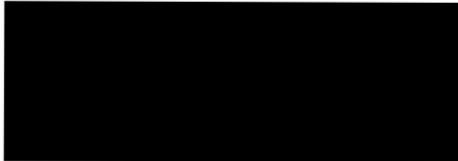


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FILE: WAC 07 043 50806 Office: VERMONT SERVICE CENTER Date: **AUG 05 2008**

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

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

ON BEHALF OF PETITIONER:



**INSTRUCTIONS:**

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

*for Robert P. Wiemann, Chief*  
for  
Robert P. Wiemann, 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 appeal will be dismissed. The petition will be denied.

The petitioner is a restaurant managing company with 10 employees and a claimed gross annual income of \$542,075. It seeks to employ the beneficiary as an operations manager. 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).

On June 8, 2007, the director denied the petition determining that the petitioner had not submitted evidence to establish that its offer of employment was authentic. The director found that the petitioner had not established that it managed restaurants, that it required the services of the beneficiary as an operations manager, or, implicitly, that it would employ the beneficiary in a specialty occupation. On appeal, the petitioner observes that the director had twice before considered the petitioner's offer of employment to the beneficiary as an operations manager legitimate and had approved the beneficiary's employment as an operations manager. The petitioner asserts that the director's decision is arbitrary, prejudiced, capricious, and self-conflicting and must be overturned.

The record includes: (1) the Form I-129 filed November 28, 2006 and supporting documentation; (2) the director's February 21, 2007 request for evidence (RFE); (3) the petitioner's May 14, 2007 response to the director's RFE and supporting documentation; (4) the director's June 8, 2007 denial decision; and, (5) the Form I-290B in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The petitioner seeks the beneficiary's services as an operations manager. In a November 17, 2006 letter appended to the Form I-129 petition, the petitioner indicated that it is a management company for six Japanese sushi restaurants and that each of the six restaurants employs approximately 50 personnel. The petitioner described the duties of the proffered position as:

Review sales and expenses data from each restaurant and expenses data from each restaurant [sic]. Communicate with each restaurant manager about procurement and personnel policies. Examine suppliers' list and oversee new sourcing of suppliers. Plan marketing strategies including planning of marketing budgets and pricing. Direct operational streamlining for maximum efficiency. Establish and monitor internal sanitary protocols through constant written and oral communications to the managers and employees. Assure compliance with local, state and federal food safety regulations through requirement of regular reports from the restaurant managers and making them accountable therefor[e], and unannounced visit to and examination of the restaurant premises. Oversee and respond to day-to-day operational issues and problems. Review job performance of each restaurant manager. Discuss and report to the President about over-all operations of all six restaurants.

The petitioner provided excerpts from the Department of Labor's *Online Summary Report* for general and operations managers. The petitioner also included a copy of an Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return filed by the petitioner for the 2005 year. The IRS Form 1120 listed \$542,075 in gross sales and receipts, salaries paid of \$274,506, and a net annual income of \$21,345. The petitioner further included copies of the beneficiary's pay stubs for funds received in 2006. The record also contained the beneficiary's IRS Form 1040A, U.S. Individual Income Tax Return for 2005.

In a May 14, 2007 response to the director's RFE, the petitioner elaborated on the initially provided description as follows:

- Review weekly, monthly, quarterly and annual sales and expenses data from each restaurant and identify potential operational problems.
- Communicate with each restaurant manager about procurement and personnel policies and provide consultation about operational issues.
- Examine suppliers' list and oversee new sourcing of suppliers.
- Plan marketing strategies including planning of marketing budgets and pricing and oversee their implementation.
- Establish, implement and direct system-wide operational streamlining goals for maximum efficiency.
- Establish and monitor internal sanitary protocols through constant written and oral communications to the managers and employees.
- Assure compliance with local, state and federal food safety regulations through requirement of regular reports from the restaurant managers and making them accountable therefor[e], and through unannounced visits to and examination of the restaurant premises.
- Oversee and respond to day-to-day operational issues and problems of restaurants and employer's manufacturing operations.
- Direct and assign specific tasks to staffs.
- Review job performance of each restaurant manager and evaluate productivity and efficiency of staffs of each restaurant.
- Discuss and report to the President about over-all operations of all five restaurants.

In addition, the petitioner referenced the 2006-2007 Department of Labor's *Occupational Outlook Handbook's (Handbook)* discussion of general and operations managers under the title top executives. The petitioner noted the *Handbook's* report that many top executives have a bachelor's or higher degree in business administration or liberal arts. The petitioner also referenced the *Occupational Informational Network (O\*NET)* and the *O\*NET's* summary report for operations managers and asserts that the Job Zone rating for these occupations indicates that most require a four-year bachelor's degree. The petitioner asserted that its job description of the proffered position and the job descriptions found in both the *Handbook* and the *O\*NET* are similar and that the similarity of the positions authoritatively establishes that a bachelor's degree is a normal industry requirement for its operation manager.

The petitioner also explained that it had been established to provide centralized management service and operational expertise to existing and future restaurants, that it also provided design services, that it had recently established a bakery and sauce plant, and that it "aimed to maximize the productivity and profit margin of our affiliated restaurants through provision of centralized management services and supply of certain food items." The petitioner provided copies of its quarterly wage reports for the third and fourth quarters of 2006 and the first quarter of 2007 as well as the second, third, and fourth quarterly reports of 2006 and the first quarterly report of 2007 for Minado Co. Inc., Japanese Food Solutions, Inc., and Monamee, LLC.

As referenced above, the director denied the petition determining that the petitioner had not submitted evidence to establish that its offer of employment was authentic, finding that the petitioner had not established that it managed restaurants and thus required the services of the beneficiary as an operations manager.

On appeal, the petitioner observes that the director had twice before considered the petitioner's offer of

employment to the beneficiary as an operations manager legitimate and had approved the beneficiary's employment as an operations manager. The petitioner notes that the director did not raise the issue of a credible offer of employment in the RFE and contends that the director's decision is arbitrary, prejudiced, capricious, and self-conflicting and must be overturned.

Preliminarily, the AAO acknowledges that the director did not use the term "credible offer of employment" in the RFE; however, the director did request information regarding the petitioner's profile and information detailing the products or services the petitioner provided, information used in part to determine whether the petitioner had established that it has the ability to make a credible offer of employment. Moreover, even if the director had committed a procedural error by failing to solicit further evidence on this issue, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has been presented the opportunity to present evidence and argument on this issue on appeal.

The AAO finds that the petitioner in this matter has not provided documentary support of its claim that it manages restaurants. The record does not contain any evidence of agreements between the petitioner and the five or six Japanese restaurants<sup>1</sup> detailing the petitioner's management duties and responsibilities to the separate entities. The petitioner claims, in response to the director's RFE, that the petitioner's shareholders wholly or partially own the restaurants but supplies no documentary evidence to substantiate this claim. Although the record contains IRS quarterly reports for Minado Co. Inc., Japanese Food Solutions, Inc., and Monamee, LLC., the record does not establish the relationship between these companies and the petitioner. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

In addition, although the AAO acknowledges that the record contains evidence that the beneficiary was previously approved for H-1B status on the basis of petitions filed by the same petitioner; prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The AAO notes that each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). When making a determination of statutory eligibility CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). This record of proceeding does not indicate whether the director reviewed the prior records and the rationale for the prior decisions. However, if those records contained the same evidence as submitted with this petition, CIS would have erred in approving those previously filed petitions. CIS 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 CIS 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).

Further, even if the AAO accepts that the petitioner is in the business of managing restaurants, the petitioner has not provided sufficient evidence to establish that the proffered position is a specialty occupation. To

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<sup>1</sup> The AAO observes that the petitioner initially stated that it managed the operations of six Japanese restaurants but in response to the director's RFE indicated that it managed five Japanese restaurants.

determine whether a particular job qualifies as a specialty occupation, CIS does not rely on a position's title. It is the specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, which are factors to be considered when determining whether a position is a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000). The AAO turns first to the description of the duties of the proffered position in an effort to determine if the occupation described corresponds to an occupation outlined in the *Handbook*, a source frequently used by CIS when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. The initial description of the proffered position provided a broad overview of responsibilities relating to the supervision of restaurant managers and their handling of personnel, procurement, marketing, compliance with safety regulations, and troubleshooting operational problems and issues. Although the petitioner provided additional detail regarding the proffered position in response to the RFE, the description included the same basic elements of a managerial position. The combined descriptions suggest that the proffered position is a mid-level management position.

Contrary to the petitioner's interpretation of the *Handbook's* information about the duties and educational requirements of a general and operations manager as listed under the heading "Top Executives," the AAO finds that the *Handbook* does not report that a bachelor's degree is the normal minimum requirement for an operations manager. The *Handbook* reports:

*General and operations managers* plan, direct, or coordinate the operations of companies or public and private sector organizations. Their duties include formulating policies, managing daily operations, and planning the use of materials and human resources, but are too diverse and general in nature to be classified in any one area of management or administration, such as personnel, purchasing, or administrative services. In some organizations, the duties of general and operations managers may overlap the duties of chief executive officers.

The AAO finds that the petitioner's initial description of the duties of the proffered position incorporates many of the general duties of an operations manager. The petitioner's indication that the beneficiary will: review expenses data identifying potential operational problems; communicate with restaurant managers regarding procurement and personnel policies; examine suppliers' lists and new sourcing of suppliers; plan marketing strategies; establish, implement, and direct system-wide operational streamlining goals; establish and monitor sanitary and safety protocols; respond to day-to-day operational issues and problems; assign tasks; review job performance of restaurant managers; and report to the President regarding the operations of the restaurants, are all duties that correspond generally to that of a mid-level operations manager.

Turning to the *Handbook's* discussion of the educational requirements for general managers, the educational requirements for these positions vary widely. The AAO acknowledges the *Handbook's* report that many top executives have a bachelor's or higher degree in business administration or liberal arts; but observes that the *Handbook* also reports that many top executives positions are filled from within the organization by promoting experienced, lower-level managers. The *Handbook* notes that in retail trade or transportation industries it is possible for individuals without a college degree to work their way up within the company and become managers.

The *Handbook* does not find a minimum educational requirement of a bachelor's or higher degree in a specific discipline for the occupation of a general or operations manager; rather entry into the occupation may be gained through a variety of avenues. Stated a different way, there is nothing in the *Handbook* that identifies a bachelor's or higher degree as the normal minimum requirement for entry into the position of an operations manager.

The AAO also acknowledges the petitioner's reference to the *O\*NET*; however, the AAO does not consider the *O\*NET* to be a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. The *O\*NET* provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. A JobZone rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. Again, the record does not demonstrate that the occupation of an operations manager managing five or six restaurants would require the beneficiary to have attained a bachelor's degree or its equivalent in a specific specialty.

The petitioner has failed to establish that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into an operations or food service manager position as required by the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO next turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), whether a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. To determine whether the petitioner's degree requirement is shared within its industry, CIS often considers whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In this matter as observed above, the *Handbook* does not report that an operations manager normally requires a baccalaureate or higher degree. The record does not contain evidence of parallel positions in industries similar to the petitioner's "management" business. Thus, the record does not establish that a degree requirement in a specific discipline is necessary for parallel positions in similar organizations. In addition, the record does not include evidence that the proffered position includes complex or unique elements so that only an individual with a degree can perform the work associated with the position. The record in this matter contains only a broad overview of the duties of the position, a position that corresponds generally to that of an operations manager. The petitioner has not provided substantive evidence that would distinguish the proffered position from that of a typical operations manager, a position that does not normally require a bachelor's degree in a specific discipline. A review of the evidence of record finds it insufficient to establish that the proposed duties of the position are identifiable with an industry-wide educational standard, or distinguishable, by their unique nature or complexity, from similar but non-degree-requiring positions. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas to assist in determining whether the petitioner has satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). As observed above, the petitioner has previously employed the beneficiary in this position. The record does not include evidence that the petitioner has employed others in the proffered position. As discussed below, the AAO finds that the petitioner has not established that the beneficiary's qualifications are the equivalent of a bachelor's or higher degree in a specific discipline. Moreover, the AAO finds that while a petitioner may believe that a proffered position requires a degree, that opinion cannot establish the position as a specialty occupation. Were CIS limited solely to reviewing a petitioner's self-imposed requirements, than any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. See *Defensor v. Meissner*, 201 F. 3d at 384. The petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4) which requires that the petitioner establish that 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. In this matter, the petitioner has submitted a general description of the position without providing comprehensive details of the daily ongoing activities of the position. The duties described are the generic duties of an operations manager and do not reveal any specific duties that are specialized or complex. A review of the totality of the record regarding the proffered position and the lack of definitive evidence regarding the nature of the petitioner's management business does not reveal that the duties of the proffered position would require the theoretical and practical application of a body of highly specialized knowledge attained through a four-year course of study in a specific specialty at the university level.

The petitioner has not provided sufficient documentary evidence that the duties of the proffered position contain elements different from that of a generic operations manager. Neither does the position, as described, represent a combination of jobs that would require the beneficiary to have a unique set of skills beyond those of an operations manager. The petitioner has not described complex projects or specialized duties that incorporate knowledge that is gained only through coursework at the university level. Again, 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. at 165. The description of duties as depicted in the record does not demonstrate that the nature of the 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 in a specific discipline. Without such evidence, the petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO agrees with the director that the record does not establish that the petitioner will employ the beneficiary in a specialty occupation. 8 C.F.R. § 214.2(h)(4)(iii)(A).

Beyond the decision of the director, the petitioner has not established the beneficiary's eligibility to perform the duties of a specialty occupation. The AAO observes that the beneficiary does not hold a U.S. or foreign degree; rather, the beneficiary has lengthy work experience that has been evaluated to be the equivalent of a U.S. degree in hospitality management. The record includes a November 30, 2000 evaluation prepared by a

credentials evaluation service; however, when attempting to establish that a beneficiary has the equivalent of a degree based on his or her combined education and employment experience under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), a petitioner may not rely on a credentials evaluation service to evaluate a beneficiary's work experience. A credentials evaluation service may evaluate only a beneficiary's educational credentials. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). To establish an academic equivalency for a beneficiary's work experience, a petitioner must submit an evaluation of such experience from an official who has the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university that has a program for granting such credit. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). Moreover, the record regarding the beneficiary's work experience and training only contains: a July 15, 1999 certificate of employment provided by The Westin Chosun confirming the beneficiary's employment from March 21, 1978 to February 28, 1998 in the housekeeping office as the acting director of guest services; a September 5, 1981 certificate of completion of a hotel manager course from August 31 to September 5 in an unspecified year; and, an undated certificate of completion of a tourist hotel management special education course from November 30, 1982 to December 3 of an unspecified year. The information in the record regarding the beneficiary's work experience from his foreign employer does not include a discussion of the beneficiary's peers, supervisors, or subordinates or whether these individuals held degrees or specialized knowledge at a bachelor's or higher degree level associated with a specialty occupation in the business. The record also does not contain evidence that the beneficiary's work experience with his peers, supervisors, or subordinates comprised an atmosphere conducive to obtaining knowledge that consequentially progressed to the equivalent of a bachelor's degree or its equivalent in a specific field. The petitioner has not provided sufficient evidence of the beneficiary's work experience to enable the AAO to determine that the beneficiary is eligible to perform the duties of a specialty occupation.

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 *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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