by the beneficiary's prior employer to establish the offered position as a specialty occupation. Counsel references *China Chef Inc. vs. Puelo*, 1993 U.S. App. LEXIS 32929, (6th Cir., Dec. 15 1993), and *Matter of Sun*, 12 I&N Dec. 535 (BIA 1966) to establish that the proposed position requires a bachelor's degree. Counsel states that the beneficiary has the educational equivalent of a bachelor's degree in restaurant management.

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 first considers 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 2006-2007 edition of 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)).

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation.

The record contains information from the *O*Net OnLine*. The *O*Net OnLine* is not a persuasive source of information regarding whether a job requires a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. A Job Zone and a Specific Vocational Preparation (SVP) rating do not describe the particular type of degree, if any, that a position would require. It is the *Handbook* that the AAO routinely consults for information about the duties and educational requirements of occupations.

The *Handbook* discloses that the proposed position resembles an executive chef, which does not require a bachelor's degree in a specific academic field. The *Handbook* describes 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.

As described by the petitioner, the beneficiary will be in charge of all aspects of the Indian cuisine restaurant including supervising food preparation and presentation, developing the menu, and obtaining and preparing the food product; checking quality and quantity; developing new cooking techniques and presentations; supervising staff; and estimating costs. All of these duties are within the *Handbook's* description of an executive chef. An executive chef, the *Handbook* states, is in charge of all food service operations, such as coordinating the work of the kitchen staff and directing the preparation of meals; determining serving sizes, planning menus, ordering food supplies, and overseeing kitchen operations to ensure uniform quality and presentation of meals.

With regard to the training and qualifications required of an executive chef, the *Handbook* conveys that employers, including those of fine-dining restaurants, do not require a baccalaureate degree in a specific academic field. It states:

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. Professional culinary institutes, industry associations, and trade unions also may sponsor formal apprenticeship programs in coordination with the U.S. Department of Labor. Many chefs are trained on the job, receiving real work experience and training from chef mentors in the restaurants where they work.

...

Some chefs and cooks go into business as caterers or personal chefs or they open their own restaurant.

To establish a position as a specialty occupation, the petitioner must show that a baccalaureate degree in a specific academic field that is directly related to the offered position is required for the position. As the *Handbook* conveys that employers do not require executive chefs to have a baccalaureate degree in a specific academic field, the petitioner fails to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1): that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position.

To establish the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), that a degree requirement is common to the industry in parallel positions among similar organizations, counsel references approval notices and documentation for other petitions. This record of proceeding does not, however, contain all of the supporting evidence submitted to the service centers in the prior cases. In the absence of all of the corroborating evidence contained in those records of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the position offered in the prior cases were similar to the position in the instant petition. Furthermore, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior cases were similar to the proffered position or were approved in error, no such determination may be made without review of the original record in its entirety. If the prior petitions were approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petitions would have been erroneous. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008

(1988). For these reasons, the approval notices fail to establish the first prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

To establish the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the petitioner must show that the proposed position is so complex or unique that it can be performed only by an individual with a bachelor's degree in a specific specialty. The evidence of record conveys that the proposed position is a typical executive chef, which does not require a baccalaureate degree in a specific academic field. The petitioner fails to establish the second prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) requires that the petitioner establish a past practice of normally requiring a degree or its equivalent for the position. No evidence in the record establishes a past practice of normally requiring a degree or its equivalent for the executive chef position.

The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) requires the petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The proposed duties parallel the *Handbook's* depiction of an executive chef, which does not require a baccalaureate degree in a specific specialty. Counsel references *Matter of Sun* and *China Chef, Inc.* to establish the offered position as a specialty occupation. It is noted that *Matter of Sun* involves the vocation of a hotel manager in charge of a large hotel. The duties of a hotel manager in charge of a large hotel, which are described by the court in *Matter of Sun*, are not analogous to those of an executive chef in charge of a small restaurant. *Matter of Sun* therefore fails to establish the offered position as a specialty occupation. In *China Chef, Inc.* the court found that the duties of the manager and treasurer position, which involved coordinating food suppliers; planning menus and banquet operations; managing personnel; preparing financial reports and budgets; analyzing financial operations; and managing "receipt disbursement and custody of funds," did not require a baccalaureate degree in a specific academic field. *China Chef, Inc.* therefore does not support the assertion that the executive chef requires a bachelor's degree in a specific field as the court in *China Chef, Inc.* did not find the manager and treasurer duties, which encompass some of the duties of the executive chef, require a specific bachelor's degree. Thus, based on the evidence of record and the *Handbook's* information, the petitioner fails to establish the criterion at 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. Accordingly, the AAO shall not disturb the director's denial of the petition on this ground.

In the denial letter, the director stated that the beneficiary failed to maintain proper nonimmigrant status and is therefore ineligible for change of status. Change of status issues are not within the jurisdiction of the AAO and are not before the AAO in this proceeding.

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.

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