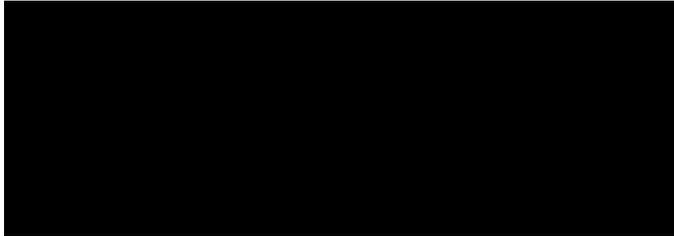


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FILE: EAC 04 030 53618 Office: VERMONT SERVICE CENTER Date: NOV 02 2005

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The acting director of the 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 be denied.

The petitioner is a Japanese restaurant, with 2 employees. It seeks to employ the beneficiary as a sushi special cook 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 she determined the proffered position was not a specialty occupation and the beneficiary was not qualified to perform the duties of a specialty occupation.

The record of proceeding before the AAO 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 additional documentation. The AAO reviewed the record in its entirety before reaching its decision.

The initial issue before the AAO is the determination of whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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 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 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 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act.

The petitioner states that it is seeking the beneficiary's services as a sushi special cook. Evidence of the beneficiary's duties includes: the Form I-129; the petitioner's October 20, 2003 letter of support; and counsel's February 7, 2004 response to the director's request for evidence, with a February 4, 2004 letter from the petitioner.

At the time of filing, the petitioner indicated that the proffered position would require the beneficiary to:

- Cook a variety of Japanese dishes including sushi;
- Oversee the ordering of food material, including fresh fish and other items;
- Design the menu; and
- Provide input on service-related issues.

In response to the director's request for evidence, the petitioner provided a specific description of the types of Japanese dishes that would be prepared by the beneficiary.

To make its determination whether the employment just described 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 or its equivalent is the normal minimum requirement for entry into the particular position; and 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 considered by the AAO when determining these criteria include: whether the 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; 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. Slattery*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO concurs with the petitioner's description of its proffered position as that of a cook. As discussed at page 365 of the 2004-2005 edition of the DOL *Handbook*, chefs and cooks:

[c]reate recipes and prepare meals

. . . .

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

Accordingly, the AAO turns to the *Handbook*, at pages 366-367, for its discussion of the requirements generally imposed on individuals seeking employment as cooks:

Executive chefs and head cooks who work in fine 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 that are 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.

People who have had courses in commercial food preparation may start in a cook or chef job without spending a lot of time in lower-skilled kitchen jobs. Their education may give them an advantage when looking for jobs in better restaurants. Some vocational programs in high schools may offer training, but 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

Based on the above discussion, the AAO concludes that individuals seeking employment as cooks or chefs are not required to have a baccalaureate degree, but may obtain work based on experience alone. Accordingly, the petitioner is unable to establish the proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

On appeal, counsel agrees that the *Handbook* does not establish a degree requirement for the employment of chefs and cooks. However, he contends that the years of training and experience the *Handbook* indicates are necessary to be an executive chef or cook in a fine restaurant should be considered to be the equivalent of a baccalaureate degree. While the AAO agrees that a proffered position may be established as a specialty

occupation on the basis of a degree equivalency, it finds the record to contain no evidence to support counsel's assertions in this regard, e.g., an expert opinion indicating the years of training and experience required to attain proficiency as a Japanese chef or cook are the equivalent of a baccalaureate or higher degree in food science. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof in these proceedings. The 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).

The AAO also notes counsel's reference to CIS' previous approval of an H-1B petition on behalf of an executive pastry chef. In response to the director's request for evidence, counsel contended that as CIS had found French cooking to qualify as a specialty occupation, it should provide the same consideration to Japanese cooking. However, the fact that CIS previously approved a petition for what appears to be a similar position is not a basis for approving the instant petition. Each petition filing is a separate proceeding with a separate record and CIS is limited to the information contained in that 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. Even if a director had approved a nonimmigrant petition on behalf of a previous beneficiary, the AAO would not be bound to follow that decision. *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 AAO now turns to a consideration of whether the proffered position may be established a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – a specific degree requirement is common to the industry in parallel positions among similar organizations or the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty. To establish the petitioner's degree requirement as the norm within its industry, counsel submits nine Internet job advertisements. However, these on-line announcements do not satisfy the first prong's requirements, as they do not come from organizations that are similar to the petitioner, a Japanese restaurant, and do not describe employment that can be identified as parallel to the proffered position. Instead, the advertisements come from a food service management firm, a catering business, a retirement community and six clubs of varying types. Further, they either do not describe the duties of the advertised position or offer descriptions that indicate the employment is not parallel to that proffered by the petitioner. The AAO also notes that of the nine advertisements, only one – the announcement for a research and development chef – imposes a baccalaureate degree in a field of study directly related to the position, as required for classification as a specialty occupation. Seven of the advertisements indicate a willingness to accept job candidates with associate's degrees or on the basis of experience. The remaining advertisement states the employer requires a college degree, but does not specify a particular field of study. As a result, the record does not establish the proffered position as a specialty occupation under the first prong of the second criterion.

Further, the AAO also concludes that the record before it does not establish that petitioner's position qualifies as a specialty occupation under the second prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) – the position is so complex or unique that it can be performed only by an individual with a degree. It finds no evidence that would support such a finding. Accordingly, the petitioner cannot establish its position as a specialty occupation under either prong of the second criterion.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and the nature of the specific 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.

To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In this case, the petitioner has submitted no evidence to establish that it previously required a degree or its equivalent for the proffered position, nor has it indicated it currently imposes such a requirement. Neither its October 20, 2003 letter of support or the February 4, 2004 letter it submitted in response to the director's request for evidence discuss a degree requirement with regard to the proffered position. Therefore, the record does not establish the proffered position as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion requires a petitioner to prove that the nature of the specific duties of its position is so specialized and complex that the knowledge required to perform those duties is usually associated with the attainment of a baccalaureate or higher degree. However, a review of the record does not establish that the beneficiary's duties are more specialized or complex than those normally performed by chefs or head cooks in other restaurants. Nor does the AAO find the proffered position to be an amalgam of jobs that would require the beneficiary to possess knowledge and skills beyond those required for cooking employment. As a result, the proffered position cannot be established as a specialty occupation on the basis of the exceptional specialization and complexity of its duties.

Therefore, for the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position meets any of the four alternative criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A) and cannot establish its proffered employment as a specialty occupation.

The AAO now turns to an assessment of whether an alien is qualified to perform the duties of a specialty occupation. In making this determination, CIS looks to the petitioner to establish that the beneficiary meets one of the requirements set forth at Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2) -- full state licensure to practice in the occupation, if such licensure is required; completion of a degree in the specific specialty; or experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Further discussion of discussion of how an alien qualifies to perform services in a specialty occupation is found at 8 C.F.R. § 214.2(h)(4)(iii)(C), and requires the individual to:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The beneficiary does not hold a U.S. baccalaureate degree or a foreign degree determined to be its equivalent. Nor does the proffered position require a license or certification. Accordingly, the petitioner must establish that the beneficiary's combined education, training and employment experience establish his eligibility to perform the duties of a specialty occupation under the fourth and final criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C).

For the purposes of 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), equivalence to a U.S. baccalaureate or higher degree shall mean the achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty, and shall be determined by one or more of the following requirements at 8 C.F.R. § 214.2(h)(4)(iii)(D):

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

The record contains no evidence that would establish the beneficiary's qualifications to perform the duties of a specialty occupation under any of the first four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(D). Accordingly, the AAO now turns to an evaluation of the beneficiary's background under the fifth criterion – a determination by CIS that the equivalent of a degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

When evaluating a beneficiary's qualifications under the fifth criterion, CIS considers three years of specialized training and/or work experience to be the equivalent of one year of college-level training. To establish equivalence to an advanced or master's degree, the beneficiary must have a baccalaureate degree followed by at least five years of experience in the specialty. The record must also establish that the beneficiary's training and/or work experience has included the theoretical and practical application of the specialized knowledge required by the specialty occupation, that this experience was gained while working with peers, supervisors, or subordinates who have degrees or the equivalent in the specialty occupation and that the beneficiary's expertise in the specialty has been recognized, as evidenced by one of the following: recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation; membership in a recognized foreign or U.S. association or society in the specialty occupation; published material by or about the alien in professional publications, trade journals, books or major newspapers; licensure or registration to practice the specialty in a foreign country; or achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

At the time of filing, the petitioner submitted copies of the beneficiary's Korean technical qualification license as a Japanese food cooking specialist, as well as affidavits from the beneficiary's previous employers attesting to his employment as a cook from April 1, 1999 to March 30, 2003. In response to the director's request for evidence, the petitioner also provided an additional affidavit covering the beneficiary's cooking employment between July 1993 and March 1999, and additional details regarding his employment between 1999 and 2003. The petitioner also submitted an evaluation of the beneficiary's training from the INA Institute of Culinary Arts (INA) in Philadelphia, which found that training to be the equivalent to the INA's one-year diploma program in professional cooking. The evaluation, completed by the INA director and president, also concluded that the beneficiary's work experience was equivalent to a third of the INA's second academic year.

On appeal, counsel asserts that the beneficiary's ten years of cooking experience, when combined with his occupational training, are the equivalent of a U.S. baccalaureate degree. He also contends that the beneficiary's qualifications to perform the proffered position are indicated by his licensing as a Japanese cook by the Korean government, as prior to licensing he was required to pass a written examination on food preparation and health issues, as well as a practical examination. The AAO does not agree. The evidence submitted by the petitioner to establish the beneficiary's training and employment is insufficient to establish the beneficiary as holding the equivalent of baccalaureate degree or its equivalent in a field of study related to the proffered position.

Although the INA director's evaluation is relevant to these proceedings, it does not establish an academic equivalency for the beneficiary's training at the Dong- A cooking institute and his work experience. The AAO accepts evaluations of education from credentials evaluation services that specialize in evaluating foreign educational credentials and academic equivalencies for training and employment experience from officials who have the authority to grant college-level for training and/or experience at accredited colleges or universities with programs for granting such credit. The record does not establish the INA director in either capacity, nor does it provide independent documentation of his expertise or authority to evaluate the beneficiary's training and experience. Accordingly, the AAO will discount his evaluation. The AAO also notes that the record contains no evidence that allows for a comparison of INA culinary degrees and those awarded by two and four-year academic programs.

The affidavits attesting to the beneficiary's employment do not satisfy the requirements of the fifth criterion. While they confirm the length of his employment, they do not provide the detail necessary to determine whether the beneficiary's work experience has included the theoretical and practical application of the specialized knowledge or that this experience was gained while working with peers, supervisors, or subordinates who hold baccalaureate or higher degrees, or their equivalent. Nor does the record include the documentation necessary to determine whether the beneficiary's expertise in food preparation has been formally recognized by recognized authorities, professional associations, or the media, another requirement imposed by the fifth criterion.

Although the AAO takes note of counsel's comments regarding the petitioner's Korean cooking license, it finds no independent evidence in the record to establish the significance of this document in terms of the beneficiary's training and experience. Without supporting documentation, the AAO will not accept counsel's evaluation of the beneficiary's license in Japanese cooking. The 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).

Therefore, the petitioner has not established that the beneficiary has acquired the equivalent of a baccalaureate degree in a field related to food preparation through a combination of education, specialized training, and/or work experience, as required to satisfy the requirements of the fifth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(D).

For reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary is qualified to perform the duties of a specialty occupation pursuant to the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(C). Accordingly, the AAO will 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 met that burden.

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