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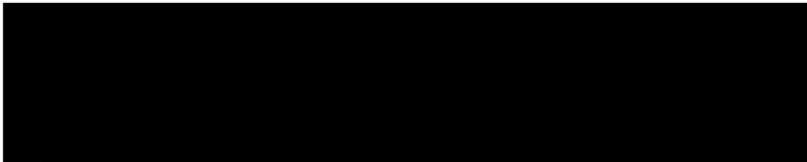
File: WAC 07 220 50674 Office: CALIFORNIA SERVICE CENTER Date: **APR 03 2008**

IN RE: Petitioner:
Beneficiary:



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

IN 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, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant visa petition seeking to employ of the beneficiary as a "sauté head chef" as an L-1B nonimmigrant intracompany transferee having specialized knowledge pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized under the laws of the State of California and allegedly operates restaurants serving Filipino style food.

The director denied the petition concluding that the petitioner did not establish (1) that the beneficiary will be employed in the United States in a position involving specialized knowledge; or (2) that the beneficiary has been employed abroad in a position involving specialized knowledge.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that the beneficiary has specialized knowledge of preparing and cooking Filipino style sauté and fry dishes.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) further states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The primary issue in this proceeding is whether the petitioner has established that the beneficiary has been or will be employed in a specialized knowledge capacity and whether the beneficiary has specialized knowledge as defined in the Act and the regulations. 8 C.F.R. §§ 214.2(l)(3)(ii) and (iv).¹

Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B), provides:

For purposes of section 101(a)(15)(L), an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.

Furthermore, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D) defines “specialized knowledge” as:

[S]pecial knowledge possessed by an individual of the petitioning organization’s product, service, research, equipment, techniques, management or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization’s processes and procedures.

The petitioner described the beneficiary's purported specialized knowledge and job duties in an undated letter appended to the Form I-129 as follows:

[The petitioner] at Artesia, California is soon commencing its dining services. At this particular time, we are starting the recruitment from our Philippine based branches for the right kitchen cooks in whose hands we entrust the initial success of our operations at the Southern part of California. This venture is also critical in the sense that the reputation of [the petitioner's restaurant] for fine and good food must be replicated 100%. It is important and necessary to maintain and retain this reputation for serving the kind and quality of dishes that [the petitioner's restaurant] is well known for not only among Filipinos who consist of the bulk of our patrons but also to other nationalities who caters to Filipino food. This is possible only by the transfer of our key kitchen chefs and cooks who possess the unique knowledge of [the petitioner's] preparation and cooking sauté and fry product lines as well as all grilled seafood products. [The beneficiary] possesses specialized knowledge of preparing

¹While not addressed by the director or the petitioner, it is noted that the petitioner asserts in the Form I-129 that the beneficiary is coming to the United States to be employed in a specialized knowledge capacity at a "new office." See 8 C.F.R. § 214.2(l)(3)(vi). However, the petitioner in this matter does not meet the definition of a "new office" and the criteria at 8 C.F.R. § 214.2(l)(3)(vi) will not be applied to the petition by the AAO. A "new office" is defined as "an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year." 8 C.F.R. § 214.2(l)(1)(ii)(F). Since the petitioner has been operating a restaurant elsewhere in the United States for more than one year, the opening of a new location in Artesia, California, does not constitute the opening of "new office" as defined by the regulations. Accordingly, the petitioner was properly treated as a fully formed entity for purposes of this visa classification.

and cooking all sauté and fry dishes being served at [the petitioner's] restaurant, as he was trained by the best Executive Chefs at [the foreign employer's restaurant] in the Philippines. He has acquired the unique and specialized preparation and cooking techniques derived from his mentors and from his own experience in [the foreign employer's] restaurants for the last five years.

* * *

[The beneficiary's] five years of experience as a Head Cook makes him qualified and very much familiar with [the petitioner's] system and standard. The production line for sauté performs all preparations for all the product lines in the division including cutting of meat, fish, seafoods and vegetables; preparation of marinades and sauces; pre-cooking of items as required and marinating of meats and seafoods at required length of time and temperature which all require special, unique techniques and cooking procedure where beneficiary is an expert.

The petitioner also submitted job descriptions for both the beneficiary's position abroad (head cook) and his prospective position in the United States (sauté head chef). As these job descriptions are in the record, they will not be repeated here verbatim. Generally, the beneficiary is described as overseeing the preparation and cooking of Filipino style sauté and fry dishes and as administering the kitchen in general.

On July 25, 2007, the director requested additional evidence. The director requested, *inter alia*, a description of the technique or service of which the beneficiary has specialized knowledge and an explanation of how the beneficiary's duties are different from those of other workers.

In response, counsel submitted a letter dated September 25, 2007 in which she asserts that, because the petitioning organization's Filipino cuisine is not as popular in the United States as other Asian cuisines, it "takes much longer to familiarize local cooks with [the] cuisine and train them on the correct preparation, taste and quality." She also asserts that "[l]ocally hired cooks have no knowledge about the techniques of Filipino cooking" and that "[t]his makes cooking of Filipino dishes in the U.S. a special skill." Counsel did not further address whether the beneficiary had specialized knowledge of Filipino cooking in the Philippines.

On October 16, 2007, the director denied the petition. The director concluded that the record did not establish that the beneficiary has been or will be employed in a specialized knowledge capacity.

On appeal, the petitioner again asserts that the beneficiary has specialized knowledge of Filipino cooking techniques.

Upon review, the petitioner's assertions are not persuasive in demonstrating that the beneficiary has been or will be employed in a specialized knowledge capacity as defined at 8 C.F.R. § 214.2(l)(1)(ii)(D).

In examining the specialized knowledge capacity of the beneficiary, the AAO will look to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3). The petitioner must submit a detailed job

description of the services that were and will be performed sufficient to establish that he has specialized knowledge.

Although the petitioner repeatedly asserts that the beneficiary's position abroad and in the United States requires "specialized knowledge" and that the beneficiary had been and will be employed abroad in a "specialized knowledge" capacity, the petitioner has not adequately articulated any basis to support this claim. The petitioner has failed to identify any specialized or advanced body of knowledge which would distinguish the beneficiary's role from that of other similarly experienced chefs employed by the petitioning organization or in the industry at large. Going on record without 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Specifics are clearly an important indication of whether a beneficiary's duties involve specialized knowledge; otherwise, meeting the definitions would simply be a matter of reiterating the regulations. See *Fedin Bros. Co., Ltd. v. Sava*, 724, F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905, F.2d 41 (2d. Cir. 1990).

The petitioner describes the beneficiary as having specialized knowledge of "preparing and cooking all sauté and fry dishes being served at [the petitioner's] restaurant." However, the petitioner never explains what, exactly, distinguishes the preparation of Filipino sauté and fry dishes from those techniques employed by cooks in other restaurants, or, crucially, why the knowledge of the preparation of Filipino sauté and fry dishes is noteworthy, uncommon, or distinguished by some unusual quality that is not generally known by other experienced chefs in general. It appears that most, if not all, chefs must sauté or otherwise prepare and properly season dishes, and is unclear why the Filipino sauté or fry dishes would be of such complexity that this knowledge could not be imparted to a similarly experience restaurant chef. While the petitioner asserts that the beneficiary was "trained by the best Executive Chefs at [the foreign employer's restaurant] in the Philippines" over the past five years, the record fails to establish what kind of training a sauté or fry chef receives or how long this training and practical experience must last in order to impart the claimed specialized knowledge to a "generic" chef.

Finally, even if the petitioner had established that the beneficiary's knowledge of preparing Filipino style sauté and fry dishes constitutes "specialized knowledge" in the United States, the petitioner has failed to establish that the beneficiary was employed in a specialized knowledge capacity in the Philippines. According to the petitioner, the Philippines is the source of the claimed specialized knowledge in preparing these sauté and fry dishes. It is simply not credible that a Filipino chef's knowledge of the preparation of authentic Filipino dishes would be considered specialized in the Philippines. Once again, going on record without documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

The AAO does not dispute the possibility that the beneficiary is a skilled and experienced cook who has been, and would be, a valuable asset to the petitioning organization. However, it is appropriate for the AAO to look beyond the stated job duties and consider the importance of the beneficiary's knowledge of the business's product or service, management operations, or decision-making process. *Matter of Colley*, 18 I&N Dec. 117, 120 (Comm. 1981)(citing *Matter of Raulin*, 13 I&N Dec. 618(R.C. 1970) and *Matter of LeBlanc*, 13 I&N

Dec. 816 (R.C. 1971)). As stated by the Commissioner in *Matter of Penner*, when considering whether the beneficiaries possessed specialized knowledge, “the *LeBlanc* and *Raulin* decisions did not find that the occupations inherently qualified the beneficiaries for the classifications sought.” 18 I&N Dec. at 52. Rather, the beneficiaries were considered to have unusual duties, skills, or knowledge beyond that of a skilled worker. *Id.* The Commissioner also provided the following clarification:

A distinction can be made between a person whose skills and knowledge enable him or her to produce a product through physical or skilled labor and the person who is employed primarily for his ability to carry out a key process or function which is important or essential to the business firm's operation.

Id. at 53.

It should be noted that the statutory definition of specialized knowledge requires the AAO to make comparisons in order to determine what constitutes specialized knowledge. The term “specialized knowledge” is not an absolute concept and cannot be clearly defined. As observed in *1756, Inc. v. Attorney General*, “[s]imply put, specialized knowledge is a relative . . . idea which cannot have a plain meaning.” 745 F. Supp. 9, 15 (D.D.C. 1990). The Congressional record specifically states that the L-1 category was intended for “key personnel.” See generally, H.R. REP. NO. 91-851, 1970 U.S.C.C.A.N. 2750. The term “key personnel” denotes a position within the petitioning company that is “of crucial importance.” Webster’s II New College Dictionary 605 (Houghton Mifflin Co. 2001). In general, all employees can reasonably be considered “important” to a petitioner’s enterprise. If an employee did not contribute to the overall economic success of an enterprise, there would be no rational economic reason to employ that person. An employee of “crucial importance” or “key personnel” must rise above the level of the petitioner’s average employee. Accordingly, based on the definition of “specialized knowledge” and the congressional record related to that term, the AAO must make comparisons not only between the claimed specialized knowledge employee and the general labor market, but also between the employee and the remainder of the petitioner’s workforce. While it may be correct to say that the beneficiary in the instant case is a highly skilled and productive employee, this fact alone is not enough to bring the beneficiary to the level of “key personnel.”

Moreover, in *Matter of Penner*, the Commissioner discussed the legislative intent behind the creation of the specialized knowledge category. 18 I&N Dec. 49 (Comm. 1982). The decision noted that the 1970 House Report, H.R. REP. NO. 91-851, stated that the number of admissions under the L-1 classification “will not be large” and that “[t]he class of persons eligible for such nonimmigrant visas is narrowly drawn and will be carefully regulated by the Immigration and Naturalization Service.” *Id.* at 51. The decision further noted that the House Report was silent on the subject of specialized knowledge, but that during the course of the subcommittee hearings on the bill, the Chairman specifically questioned witnesses on the level of skill necessary to qualify under the proposed “L” category. In response to the Chairman’s questions, various witnesses responded that they understood the legislation would allow “high-level people,” “experts,” individuals with “unique” skills, and that it would not include “lower categories” of workers or “skilled craft workers.” *Matter of Penner*, 18 I&N at 50 (citing H.R. Subcomm. No. 1 of the Jud. Comm., Immigration Act of 1970: Hearings on H.R. 445, 91st Cong. 210, 218, 223, 240, 248 (November 12, 1969)).

Reviewing the Congressional record, the Commissioner concluded in *Matter of Penner* than an expansive reading of the specialized knowledge provision, such that it would include skilled workers and technicians, is not warranted. The Commissioner emphasized that the specialized knowledge worker classification was not intended for “all employees with any level of specialized knowledge.” *Matter of Penner*, 18 I&N Dec. at 53. Or, as noted in *Matter of Colley*, “[m]ost employees today are specialists and have been trained and given specialized knowledge. However, in view of the House Report, it can not be concluded that all employees with specialized knowledge or performing highly technical duties are eligible for classification as intracompany transferees.” 18 I&N Dec. at 119. According to *Matter of Penner*, “[s]uch a conclusion would permit extremely large numbers of persons to qualify for the ‘L-1’ visa” rather than the “key personnel” that Congress specifically intended. 18 I&N Dec. at 53; *see also 1756, Inc. v. Attorney General*, 745 F. Supp. at 15 (concluding that Congress did not intend for the specialized knowledge capacity to extend to all employees with specialized knowledge, but rather to “key personnel” and “executives.”)

A 1994 Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) memorandum written by the then Acting Executive Associate Commissioner also directs CIS to compare the beneficiary’s knowledge to the general United States labor market and the petitioner’s workforce in order to distinguish between specialized and general knowledge. The Associate Commissioner notes in the memorandum that “officers adjudicating petitions involving specialized knowledge must ensure that the knowledge possessed by the beneficiary is not general knowledge held commonly throughout the industry but that it is truly specialized.” Memorandum from James A. Puleo, Acting Executive Associate Commissioner, Immigration and Naturalization Service, Interpretation of Specialized Knowledge, CO 214L-P (March 9, 1994). A comparison of the beneficiary’s knowledge to the knowledge possessed by others in the field is therefore necessary in order to determine the level of the beneficiary’s skills and knowledge and to ascertain whether the beneficiary’s knowledge is advanced. In other words, absent an outside group to which to compare the beneficiary’s knowledge, CIS would not be able to “ensure that the knowledge possessed by the beneficiary is truly specialized.” *Id.* The analysis for specialized knowledge therefore requires a test of the knowledge possessed by the United States labor market, but does not consider whether workers are available in the United States to perform the beneficiary’s job duties.

As explained above, the record does not distinguish the beneficiary’s knowledge as more advanced than the knowledge possessed by other people employed by the petitioning organization or by cooks employed elsewhere. As the petitioner has failed to document any materially unique qualities to the beneficiary’s knowledge, the petitioner’s claims are not persuasive in establishing that the beneficiary, while perhaps highly skilled, would be a “key” employee. There is no indication that the beneficiary has any knowledge that exceeds that of any other similarly experienced cooks or that he has received special training in the company’s methodologies or processes which would separate him from other workers employed with the foreign entity or elsewhere. It is simply not reasonable to classify this employee as a key employee of crucial importance to the organization.

The legislative history of the term “specialized knowledge” provides ample support for a restrictive interpretation of the term. In the present matter, the petitioner has not demonstrated that the beneficiary should be considered a member of the “narrowly drawn” class of individuals possessing specialized knowledge. *See 1756, Inc. v. Attorney General, supra* at 16. Based on the evidence presented, it is concluded

that the beneficiary was not employed abroad, and will not be employed in the United States, in a capacity involving specialized knowledge. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner failed to establish that it has a qualifying relationship with the foreign entity.

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed United States employer are the same employer (i.e., one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l). If one individual owns a majority interest in the petitioner and the foreign employer, and controls those entities, then the entities will be deemed to be "affiliates" under the definition. 8 C.F.R. § 214.2(l)(1)(ii)(L). A "subsidiary" is defined in part as a corporation "of which a parent owns, directly or indirectly, more than half of the entity and controls the entity." 8 C.F.R. § 214.2(l)(1)(ii)(K).

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In this matter, the petitioner asserts in the undated letter appended to the Form I-129 that "the majority stockholder of the U.S. corporation is the Philippine corporation called Prime Pacific Grill Corporation." However, the petitioner also submitted copies of stock certificates and a copy of its "Minutes of the Special Meeting of the Board of Directors" dated January 29, 2007 which indicate that the foreign employer actually owns only 850,000 of 2,000,000 shares of stock. The remaining 1,150,000 shares are owned by 14 different individuals. While the foreign employer appears to be the largest single stockholder, it does not own a "majority" of the shares. The petitioner also submitted a copy of the foreign employer's "Minutes of the Special Meeting of the Board of Directors" dated January 18, 2007 which indicate that [REDACTED] owns a majority of the shares of the Filipino company. Mr. [REDACTED] is not listed as an individual stockholder of the petitioner in the January 29, 2007 minutes.

In view of the above, the petitioner and the foreign employer are not owned and controlled by the same individuals or entities and are not qualifying organizations. Contrary to the petitioner's assertions, the petitioner is not majority owned by the foreign employer and, thus, it does not have *de jure* control over the corporation. The petitioner is instead controlled by a group without any one person or entity owning a majority. Therefore, the petitioner is not a subsidiary of the foreign employer. Likewise, the entities are not affiliates. The same individual or group of individuals does not own and control both the petitioner and the foreign employer. As noted above, the foreign employer is owned and controlled by Gerardo B. Apolinario who does not own and control the petitioner.

