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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: MAY 02 2014 OFFICE: CALIFORNIA SERVICE CENTER FILE:

IN RE: Applicant:

APPLICATION: Application for Change of Status and Extension of Stay as an E-2 Nonimmigrant Treaty Investor Pursuant to 8 C.F.R. § 214.2(e)(20) and (21).

IN BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

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.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center denied this nonimmigrant visa application and dismissed the applicant's subsequent motion to reopen and reconsider.[1] The director has since reopened the matter *sua sponte* and issued a new decision denying the application. That decision has been certified to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed and the application will be denied.

The treaty enterprise (also referred to herein as "the employer") is a California corporation that is majority owned by an E-2 nonimmigrant treaty trader. It filed this application to change the applicant's nonimmigrant status to that of an essential employee of a treaty investor pursuant to section 101(a)(15)(E)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(E)(ii) and 8 C.F.R. § 214.2(e)(3). The applicant and the principal E-2 nonimmigrant treaty investor are both nationals of the Republic of Korea. The treaty enterprise seeks to employ the applicant as the head chef of its Korean restaurant.

The director denied the application, finding that the record lacked evidence which would allow U.S. Citizenship and Immigration Services (USCIS) to conclude that the applicant possesses special qualifications that make her services essential to the efficient operation of the enterprise that seeks to employ her.

Recognizing that the application involved a complex or novel issue of law, the director certified the decision to the AAO for review. 8 C.F.R. § 103.4(a).

I. THE LAW

Section 101(a)(15)(E)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(E)(ii) defines a treaty investor as:

> an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such alien if accompanying or following to join him; . . . (ii) solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital . . . .

The regulation at 8 C.F.R. § 214.2(e)(3) states the following, in pertinent part, with regard to the employee of a treaty investor:

> . . . an alien employee of a treaty investor, if otherwise admissible, may be classified as

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[1] Unlike many other employment-based nonimmigrant visa classifications, approval of an E-2 nonimmigrant visa is based on the filing of an application, not a petition. *See* 8 C.F.R. 214.2(e); *see also* 62 Fed. Reg. 48138 (Sept. 12, 1997). Therefore, for purposes of this decision, the alien will be referred to as an "applicant."

> E-2 if the employee is in or is coming to the United States to engage in duties of an executive or supervisory character, or, if employed in a lesser capacity, the employee has special qualifications that make the alien's services essential to the efficient operation of the enterprise. The employee must have the same nationality as the principal alien employer. . . .

Additionally, the regulation at 8 C.F.R. § 214.2(e)(18) defines the term "special qualifications" as those skills and/or aptitudes that an employee in a lesser capacity brings to a position or role that are essential to the successful or efficient operation of the treaty enterprise. The regulation further states that in order to determine whether the skills possessed by the alien are essential to the efficient operation of the employing treaty enterprise, a Service officer must consider the following factors, where applicable:

> (i) The degree of proven expertise of the alien in the area of operations involved; whether others possess the applicant's specific skill or aptitude; the length of the applicant's experience and/or training with the treaty enterprise; the period of training or other experience necessary to perform effectively the projected duties; the relationship of the skill or knowledge to the enterprise's specific processes or applications, and the salary the special qualifications can command; that knowledge of a foreign language and culture does not, by itself, meet the special qualifications requirement, and;
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> (ii) Whether the skills and qualifications are readily available in the United States. In all cases, in determining whether the applicant possesses special qualifications which are essential to the treaty enterprise, a Service officer must take into account all the particular facts presented. . . .

II. FACTS AND PROCEDURAL HISTORY

The treaty enterprise is a California corporation that operates as a Korean restaurant under the name [redacted]. In a letter dated May 4, 2010, which accompanied the initial application, counsel stated that the treaty enterprise intends to employ the applicant as the head chef. Counsel briefly described the job duties of the proposed position and further stated that the position of head chef is essential to the U.S. entity's operation because the head chef would be charged with hiring and overseeing subordinate cooks and chefs, training staff in the preparation of authentic Korean cuisine, and generally managing the growing customer base. Counsel claimed that the alien applicant meets the criteria of the proffered position as a result of her prior employment as head chef of a Korean restaurant in Japan, where she was employed for 12 years and was charged with "preparing authentic Korean food, training of staff, and managing the kitchen."

The initial evidence also included a list of ten responsibilities assigned to the petitioner's head chef position and an employment certificate from the applicant's foreign employer. According to the employment certificate, the applicant was employed as head chef of [redacted] in Osaka, Japan, from April 1, 1997 until October 1, 2009, where her duties were to "prepare and cook all

menu and train new employees how to cook."

The record also shows that the director issued two nearly identical requests for evidence (RFEs) which addressed the lack of evidence describing the applicant's degree of expertise in the area of operations that the proposed position requires and establishing that the applicant's experience in fact meets the requirements of that position. In both instances, the director requested a more detailed description of the applicant's duties; an explanation and evidence of the applicant's degree of proven expertise in her area and whether others possess the applicant's specific skill or aptitude to perform the proposed duties; a description of the applicant's experience or training with the treaty enterprise, if applicable; and a description and evidence to establish the period of training or other experience required to perform the proposed duties. The director further requested evidence from sources such as the chamber of commerce, state employment sources, labor organizations, or trade sources to establish that the applicant's skills and qualifications are not readily available in the United States. In the second RFE, the director also requested evidence to support the treaty enterprise owner's statement that his business had made an effort to recruit employees for the offered position.

In response to the first RFE, owner and president of the treaty enterprise, submitted a statement dated June 4, 2010 discussing the applicant's prior experience as a Korean chef during her employment abroad and claiming that such prior employment would enable her to carry out her assigned duties as head chef of the treaty enterprise. Mr. emphasized the applicant's experience cooking with a yakiniku grill and stated:

> As we use yakiniku grills in our restaurant, [the applicant's] experience as a Korean Chef creating authentic Korean dishes on authentic yakiniku grills using specialized techniques honed in Japan make her uniquely qualified for our position as head chef. We have found no other locally qualified chef with her unique experience mastering the authentic Korean cuisine coupled with the use of authentic yakiniku grills. The qualifications for this position require years of experience as a head chef in the proper environment, the likes of which [the applicant] possesses.

The response also included a letter dated June 18, 2010 from president of the of Mr. stated that the members of his organization who own Korean restaurants employ chefs who have "years of experience cooking authentic dishes overseas from Korea," or recruit chefs from ethnic Korean restaurants in Japan who have experience in the "emerging trend of Korean restaurants implementing Japanese grilling techniques." Mr. states that such experience is "rarely found locally," and that chefs from overseas often market themselves to local restaurant owners in southern California. He concludes that "it is in our experience working with Korean restaurant establishments that their chefs have years of experience developing their expertise cooking Korean dishes."

In addition, the applicant submitted two letters from other restaurant owners/managers in In a letter dated June 10, 2010, of stated that his restaurant's hiring process "is based on having the required experience cooking authentic Korean and/or Japanese dishes in an authentic

overseas environment." owner of stated in a letter dated June 18, 2010 that "it has been our policy that our head chef must have had years of training in preparing Korean cuisines" and that such years "are cultivated in overseas authentic Korean restaurants" either in Korea or in Japan. Ms. stated that "these kinds of qualifications are rarely found in local applicants and are highly sought after to the point where sometimes the same chef is recruited by several Korean competitors.

Lastly, the first RFE response included an expanded description of the ten responsibilities the applicant would perform as head chef and the percentage of time to be allocated to each area of responsibility.

The response to the second RFE included an updated letter from of the of and five additional letters from owners and managers of local Korean restaurants in the area. Mr. attests that "Korean restaurants require their head chefs to have foreign culinary experience" and that "[c]andidates who meet this qualification are not readily available in the local market."

The five new letters were similar in content to the letters provided by Mr. and Ms. In a letter dated May 9, 2012, restaurant owner stated that the key element of an authentic Korean restaurant is a chef who trained in Korea. Three of the other restaurant owners in statements dated May 14, 2012, May 15, 2012, and June 1, 2012, respectively, emphasized the importance of foreign experience for the position of head chef in a Korean restaurant. The fifth letter, dated May 16, 2012, generally stated that "it is essential to maintain a highly trained and experienced kitchen."

After reviewing the second RFE response, the director affirmed the denial of the application on Service motion and certified her decision to the AAO. The director determined that the evidence submitted was insufficient to establish that the applicant has special qualifications that make her services essential to the efficient operation of the treaty enterprise. The director acknowledged the letters from restaurants and the attesting to the scarcity of the applicant's skills, but emphasized that the letters were not supported by documentary evidence to substantiate their claims, and did not include information regarding the source of information provided in their letters. The director further noted that the treaty enterprise was asked to corroborate Mr. 's statement that he made an effort to recruit employees for the position prior to seeking to hire the applicant, but it failed to respond to this request.

III. ANALYSIS

The petitioner did not claim nor does the evidence of record support a finding that the beneficiary would engage in duties of an executive or supervisory character. *See* 8 C.F.R. § 214.2(e)(17) (defining executive and supervisory character and explaining in part that (1) such a position must be principally and primarily executive or supervisory and (2) primarily supervisory positions do not generally involve the direct supervision of low-level employees and that routine work usually performed by a staff employee may only be of an incidental nature). Therefore, the remaining issue to be addressed in this proceeding is

whether the treaty enterprise that seeks to hire the applicant has established that she has special qualifications that will make her services essential to the prospective employer.

Although section 101(a)(15)(E) of the Act is silent on whether employees of treaty investors and treaty enterprises may be admitted in E nonimmigrant visa classification, USCIS has historically allowed for the admission of non-executive or non-supervisory employees who possess special qualifications which make their skills essential, i.e., indispensable to the success of the investment, thereby indicating that the alien employee's essentiality to the enterprise is the foremost consideration in the context of E nonimmigrant visa classification. The regulations were amended in 1997 for the purpose of codifying existing policy guidelines related to the E nonimmigrant treaty trader and treaty investor visa classification. 62 Fed. Reg. 48138, 48144 (Sept. 12, 1997) ("1997 Final Rule"). Therefore it is instructive to look to the commentary accompanying the 1997 Final Rule for clarification of the regulations pertaining to alien employees with special qualifications that make their services essential to the efficient operation of the enterprise.

The agency clearly intended that there would be no bright-line test for determining whether an alien employee is essential to an investment enterprise. *Id.* On the contrary, in determining whether an employee is essential to an organization, USCIS will consider a variety of factors, including the uniqueness of a special skill which, while not required, may have a positive impact in making the determination. *Id.* In fact, there is no set group of factors that determine what constitutes an essential employee. Rather, essentiality must be determined based on the specific facts of each case, taking into account an alien's skills, which may include knowledge of a foreign language and culture, knowledge of conditions in the foreign country that are unique to his or her nationality, and previous employment with the enterprise in question, where applicable. *Id.*

USCIS must also consider whether the needed skills are "commonplace" or readily available among United States workers who are able to perform the duties in question, thus indicating that the alien applicant who possesses these skills may not be essential or indispensable to the enterprise. *Id.*

A. Degree of Proven Expertise

The regulation at 8 C.F.R. § 214.2(e)(18)(i) requires consideration of: the degree of proven expertise of the alien in the area of operations involved; consideration of whether others possess the applicant's specific skill or aptitude, the length of the applicant's experience and/or training with the treaty enterprise; the period of training or other experience necessary to perform the projected duties effectively; the relationship of the skill or knowledge to the enterprise's specific processes or applications; and the salary the special qualifications can command. Knowledge of a foreign language and culture does not, by itself, meet the special qualifications requirement.

Here, the treaty enterprise provided minimal evidence to establish the applicant's degree of proven expertise in the field of Korean cuisine. The only evidence of the alien's prior experience consisted of an employment certification document and its English language translation, which contained the name of the employing entity in Japan, the dates of employment, and a brief statement indicating that during her employment abroad the alien was required to "[p]repare and cook all menu and train new employees how

to cook." Although the employer's name was translated to [redacted] the letter itself contains no information regarding the applicant's specific culinary skills, expertise in specific cooking styles or techniques, or the restaurant's menu. As the applicant's claimed expertise in yakiniku grilling techniques is central to its claim that the applicant possesses special qualifications, the lack of specific information and documentation regarding her previous training and experience in the culinary field presents a significant evidentiary deficiency.

Moreover, the director specifically requested in both RFEs that the treaty enterprise "explain and provide evidence to establish the applicant's degree of proven expertise in the area of operations that he or she will be involved." The treaty enterprise responded to both requests with the same basic employment letter from the applicant's prior employer in Japan, and its own brief and unsupported statements regarding the applicant's skills. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the application. 8 C.F.R. § 103.2(b)(14). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Therefore, the treaty enterprise's unsupported assertions that the applicant possesses "unique abilities" are insufficient.

For these reasons, the evidence submitted fails to establish the applicant's degree of proven expertise in Korean cuisine. Further, due to the lack of any specific information or documentation regarding the applicant's skills and experience, the record does not establish whether others possess the applicant's specific skill or aptitude to perform the contemplated duties. That is, the treaty enterprise has not submitted evidence that would differentiate the applicant from any other chef in her field.

The applicant has no prior training or experience with the treaty enterprise that could be weighed positively. Further, the record contains no specific information or evidence to establish the period of training or other experience necessary to effectively perform the projected duties, other than Mr. [redacted]'s vague statement that "the qualifications for this position require years of experience as a head chef in the proper environment." Finally, the treaty enterprise has not established whether the job requires skills or knowledge that are specific to the enterprise's specific processes or applications. It attempts to distinguish itself from other Korean restaurants by emphasizing its use of the yakiniku grill, but has not provided evidence that this cooking method is in fact uncommon in its culinary field.

Overall, the treaty enterprise has submitted minimal evidence for consideration pursuant to 8 C.F.R. § 214.2(e)(18)(i). While the applicant may have knowledge of a foreign language and culture based on her nationality, the record lacks evidence that address the depth of the alien's experience with the type of Korean cuisine she would be expected to prepare in her proposed position, information regarding her specific skills such that they could be compared to others, and evidence regarding the amount and type of training and experience actually required to perform the anticipated head chef duties.

B. Availability of Required Skills and Qualifications in the United States

The regulation at 8 C.F.R. § 214.2(e)(18)(ii) requires consideration of whether the applicant's skills and

qualifications are readily available in the United States. Such consideration contributes to the overall determination of whether an applicant possesses special qualifications that make her services essential to the operation of the enterprise.

The owner of the treaty enterprise stated in his letter dated June 4, 2010 that he has "found no other locally qualified chef with [the applicant's] unique experience mastering the authentic Korean cuisine coupled with the use of authentic yakiniku grills." Therefore, the director requested evidence of the treaty enterprise's recruitment efforts, such as copies of job announcements. While this classification does not require a labor market test certified by the U.S. Department of Labor, the director's request that the treaty enterprise corroborate its claims with evidence was reasonable and relevant. The treaty enterprise did not acknowledge this request and instead relies on letters from its local [redacted] and other Korean restaurant owners.

The submitted letters support a conclusion that there is competition among [redacted]-area Korean restaurant owners to hire from a pool of experienced and reputable head chefs with overseas training and experience. For example, [redacted], manager of [redacted] Inc. stated that "[it] is very hard to find a head chef in the local area. All the best head chefs are already hired by our competitors and the ones who decide to move positions already have done so with the intent or contract to go to another kitchen." Mr. [redacted] also states that "if there is a qualified local chef with a good reputation, that chef is already employed," and observes that "even in the case where an authentic Korean restaurant closes down, other restaurants would not want to hire their chefs who do have foreign experience because they came from an unsuccessful restaurant." While all of the restaurant owners indicated that they hired head chefs with overseas training and experience, none of them claimed to have actually recruited their chefs from outside the United States, and only one restaurant manager, Ms. [redacted] indicates that direct recruitment of overseas chefs is a normal practice in the field.

This evidence does not support a conclusion that the skills and qualifications needed for the treaty enterprise's head chef position are not readily available in the United States. The submitted evidence is focused instead on whether desirable Korean head chef candidates are readily available in the [redacted] metropolitan area.

In administrative immigration proceedings, the applicant must prove by a preponderance of evidence that he or she is eligible for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). In evaluating the evidence, eligibility is to be determined not by the quantity of evidence alone but by its quality. *Id.* The director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. Here, the treaty enterprise submitted insufficient relevant evidence for consideration pursuant to 8 C.F.R. § 214.2(e)(18)(i) and (ii) and therefore fell short of meeting its burden of proof in this proceeding.

We do not doubt that the treaty enterprise requires an individual with experience in authentic Korean cuisine and that a head chef position is likely required for most restaurant operations. The evidence as a whole, however, is insufficient to meet the employer's burden to establish that the alien applicant

possesses special qualifications that make her services essential to the efficient operation of the enterprise as defined at 8 C.F.R. § 214.2(e)(18). Accordingly, the director's decision dated June 29, 2012 will be affirmed and the application will be denied.

IV. CONCLUSION

In visa proceedings, the burden of proving eligibility for the benefit sought remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the application must be denied.

ORDER: The director's decision is affirmed. The application is denied.