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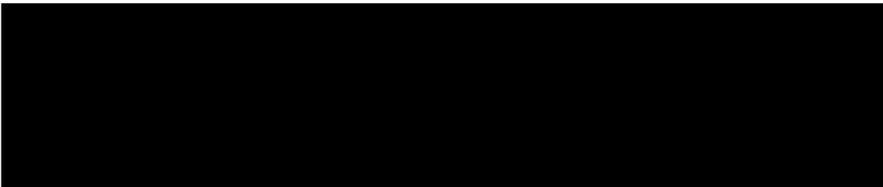


FILE: SRC 05 145 52112 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

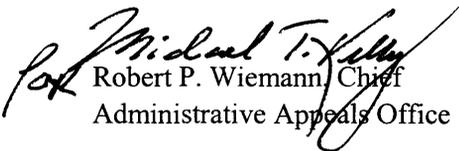
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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, 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 Japanese restaurant and grocery that seeks to employ the beneficiary as a Japanese gourmet 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 based on his determination that the record failed to establish the proffered position as 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; (4) the director's denial letter; and (5) Form I-290B, with counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the 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 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:

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) consistently 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 seeks the beneficiary’s services as a Japanese gourmet chef. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s April 12, 2005 cover letter in support of the petition; and counsel’s July 8, 2005 response to the director’s request for evidence. As stated by the petitioner, the proposed duties are as follows:

1. Create recipes and artistic designs of sushi and other Japanese cuisine in a variety of aesthetic ways and supervise all food service operation[s];
2. Hire and fire kitchen cooks and other staff;
3. Coordinate the work of the kitchen staff and direct the preparation of meals;
4. Determine serving sizes, plan menus and order food supplies;
5. Oversee kitchen operations to ensure uniform quality and presentation of meals; and

6. Measure, mix, and cook sauces and ingredients according to recipes, using a variety of pots, pans, cutlery, and other equipment, including ovens, broilers, grills, slicers, grinders, and blenders, etc.

In her denial, the director found the proposed chef-related duties do not require a bachelor's degree. Citing to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states, in part, that the proffered position, although similar to a food service manager, is far more complex than the *Handbook's* description of the position, as it requires authentic Japanese cooking techniques as well as computer and management skills. Counsel also states that the AAO has previously approved a petition for an executive pastry chef and, therefore, recognizes the position of chef as a specialty occupation. He states further that, as a result of filing a motion to reconsider, the Texas Service Center recently approved a petition on behalf of an executive Japanese chef whose duties are very similar to the proposed duties of the proffered position. Counsel states that the beneficiary's duties entail: supervising the whole kitchen staff including overseeing the activities of two chefs; planning menus; developing recipes; estimating food consumption; purchasing or requisitioning ingredients and supplies; analyzing recipes to determine costs and assigning prices; observing and directing methods of food preparation; hiring, firing, and training Japanese cooks and assistants; maintaining time and payroll records; allocating the budget; and establishing and enforcing nutrition and sanitation standards. Counsel also states that, like the position that was approved by the Texas Service Center, the proffered position requires a Professional Chef Certificate for Japanese cuisine. Counsel states further that the petitioner has previously hired several chefs with a bachelor's degree.

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 turns first 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; 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 *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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with counsel that the proffered position is a specialty

occupation. No evidence in the *Handbook*, 2006-2007 edition, under the category of Chefs, Cooks, and Food Preparation Workers, indicates that a baccalaureate or higher degree, or its equivalent, is required for an executive chef job.

Regarding parallel positions in the petitioner's industry, counsel asserts that CIS has already determined that the proffered position is a specialty occupation since CIS has approved other, similar petitions in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to CIS in the prior cases. In the absence of all of the corroborating evidence contained in that record of proceeding, the information submitted by counsel is not sufficient to enable the AAO to determine whether the positions offered in the prior cases were similar to the position in the instant petition.

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 records in their 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).

The record also does not include any evidence from individuals, firms, or professional associations regarding an industry standard.

The record does not demonstrate that the proffered position is more complex than or unique from the range of chef positions for which the *Handbook* indicates no requirement for at least a bachelor's degree in a specific specialty. The duties that comprise the proffered position are described in generalized terms (such as "creat[ing] recipes and artistic designs," "hir[ing] and fir[ing]," "coordinat[ing]," and "oversee[ing]") that do not indicate the necessity for a body of highly specialized knowledge attained by at least a baccalaureate degree level of coursework in a specific specialty.

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. On appeal, counsel asserts that the petitioner has previously hired several chefs with a bachelor's degree. The record contains copies of a Bachelor of Arts degree in Computer and Information Systems for [REDACTED], and a Bachelor of Science degree in Electronic Media and Film for [REDACTED]. This information does not demonstrate that a degree in a specific specialty is required. It is also noted that the record contains a copy of a third degree that is written in Japanese. Because the petitioner failed to submit a certified translation of the document, however, the AAO cannot determine whether the evidence supports the petitioner's claim. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. Moreover, the record contains no evidence

that these individuals were employed by the petitioner in the position of chef. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In this regard, the petitioner fails to establish that the proffered position entails the theoretical and practical application of a body of highly specialized knowledge attained by a bachelor's degree, or the equivalent, in a specific specialty.

Further, the AAO notes that, regardless of any degree requirement imposed by the petitioner, the evidence of record does not substantiate a need for at least a bachelor's degree in a specific specialty. CIS, however, must examine the ultimate employment of the alien and determine whether the position qualifies as a specialty occupation, regardless of the petitioner's past hiring practices. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or 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. To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

Counsel states, on appeal, that the beneficiary's duties entail: supervising the whole kitchen staff including overseeing the activities of two chefs; planning menus; developing recipes; estimating food consumption; purchasing or requisitioning ingredients and supplies; analyzing recipes to determine costs and assigning prices; observing and directing methods of food preparation; hiring, firing, and training Japanese cooks and assistants; maintaining time and payroll records; allocating the budget; and establishing and enforcing nutrition and sanitation standards. Counsel also states that the proffered position, although similar to a food service manager, is far more complex than the *Handbook's* description of the position, as it requires authentic Japanese cooking techniques as well as computer and management skills. Noted is counsel's assertion on appeal that the proffered position requires a Professional Chef Certificate for Japanese cuisine. The information in the record about the proposed duties does not establish that they exceed in scope, specialization, or complexity those usually performed by chefs, an occupational category for which the *Handbook* indicates no requirement for or usual association with a baccalaureate or higher degree in a specific specialty. Also, in regard to the proposed duties that relate specifically to computer and management skills, the petitioner has not demonstrated that these activities elevate the complexity of the proffered position to require a bachelor's degree in a specific specialty. As indicated earlier in this decision, the petitioner's generalized descriptions of the proposed duties do not develop the duties with sufficient specificity to establish a requirement for the level of knowledge requisite for this criterion.

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 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.

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.