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**U.S. Citizenship
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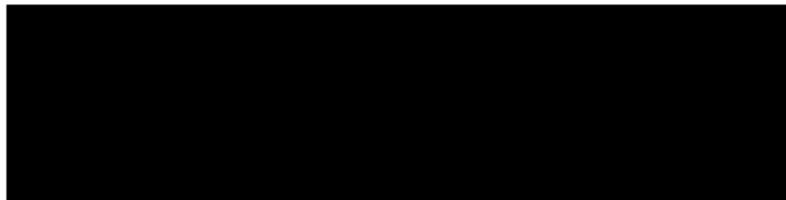
DATE: **OCT 03 2019** Office: CALIFORNIA SERVICE CENTER FILE: 

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:

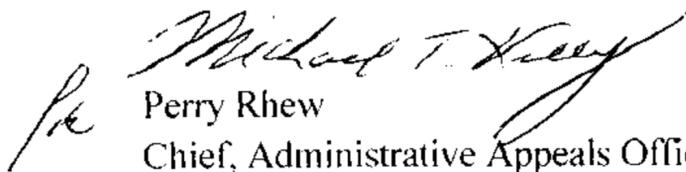


INSTRUCTIONS:

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew
Chief, 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.

On the Form I-129 visa petition the petitioner stated that it has eight employees and is a "Restaurant specialized in Peruvian gastronomy." To continue to employ the beneficiary in what it designates as a chef position for the one-year period from February 2, 2009 to February 1, 2010, the petitioner endeavors to classify him 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, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director's basis for denial was erroneous, and contended that the petitioner satisfied all evidentiary requirements. In support of these contentions, counsel submitted a brief and additional evidence.

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief and attached exhibits in support of the appeal.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would be employing the beneficiary in a specialty occupation position.

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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which (1) 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 (2) 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 also 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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in a particular position meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently 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. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry

requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

With the visa petition, the petitioner's owner submitted a letter, dated January 2, 2009. In that letter, the petitioner's owner stated:

[The duties of the proffered position] include[] creating, selecting, and developing new recipes, applying personal knowledge and experience in the Peruvian gastronomy. The Head Chef has the independence to restructure the menu, supervise, coordinate, and participate in cooking activities of kitchen personnel. He presents menus for special events, does the ordering and purchasing, and is in charge of vendor relationships. He is responsible that quality and quantity meet the established standards and specification, estimates food consumption, monitors over production of food to minimize waste. He is in control of stock inventories and kitchen equipment and budget determinations. He participates in the staff appraisal process to identify training issues and personnel development.

[Verbatim from the original.]

Because the evidence did not demonstrate that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty, and therefore qualifies as a specialty occupation, the service center, on March 10, 2009, issued an RFE in this matter. The service center requested, *inter alia*, that the petitioner explain why the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty.

In a letter, dated April 20, 2009, submitted in response to the RFE, the petitioner's owner provided a longer description of the duties of the proffered position. The amended duties include maximizing productivity, maintaining hygiene, amending the menu, and resolving problems. The petitioner's owner also stated that the proffered position requires creativity, a sensitive palate, and a well-developed sense of smell. The petitioner's owner did not explain, however, how any of those requirements are related to the requirement of a minimum of a bachelor's degree or the equivalent in a specific specialty.

The director denied the petition on May 30, 2009 finding, as was noted above, that the petitioner had failed to demonstrate that it would employ the beneficiary in a specialty occupation position.

On appeal, counsel provided a document that contains a description of ceviche and a basic recipe, as well as an English translation of that document.

On the Form I-290B appeal form, counsel asserted, "[The director] erred because [the decision] limited its focus on whether a baccalaureate or higher degree is necessary." The AAO notes that such an inquiry in this matter is not in error but is, rather, a critical determination upon which a visa petition for a specialty occupation worker necessarily hinges. Pursuant to section 214(i)(1) of the

Act, set out above, the petitioner must demonstrate that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty; if the petitioner cannot, the petition must be denied.

Counsel also cited the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, apparently as authority for the proposition that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty. The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ The *Handbook* addresses chef positions in the section entitled Chefs, Head Cooks, and Food Preparation and Serving Supervisors. It describes the duties of that group of occupations as follows:

Chefs, head cooks, and food preparation and serving supervisors oversee the daily food service operation of a restaurant or other food service establishment. *Chefs and head cooks* are usually responsible for directing cooks in the kitchen, dealing with food-related concerns, and providing leadership. They are also the most skilled cooks in the kitchen and use their creativity and knowledge of food to develop and prepare recipes.

It further states:

All of these workers—chefs, head cooks, and food preparation and serving supervisors—hire, train, and supervise staff, prepare cost estimates for food and supplies, set work schedules, order supplies, and ensure that the food service establishment runs efficiently and profitably. Additionally, these workers ensure that sanitation and safety standards are observed and comply with local regulations.

The AAO finds that the petitioner has credibly demonstrated that the proffered position is a position for a chef. The *Handbook* describes the educational requirements of Chefs, Head Cooks, and Food Preparation and Serving Supervisors as follows:

Most workers in these occupations have prior experience in the food service or hospitality industries. Most start as food preparation workers or line cooks in a full-service restaurant and work their way up to positions with more responsibility. Some attend cooking school or take vocational training classes and participate in internships or apprenticeship programs to acquire the additional skills needed to create menus and run a business.

It further states:

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online.

While most chefs, head cooks, and food preparation and serving supervisors have some postsecondary training, many experienced workers with less education can still be promoted. Formal training may take place at a community college, technical school, culinary arts school, or a 2-year or 4-year college with a degree in hospitality. A growing number of chefs participate in training programs sponsored by independent cooking schools, professional culinary institutes, 2-year or 4-year colleges with a hospitality or culinary arts department, or in the armed forces. Some large hotels and restaurants also operate their own training and job-placement programs for chefs and head cooks.

Those passages make explicit that a bachelor's degree or the equivalent in a specific specialty is not normally a minimum requirement for entry into the pertinent occupational category. They indicate that one may acquire such a position by first obtaining a bachelor's degree in a closely-related occupation, but they also indicate that one may acquire such a position by attending a two-year community college, a technical school, or a culinary institute, or simply by promotion from lesser kitchen positions, sometimes with formal in-house training.

The petitioner has not demonstrated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, finding that the record of proceeding does not include an evidentiary basis for determining that a bachelor's or higher degree, or the equivalent, in a specific specialty is "common to the industry in parallel positions among similar organizations," the AAO concludes that the petitioner has not satisfied the first alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2)

The AAO also finds that the petitioner failed to satisfy the second alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." The evidence of record does not develop relative complexity or uniqueness as an aspect of the position. Nothing about the two descriptions of the duties of the proffered position suggests that it is more complex or unique than the general range of chef positions, which the *Handbook* indicates includes positions performed by persons without at least a bachelor's degree, or the equivalent, in a specific specialty.

Next, as the record of proceeding contains no evidence establishing a recruiting and hiring history for the proffered position, there is no basis for finding that the petitioner satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next the AAO finds that neither the duty descriptions nor any other evidence in the record of proceeding establishes that the duties of the proffered position are so specialized and complex that they require knowledge usually associated with a minimum of a bachelor's degree in a specific specialty or the equivalent. Also, there is no evidence in the record of proceeding that distinguishes the knowledge required for the proffered position from that required for chef positions that are

performed by persons without at least a bachelor's degree or the equivalent in a specific specialty. Accordingly, the AAO concludes that the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

Because the petitioner has not demonstrated that the proffered position qualifies as a specialty occupation pursuant to any of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A), the AAO finds that the director was correct in her determination that the record before her failed to establish that the beneficiary would be employed in a specialty occupation position. It also finds that the evidence and argument submitted on appeal have not remedied that failure. Accordingly, the appeal will be dismissed and the petition denied on this basis.

Beyond the decision of the director, the AAO finds that the petition must also be denied on additional grounds, which will now be discussed, that were not addressed in the director's decision. The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the exercise of this function that the AAO identified these additional grounds for denying the petition.

The record contains no indication that the beneficiary has a minimum of a bachelor's degree or the equivalent in a specific specialty closely related to the proffered position. Thus, if the proffered position had been demonstrated to qualify as a specialty occupation, the beneficiary's qualification to serve in that position has not been established. The appeal will be dismissed and the petition denied on this additional basis.

The record also suggests the issue of whether approval of this petition is barred, or must necessarily be truncated, by the six-year limitation of H-1B visa status imposed by section 214(g)(4) of the Act, 8 U.S.C. §1184(g)(4).

The petitioner filed previous Form I-129 nonimmigrant visa petitions for the instant beneficiary, and those visa petitions were approved. One of those petitions, [REDACTED] was approved for a period of employment from April 30, 2003 through February 1, 2006. Another, [REDACTED], was approved for a period of employment from February 2, 2006 through February 1, 2009. Those two periods of employment are only two months short of six years.

The AAO notes that, in general, section 214(g)(4) of the Act, 8 U.S.C. §1184(g)(4) provides that: "[T]he period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years." If the instant visa petition were otherwise approvable, but not exempted from the six-year limit, the visa petition could be approved for only two months. The petitioner, however, asserts that the six year limitation does not apply in the instant case because of the operation of section 106(a) of the "American Competitiveness in the Twenty-First Century Act" (AC21).

In general, section 214(g)(4) of the Act, 8 U.S.C. §1184(g)(4) provides that: "[T]he period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years." However, AC21, as

amended by the Twenty-First Century Department of Justice Appropriations Authorization Act (DOJ21), removes the six-year limitation on the authorized period of stay in H-1B visa status for certain aliens whose labor certifications or immigrant petitions remain undecided due to lengthy adjudication delays, and broadens the class of H-1B nonimmigrants who may avail themselves of this provision.

As amended by § 11030A(a) of DOJ21, § 106(a) of AC21 reads:

(a) EXEMPTION FROM LIMITATION. -- The limitation contained in section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. § 1184(g)(4)) with respect to the duration of authorized stay shall not apply to any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) of such Act (8 U.S.C. § 1101(a)(15)(H)(i)(b)), if 365 days or more have elapsed since the filing of any of the following:

(1) Any application for labor certification under section 212(a)(5)(A) of such Act (8 U.S.C. § 1182(a)(5)(A)), in a case in which certification is required or used by the alien to obtain status under section 203(b) of such Act (8 U.S.C. § 1153(b)).

(2) A petition described in section 204(b) of such Act (8 U.S.C. § 1154(b)) to accord the alien a status under section 203(b) of such Act.

Section 11030A(b) of DOJ21 amended § 106(b) of AC21 to read:

(b) EXTENSION OF H-1B WORKER STATUS--The [Secretary of Homeland Security] shall extend the stay of an alien who qualifies for an exemption under subsection (a) in one-year increments until such time as a final decision is made--

(1) to deny the application described in subsection (a)(1), or, in a case in which such application is granted, to deny a petition described in subsection (a)(2) filed on behalf of the alien pursuant to such grant;

(2) to deny the petition described in subsection (a)(2); or

(3) to grant or deny the alien's application for an immigrant visa or for adjustment of status to that of an alien lawfully admitted for permanent residence.

Pub. L. No. 107-273, §11030A, 116 Stat. 1836, 1836-37 (2002) (emphasis added to identify sections amended by DOJ21).

Therefore, if the petitioner demonstrates that the beneficiary of the instant visa petition is also the beneficiary of a pending I-140 immigrant petition that was filed more than 365 days before the instant visa petition was filed, then the beneficiary would qualify for the AC21 exemption, and the instant visa petition would be approvable for the entire one-year extension for which the petitioner

applied. The petitioner did, in fact, file a Form I-140 immigrant petition, [REDACTED], for the beneficiary on September 24, 2007, a date more than 365 days prior to January 21, 2009, the filing date of the instant visa petition.

However, that I-140 immigrant visa petition was denied on February 19, 2009, prior to the decision in this case, and a check of USCIS records indicates that no appeal or motion was filed with regard to that denial. Thus, the one-year extensions provided by AC21 are not available in the instant case, as a final decision had been issued denying the I-140 petition, and even if the instant visa petition were otherwise approvable, the director would be precluded from approving the instant visa petition for more than a two-month period.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The AAO recognizes that this is an extension petition. The director's decision does not indicate whether she reviewed the prior approvals of the previous nonimmigrant petitions filed on behalf of the beneficiary. If the previous nonimmigrant petitions were approved based on the same unsupported assertions and evidentiary deficiencies that are contained in the current record, those approvals would constitute material and gross error on the part of the director. The AAO is not required to approve applications or 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). It would be absurd to suggest that USCIS or any 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). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the instant nonimmigrant petition on behalf of the beneficiary, the AAO would not be bound to follow the decision of a service center. *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 prior approvals do not preclude USCIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

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. The appeal will be dismissed and the petition denied.

Further, in light of the petitioner's failures to establish the proffered position as a specialty occupation and to establish that the beneficiary possesses a bachelor's degree, or the equivalent, in a specific specialty, the director should review the prior approvals of H-1B petitions filed by the petitioner for this beneficiary to serve as its chef, to determine whether to initiate revocation-on-notice proceedings with regard to such approvals.

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

FURTHER ORDER: The director should review the prior approvals of H-1B petitions issued to this petitioner for H-1B services by this beneficiary, in order to determine whether to initiate revocation proceedings with regard to those approvals.