U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: APR 0 1 2013 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]

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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The matter will be remanded for further consideration and entry of a new decision.

On the Form I-129 petition, the petitioner claims to be engaged in the manufacture and marketing of food products. It seeks to employ the beneficiary in a position it designates as a food scientist. Accordingly, 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, determining that the record did not establish that the proffered position is a specialty occupation. On appeal, counsel for the petitioner asserts that the proffered position is a specialty occupation requiring the theoretical and practical application of a body of highly specialized knowledge, namely food science, and at least the attainment of a bachelor's degree or its equivalent in the relevant field.

The record of proceeding before the AAO contains: (1) the Form I-129 filed on November 4, 2011 and supporting documentation; (2) the director's November 18, 2011 request for evidence (RFE); (3) the petitioner's February 1, 2011 response to the director's RFE; (4) the director's February 10, 2011 denial letter; and (5) Form I-290B and counsel's brief in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

Upon review, the evidence presented in this record of proceeding establishes that the duties of the particular position proffered here are so specialized and complex relative to other general food scientists that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the position. *See* 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*). The petitioner has also established that this particular position otherwise meets the requirements of a specialty occupation as that term is defined by section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). The petitioner has therefore established that the position proffered here qualifies for classification as a specialty occupation. Accordingly, the director's decision to deny the petition on this basis will be withdrawn.

The petition may not be approved, however, because the petitioner has failed to establish that the beneficiary is qualified to perform the duties of a food scientist. Although not discussed in detail, this ground of ineligibility was noted by the director, who found that the petitioner failed to submit an evaluation of education and experience that complied with the regulations. For the reasons set forth below, the AAO concurs with this finding of the director.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

(*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 petitioner is seeking the beneficiary's services as a food scientist. The record contains four evaluations of the beneficiary's education and experience, each of which equate the beneficiary's combined academics and experience to a U.S. bachelor's degree in food science: (1) letter from who holds a bachelor's degree in dietetics and a master's degree in food and nutrition; (2) evaluation of education, training and experience from of the (3) expert opinion evaluation from Ph.D., Professor and Department Chair of the Department of Decision, Operations, and Information Technologies at the ; and (4) letter from Dean of the .

Upon review, the record reveals that the petitioner has failed to establish that the beneficiary possesses the equivalent of a U.S. bachelor's degree in food science or another directly related degree.

The beneficiary holds an associate of applied science degree in culinary arts from . As the beneficiary does not hold a U.S. baccalaureate degree in a specific specialty or a foreign degree determined to be equivalent to a U.S. baccalaureate degree required by the specialty occupation and as the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(c)(*3*) is not applicable in this matter, the petitioner must demonstrate that the beneficiary meets the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*).

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating the beneficiary's credentials to a United States baccalaureate or higher degree shall be determined by one or more of the following:

(*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; or

(*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.

Although the submitted letters, expert opinion, and evaluation described above state that the beneficiary's education and work experience are equivalent to a U.S. bachelor's degree in food science offered at accredited institutions of higher education, these documents satisfy none of the criteria under 8 C.F.R. § 214.2(h)(4)(iii)(D). Regarding the evaluation by the AAO notes that no evidence was submitted establishing the evaluator as 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, as required under 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*). For example, no documentation was submitted from the to establish that has the authority to grant credit for training and/or work experience, which is one of the requirements under this regulatory provision. Therefore, the petitioner failed to submit an evaluation that meets the standard of 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*). Likewise, no evidence establishes 8 C.F.R. § 214.2(h)(4)(iii)(D)(*2*).

According to 8 C.F.R. § 214.2(h)(4)(iii)(D)(*3*), an educational evaluation from a credentials evaluation service that specializes in evaluating foreign educational credentials, such as , can be used to equate the beneficiary's educational credentials to a U.S. baccalaureate degree. But the evaluator cannot consider work experience in the evaluation. Here, since evaluation

includes work experience it does not persuasively establish the beneficiary's qualifications for the proposed position. Finally, the letters from and lack sufficient detail about the authors and their qualifications, and therefore do not satisfy any of the regulatory requirements discussed herein. No evidence establishes the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(*4*).

When USCIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

> *(i)* Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation[1];
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> *(ii)* Membership in a recognized foreign or United States association or society in the specialty occupation;
>
> *(iii)* Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
>
> *(iv)* Licensure or registration to practice the specialty occupation in a foreign country; or
>
> *(v)* Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

A combination of the beneficiary's education and work experience fails to establish the equivalent of a U.S. bachelor's degree in food science or another directly related field. The record contains the beneficiary's resume, transcript, and diploma certificate. The record also contains a confirmation email demonstrating her membership in the , and letters from two prior employers, namely, and This evidence, however, fails to establish that the beneficiary's training and/or work experience included the theoretical and practical application of specialized knowledge in food science which, as determined above, is required to perform the duties of the proffered position; that the alien's experience was gained while working with

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[1] *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty.

Although the letters from her prior employers are submitted in support of her qualifications, these letters merely restate the duties performed by the beneficiary from year to year. There is no assertion that the beneficiary gained said experience working with peers, supervisors or subordinates who had degrees in food science nor that her experience included the theoretical and practical application of specialized knowledge in food science. Moreover, her membership in is simply a professional membership open to "anyone who is active in any aspect of the food profession," according to website.[2] For these reasons, the petitioner fails to establish the beneficiary's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

Finally, the petition may also not be approved due to the petitioner's failure to provide a Labor Condition Application (LCA) that corresponds to the petition. More specifically, it is noted that the LCA provided in support of the instant petition lists a Level I prevailing wage level for a food scientist in Utah. This indicates that the LCA, which is certified for an entry-level position, is at odds with the claims made by the petitioner and its counsel that the duties of the proffered position are "complex and unique" as well as "specialized and complex" as compared to food scientist positions in general and that the position also requires, in part, work experience to perform its responsibilities.

As concluded above, however, the proffered position was found to be a specialty occupation on the very basis that its duties are "specialized and complex" relative to other food scientist positions. Referencing the U.S. Department of Labor (DOL), Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, a position involving duties assigned to those experienced employees who have a sound understanding of the occupation or involving complex duties relative to other general positions within the same occupation would appear to indicate at least a Level III wage level ("experienced") or more likely a Level IV position ("fully competent"). *See* U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), *available at* http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

Given that the LCA submitted in support of the petition is for a Level I, entry level wage that is not in accord with the proffered higher-level job duties, it must therefore be concluded that the LCA does not correspond to the petition. In other words, the petition may not be approved based on the record of proceeding as currently constituted due to the petitioner's failure to submit an LCA that corresponds to the Level III or IV position offered to the beneficiary. Alternatively, if the petitioner were to now claim that the LCA was certified for the proper wage level, it would raise credibility issues with regard to its claims about the complexity of the proffered position and likely mean that the director's initial conclusion that the proffered position is not a specialty occupation was correct.

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[2] *See* http://www (last visited March 26, 2013).

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

> For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that corresponds to the claimed Level III or IV position, and the petition may not be approved for this additional reason.

As the director's decision did not specifically address the issue of whether the beneficiary was qualified to perform the duties of a specialty occupation position and did not address the issue of whether the submitted LCA corresponds to the petition, the petition will be remanded for a determination on these two issues and a new decision to either grant or deny the petition. The director may request such additional evidence as is deemed necessary in rendering a decision.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The director's decision dated February 10, 2011 shall be withdrawn and the record remanded for the entry of a new decision consistent with this decision.