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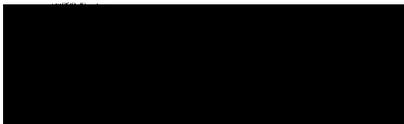


FILE: WAC 02 195 53065 Office: CALIFORNIA SERVICE CENTER Date **APR 14 2004**

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 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.

The petitioner operates a restaurant and seeks to employ the beneficiary as an executive chef. The petitioner 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 because the proffered position is not a specialty occupation. On appeal, counsel submits a brief and additional information.

The issue to be discussed in this proceeding is whether the position offered to the beneficiary qualifies as a specialty occupation.

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), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(1) of the Immigration and Nationality Act (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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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 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 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 additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B with supporting documentation. 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 I-129 petition with attachment; and the petitioner's response to the director's request for evidence. According to this evidence the beneficiary would: develop a Chinese Huaiyng cuisine specialty menu; purchase all necessary supplies and equipment; hire, train, and supervise cooks; design promotional programs and materials; prepare a budget and inventory system; manage the kitchen, supervise support staff, and organize/direct work flow; and control quality and inventory maintenance. The petitioner requires a minimum of a bachelor's degree in culinary arts, or its equivalent, for employment in the offered position.

The director found that the offered position did not qualify as a specialty occupation and failed to meet any of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel submits a brief stating that the proffered position meets the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Upon review of the record, the petitioner has failed to establish that the offered position meets the requirements of the above cited regulatory criteria. Factors often considered by CIS when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook*, (*Handbook*), reports that the industry requires a degree; whether an industry 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. Min. 1999) (quoting *Hird/Baker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991).

The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations. The duties of the proffered position are essentially those noted for chefs. In the *Occupational Outlook Handbook*, 2002-03, (*Handbook*) at 307, the Department Of Labor describes, in part, the duties of an Executive Chef as follows:

Executive chefs and head cooks coordinate the work of the kitchen staff and often direct the preparation of certain foods. They decide the size of servings, plan menus, and buy food supplies. Although the terms of chef and cook still are used interchangeably, chefs tend to be more highly skilled and better trained than most cooks. Due to their skillful preparation of traditional dishes and refreshing twists in creating new ones, many chefs have earned fame for both themselves and for the establishments where they work.

The duties associated with the proffered position are similar to those listed above. The *Handbook* further notes that to achieve the level of skill required of an executive chef, many years of training and experience are necessary. Though many chefs learn their craft through on the job training, formal training is becoming increasingly popular. Employers usually prefer training given by trade schools, vocational centers, colleges, professional associations, or trade unions. Postsecondary courses range from a few months to 2 years or more. *Id.* at 308. It is, therefore, apparent that a baccalaureate degree or its equivalent is not the minimum requirement for entry into the proffered position. The petitioner has failed to establish the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner has also failed to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). In support of this assertion, the petitioner states that completion of the Culinary Institute of America (CIA) degree program would qualify an individual to work as a culinarian, and that the position of culinarian requires expertise below that of the offered position. The petitioner then reasons that a bachelor's degree, or its equivalent, is a normal minimum industry wide requirement for the offered position. The petitioner's assertion is not persuasive. As previously noted in the *Handbook*, a bachelor's degree is clearly not a minimum requirement for entry into the proffered position, nor is it common to the industry. Executive chefs learn their trade from training, experience, and/or education. A bachelor's level education is not, however, normal or necessary for entry into the position. It should further be noted that the duties of the offered position are routine duties for chefs in the industry. Thus, the duties are not so complex or unique that they can be performed only by individuals with a degree. The petitioner does not assert that it has previously required a degree or its equivalent for the offered position. 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, and as previously noted, the duties of the offered position are routine in the industry. They are not so specialized or complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate level education. 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). The petitioner states that the existence of baccalaureate level degree programs and certifications for chefs indicates that the duties of the position are so specialized and complex that a degree is required. That is clearly not the case, as executive chefs work throughout the industry with less education than a bachelor's degree. Many avenues of training/experience at less than a baccalaureate level are available in the industry and qualify applicants for executive chef positions.

It should further be noted that the petitioner's reference to CIS approvals of unrelated H-1B chef petitions does not sustain the petitioner's burden of establishing H-1B qualification in the petition now before the AAO. This record of proceeding does not contain the entire record of proceeding in the petition referred to by counsel. In the absence of all of the corroborating evidence contained in that record of proceeding, the AAO is unable to determine whether the referenced approval was approved in error.

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, the AAO 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 approval was granted in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in the record of proceeding now before the AAO, however, the approval of the prior petition would have been erroneous. The AAO 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 of 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).

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.

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 and the appeal shall accordingly be dismissed.

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