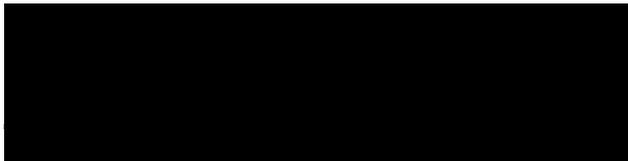




U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



DJ

FILE:



Office: VERMONT SERVICE CENTER

Date: FEB 22 2005

EAC 03 012 52797

IN RE:

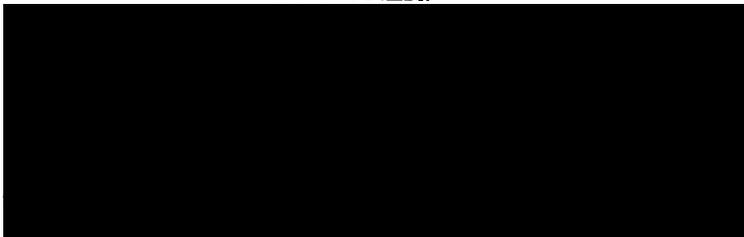
Petitioner:



Beneficiary:

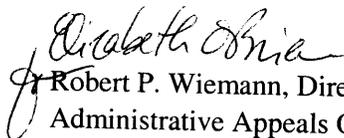
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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, Director
Administrative Appeals Office

DISCUSSION: The director of the Vermont Service Center denied the Form I-129 nonimmigrant visa petition, which the petitioner had filed to extend the H-1B employment of the beneficiary. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The petitioner subsequently filed a complaint in the U.S. District Court for the District of Puerto Rico seeking declaratory and injunctive relief requiring Citizenship and Immigration Services (CIS) to approve the beneficiary's H-1B visa petition. *Royal Siam Corp. & Surasak Srisang v. Tom Ridge, et al*, CV-04-1843 (HL) (filed August 16, 2004). On December 29, 2004, the Court entered an order remanding the petition to the AAO and requested an explanation as to why a previous H-1B petition filed by the same petitioner on behalf of the same beneficiary in 1999 (the 1999 petition) had been approved. In response to the Court's remand, the AAO will reopen the matter. The AAO will affirm its prior decision denying the petition.

The administrative record includes the following records of proceeding: (1) [REDACTED] Corp. [REDACTED] EAC 03 012 52797, the subject of the litigation and the petition on remand; (2) [REDACTED] EAC 00 009 52213; and (3) [REDACTED]. The records have been authenticated and certified copies are attached. The AAO has reviewed these records in their entirety.

The issue before the AAO in the remanded H-1B case is whether the petitioner's proffered position qualifies as a "specialty occupation." Additionally, pursuant to the request of the Court, the AAO will consider CIS' approval of the H-1B petition filed by the same petitioner on behalf of the same beneficiary in 1999.

The 2002 H-1B Petition

The petitioner, the [REDACTED] Corporation, is a restaurant in Carolina, Puerto Rico, describing itself as providing authentic Thai cuisine, a Thai décor and a serving style reminiscent of Thailand. Previously, the petitioner was known by the name of the [REDACTED] Restaurant and located in [REDACTED] Puerto Rico. The owner is the beneficiary's aunt (SRISANG, p. 63). The petitioner originally offered the beneficiary employment in 1999, and the director approved an initial nonimmigrant petition, after the beneficiary was granted voluntary departure in lieu of deportation for marriage fraud. The petitioner now seeks to continue the beneficiary's employment as a restaurant manager.

The record of proceeding in the remanded case contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's request for evidence; (3) the director's denial letter; and (4) the Form I-290B, with a letter from counsel and new evidence.

The Immigration and Nationality Act (the Act) provides for the nonimmigrant classification of aliens coming temporarily to the United States to perform services in a specialty occupation. *See* § 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101. Pursuant to the statutory definition at section 214(i) of the Act, 8 U.S.C. § 1184(i), the term "specialty occupation" means an occupation that requires:

- (1) the theoretical and practical application of a body of highly specialized knowledge, and
- (2) 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, a 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.

The AAO's review of the administrative record has, again, led it to conclude that the petitioner has failed to establish its proffered position as a specialty occupation under any of the four regulatory avenues open to employers who seek to hire H-1B workers. As discussed in detail in the AAO's May 21, 2004 decision (Royal Siam, pp. 1-6, incorporated herein by reference), the occupation of restaurant manager does not normally require those seeking entry-level employment to have the minimum of a baccalaureate or higher degree, or its equivalent. In making this determination, the AAO has relied, as it does routinely, on the Department of Labor's *Occupational Outlook Handbook (Handbook)*. The 2004-2005 edition of the *Handbook* reports no degree requirement for those seeking employment as food service managers, the occupational title covering the profession of restaurant manager.¹ Further, although the petitioner submitted evidence to establish its position as a specialty occupation under the second and third criteria noted above -- that a degree requirement is common to the petitioner's industry and the petitioner normally requires a degree or its equivalent for its position -- this evidence is insufficient proof of the petitioner's assertions. Finally, while the petitioner contends that the specialized nature of its proffered position requires the beneficiary to have a degree, the record does not indicate that the duties of the proffered position reflect a higher level of knowledge and skill than that normally required of restaurant managers. As a result, the petitioner is also unable to establish its position as a specialty occupation under the fourth and final criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO affirms its previous decision dated May 21, 2004, and hereby incorporates by reference the discussion of the evidence, analysis, and conclusions in that decision.

The 1999 H-1B Petition

On appeal and in response to the director's request for evidence, counsel noted the approval of a previously filed Form I-129 on behalf of the beneficiary for the same employment, EAC 00 009 52213 (the 1999 petition). The previous approval of an H-1B petition for this beneficiary does not constitute a basis for the approval of the remanded petition. CIS is not bound to approve a petition where eligibility has not been demonstrated simply because it previously approved a petition for the same beneficiary. *See Matter of*

¹ As discussed below, the AAO also finds no degree requirement for food service managers in the 1998-1999 edition of the *Handbook*.

Church Scientology International, 19 I&N Dec. 593, 597 (Comm. 1988). Each petition filing is a separate proceeding with a separate record and CIS is limited to the information contained in each record in reaching its decision. 8 C.F.R. §§ 103.2(b)(16)(ii) and 103.8(d). Further, the AAO's authority over the director is comparable to the relationship between a court of appeals and a district court. The previous approval of a nonimmigrant visa petition on behalf of this beneficiary does not bind the AAO to follow that decision in this proceeding. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The approval of the previous H-1B nonimmigrant visa petition on behalf of the same beneficiary in 1999 raised concerns on the part of the United States District Court regarding CIS' denial of the 2002 petition. The Court remanded the petition to allow the AAO to issue a new decision that would adequately address the 1999 H-1B filing and to provide an explanation for departing from its prior grant of H-1B status to the beneficiary for employment as a restaurant manager (Opinion and Order, p. 8). The AAO, therefore, turns to a review of the record in the 1999 case.

In its filing of October 9, 1999, the same petitioner stated it was a restaurant providing authentic Thai cuisine, a Thai décor and a serving style reminiscent of Thailand and that it sought the services of the beneficiary as a restaurant manager. The record of the 1999 proceeding is comprised of: (1) Form I-129; (2) a Voluntary Departure Order dated October 1, 1999 ordering the beneficiary to leave the United States on or before January 29, 2000; (3) a certified Labor Condition Application and a prevailing wage statement from Puerto Rico's Department of Labor and Human Resources; (4) documentation regarding the petitioner's business; (5) documentation of the beneficiary's educational background and past employment with the petitioner; (6) an August 24, 1999 letter of support from the petitioner stating the duties of the proffered position; and (7) an October 6, 1999 transmittal letter from counsel. The record contains no Request for Evidence from the director seeking additional information concerning either the proffered position or the beneficiary's qualifications.

As stated by the petitioner in its August 24, 1999 letter, the beneficiary was to be placed in charge of all restaurant operations, specifically to:

- Estimate food and beverage costs and requisition or purchase supplies;
- Confer with food preparation and other personnel to plan menus and related activities, such as dining room, bar, and banquet operations;
- Direct hiring and assignment of personnel;
- Investigate and resolve food quality and service complaints; and
- Handle money transfers and deposits, count money at the end of the day, be responsible for the cash register, and reconcile accounts.

While lacking the detail of the job description provided by the petitioner in its 2002 filing (Royal Siam, pp. 95-97), the duties listed above identify the proffered position as that of a restaurant and food service manager, as described by the 1998-1999 edition of the *DOL Handbook*. The proffered position outlined by the petitioner in 1999 and that described by the petitioner in support of the remanded petition are, therefore, the same employment. As a result, the differing adjudicatory outcomes between the instant case and the 1999 petition cannot be attributed to any change in the description of the proffered position.

Although neither the 1998-1999 edition or the 2004-2005 edition of the *Handbook* require a bachelor's degree for the position, it is noted that DOL amended the discussion of the educational requirements for restaurant managers in the later edition. The AAO will, therefore, explore whether the apparently contradictory outcomes of the two cases can be explained by changes in the *Handbook's* discussion of educational requirements for restaurant managers or differences in the documentation submitted by the petitioner to establish its position as a specialty occupation under one of the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO notes that the 1998-1999 edition of the *DOL Handbook* describes the education and training needed to seek employment as a restaurant and food service manager in much the same way as does the 2004-2005 *Handbook*:

Many restaurant and food service manager positions are filled by promoting experienced food and beverage preparation and service workers. Waiters, waitresses, chefs, and fast-food workers demonstrating potential for handling increased responsibility sometimes advance to assistant manager or management trainee jobs when openings occur.... However, most food service management companies and national or regional restaurant chains also recruit management trainees from 2- and 4-year college hospitality management programs. Food service and restaurant-chains prefer to hire people with degrees in restaurant and institutional food service management, but they often hire graduates with degrees in other fields who have demonstrated interest and aptitude.

Therefore, at the time the 1999 petition was adjudicated, the occupation did not require individuals seeking employment as restaurant managers to have the minimum of a baccalaureate or higher degree, or its equivalent. As a result, the petitioner would have been unable to establish its position as a specialty occupation under the degree requirement of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

With regard to the second and third criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) -- that the petitioner's degree requirement is standard within its industry or the petitioner normally requires a degree or its equivalent for the position -- the AAO finds no documentation in the record of the 1999 case that addresses these requirements, nor any statements from the petitioner or counsel asserting either to be the case. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Therefore, although the director approved the petition, the petitioner could not have established its proffered position as a specialty occupation under either the second or third criterion.

Finally, the AAO has considered whether the petitioner's description of its proffered position in 1999 might have established it as being of sufficient specialization and complexity to meet the requirements of the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). However, the petitioner's discussion of its proffered position offered only the most basic outline of the position's duties, providing no description of what was involved in their performance. Further, as listed, the duties of the proffered position are those routinely performed by individuals serving as restaurant managers. As a result, although the director approved the 1999 petition, the petitioner's description of its position could not have served as a basis for establishing it as being so specialized and complex that it required the beneficiary to have knowledge and skills beyond those normally required of a restaurant manager.

Accordingly, the AAO concludes that the director erred in approving the H-1B petition filed on behalf of the beneficiary in 1999. The AAO can find no basis on which the proffered position could have qualified as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). As discussed above, the petitioner could not have established that the occupation required the beneficiary to have a baccalaureate or higher degree, or its equivalent. There is no evidence in the record to establish that the petitioner's degree requirement was standard within its own industry, that it normally required a degree for its position, or that the position was so specialized and complex that the performance of its duties was usually associated with a degreed individual. Where a petition lacks required initial evidence, such as in the case of the petitioner's 1999 petition, the director is required by regulation to request that evidence. 8 C.F.R. § 103.2(b)(8). The director failed to request this required evidence and simply approved the petition. As a result, the AAO concludes that approval of the petitioner's 1999 H-1B petition was contrary to regulatory requirements and, therefore, constituted plain error on the part of the service center.

The director's approval of the previous H-1B petition does not support a reconsideration of CIS' findings in the remanded petition. In neither filing did the petitioner establish its position of restaurant manager as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). Were CIS required to approve the instant case based on the previous erroneous approval, it would only compound the error previously made.²

The AAO's review of the administrative record also demonstrates an additional reason why the approval of the 1999 petition was clearly erroneous, i.e., the Attorney General's previous determination that the beneficiary entered into a marriage for the purpose of evading the immigration laws.

Section 204(c) of the Act, 8 U.S.C. § 1154(c), provides that no petition is to be approved for an alien if:

- (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws or

² The AAO notes that were the previously approved H-1B petition not already expired, the provisions at 8 C.F.R. § 214.2(h)(11)(iii)(A)(5) would require the issuance of a notice of revocation.

- (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.³

The administrative record includes the beneficiary's alien file, [REDACTED] [REDACTED] which documents the beneficiary's failed attempt to immigrate to the United States based on his fraudulent 1995 marriage to a U.S. citizen. On November 14, 1995, the beneficiary, as the then-spouse of a United States citizen, was conditionally granted lawful permanent resident status under section 216 of the Act, 8 U.S.C. § 1186a. On October 6, 1997, the beneficiary and his spouse filed a joint petition, Form I-751, to remove the conditional basis of his permanent resident status and were subsequently interviewed by the Immigration and Naturalization Service (INS), CIS' predecessor agency, to confirm the bona fides of their marriage. The record reflects that at the interview on July 16, 1998, the beneficiary's spouse admitted under oath that the marriage had been entered into solely to gain immigration benefits for the beneficiary. Although the beneficiary was provided an opportunity to rebut this information, he refused to make any statements [REDACTED] pp. 94-95, 113-122). The INS therefore denied the petition to remove the beneficiary's conditional status and placed the beneficiary in removal proceedings. The beneficiary subsequently left the United States on January 23, 2000 under a Voluntary Departure Order issued on October 1, 1999 [REDACTED] pp. 118-120).⁴

In a decision dated July 16, 1998 the INS, then acting under the delegated authority of the Attorney General, found the beneficiary to have attempted to circumvent U.S. immigration law by marrying a U.S. citizen under false pretenses [REDACTED] pp. 2-3). The facts outlined in the Attorney General's decision were uncontested by the beneficiary, both during his INS interview and in removal proceedings, where he was allowed to voluntarily depart the United States in lieu of a contested removal hearing. The AAO notes that the Form I-862 Notice to Appear placing the beneficiary in removal proceedings specifically charged him with marriage fraud under the immigration laws [REDACTED] pp. 6-7). By Stipulated Request for Voluntary Departure Order, the beneficiary conceded that the factual allegations made against him in the charging document were "true and correct" [REDACTED] pp. 21-22).

Therefore, the language of section 204(c) of the Act, 8 U.S.C. § 1154(c), clearly precluded the director's approval of the H-1B petition filed on the beneficiary's behalf on October 9, 1999. In light of the beneficiary's statutory ineligibility to benefit from the approval of any petition, the AAO finds the director's approval of the previous H-1B petition to constitute error.

The petitioner, for the reasons related in the preceding discussion, has failed to establish that its proffered position is a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Further, the

³ As of March 1, 2003, the Attorney General's authority, along with other authorities and functions of the Department of Justice to administer and enforce the immigration laws, was transferred to the Secretary of Homeland Security.

⁴ The beneficiary's return to the United States as an H-1B worker should have been precluded by section 212(a)(6)(C)(i) of the Act, which prohibits the issuance of visas to those who have committed immigration fraud or misrepresentation, as well as their admission to the United States.

beneficiary is statutorily ineligible for benefits under the nonimmigrant petition filed on his behalf. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.

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