



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: EAC 02 247 52614 Office: VERMONT SERVICE CENTER

Date: JUN 23 2004

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

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

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

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.

Mari Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

RECEIVED JUN 23 2004

DISCUSSION: The service center director denied the nonimmigrant visa petition and affirmed that decision in a subsequent motion to reopen. 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 limited liability company that owns and operates two McDonald's franchise fast food restaurants. In order to employ the beneficiary as a food service manager, 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 on the basis that the evidence of record failed to establish that the proffered position qualified as a specialty occupation. The director thereafter granted the petitioner's motion to reopen for consideration of evidence not previously presented. However, the director determined that, even with the additional evidence submitted on motion, the evidence of record failed to establish that the proffered position was a specialty occupation.

On appeal, counsel contends that the director's decisions were erroneous and that the petition should be approved, because the totality of the evidence establishes that the position is a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

The issue to be discussed in this proceeding is whether the position offered to the beneficiary qualifies as a specialty occupation.

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:

[A]n occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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.

The petitioner operates its fast-food restaurants through its two principals, a husband and wife who are “the only members and sole owners of the company.” The husband is designated the chief executive officer (CEO). The two partners have operated the two restaurants for over ten years. The beneficiary would assume management duties over one of the restaurants. At the time of filing of the appeal, the two principals had performed these duties for both restaurants for three years. According to the petitioner, in earlier years these duties had been performed by three successive employees in the position now proposed for the beneficiary.

The AAO does not simply rely on a position’s title when determining whether a particular job qualifies as a specialty occupation. Rather, the specific duties of the offered position, combined with the nature of the petitioning entity’s business operations, are factors that the AAO considers.

In a letter accompanying the I-129 petition, the petitioner detailed the beneficiary’s primary job responsibilities as follows:

Our company is exploring expansion through the acquisition of additional franchises. We are in need of the services of a Food Service Manager to coordinate the food service activities at each of our [REDACTED]. This manager will report directly to [the Principal Member and Manager/CEO] . . . [The beneficiary] will be responsible for supervising other shift managers, production managers, service managers and staff and have the following duties:

- Responsible for all operations and functions of the franchise;
- Estimate food and beverage costs, requisition and purchase product and supplies;
- Direct hiring, firing and assignment of personnel;
- Responsible for all training of personnel to maintain consistent level of quality and service;

- Investigate and resolve food quality and service complaints; and
- Review financial transactions and monitor budget to ensure efficient operation, and to ensure expenditures stay within budgetary limitations.

Also among the documents submitted with the Form I-129 was a chart that outlined the hierarchy of positions in the petitioner's two fast food restaurants. According to the chart, the person holding the proffered food service manager position for one of the restaurants would report directly to the CEO and would directly supervise the restaurant's shift supervisor. In turn, the shift supervisor would be in charge of the restaurant's shift manager and "Maintenance Dept." According to the chart, the shift manager would supervise the store's production and service sections. The grill, fryolater, and assembly workers are the production section. The front counter and drive-through workers are the service section. For the maintenance department, the chart identifies only a "Primary" and a "Backup."

Other evidentiary items filed with the Form I-129 included documents related to the beneficiary's education and experience (including a resume; an evaluation of the educational equivalent of the beneficiary's work experience and foreign education by Globe Language Services, Inc. (GLS); a diploma, two academic transcripts, and a graduation certificate, all with translations); a copy of the section on food service managers from the Department of Labor's *Dictionary of Occupational Titles*; and copies of the following tax return forms filed by the petitioner: Schedule C (for tax years 1999, 2000, and 2001) and the quarterly tax return for the period ending March 31, 2002.

Subsequent to the filing of the I-129 petition, the director issued a request for additional evidence (RFE). Specifically, the director requested: a copy of the job postings and in-house job announcement that the petitioner had issued for the proffered position; a listing of the duties and responsibilities proposed for the beneficiary; an indication of the percentage of daily work time that each specific duty and responsibility would require; descriptions of "which specific tasks require the expertise of someone who holds a baccalaureate degree and how the beneficiary's education relates to the position itself"; "evidence showing that in [the petitioner's] company and in a similarly situated business in [the petitioner's] industry, a baccalaureate degree in a specific field of study is a standard minimum requirement for the job offered"; and specific educational information regarding the persons that the petitioner has employed in the proffered position in the last two years.

The petitioner's response to the RFE included two advisory opinions. The first opinion was from Nicholas J. Hadgis, [REDACTED] at Widener [REDACTED] Pennsylvania, and is dated August 20, 2002. [REDACTED] opined that the proffered position requires a baccalaureate degree (field of study unspecified) along with industry training and experience for entry into the position. The second opinion is dated August 19, 2002, and was prepared by [REDACTED] of the [REDACTED], Las Vegas, Nevada. It was Professor Stefanelli's opinion that it was the preference of [REDACTED] and other restaurant companies, to hire entry-level managers who possess four-year college degrees in hospitality and/or business.

The RFE response also included a letter from the petitioner. The letter stated, in part, that “McDonald’s encourages promotion from within the organization,” and it presented the following hierarchy of positions as “the typical progression of promotion:”

- Initial hire as a member of the crew in the kitchen, assembly, counter or drive thru level to
- Crew Chief who is the first line supervisor overseeing the crew’s performance to
- Shift Manager who is responsible for the Production or Service sides of the operation or
- Maintenance Department Manager who is responsible for all equipment and physical plant of the store and location to
- Shift Supervisor who oversees the total operation of one of two shifts operating every day to
- Food Service Manager [the proffered position] who is responsible for the general management of all operations.

On the promotion-from-within policy, this letter noted that “[o]ne objective criteria [sic] used to determine eligibility for promotion is the employee’s interest and desire to attend and complete [sic] of courses, paid by us, conducted through regional offices of ██████████ and completion of the standard Commonwealth of Massachusetts Department of Health’s Serve Safe course.” The letter also noted, however, that most of the high school graduates with the greatest managerial potential opt for college “and do not stay in our employ long enough to take any courses offered by McDonald’s.”

This letter of reply to the RFE also identified four areas which the food service manager/general manager has to attend in order to “manage all aspects of the business”:

- Budget – accurately project and control all profit and loss balance line items, calculate and control crew labor cost, food cost;
- Human Resources – plan, organize, direct, control, hire, and fire the staff, set goals, objectives and strategies;
- Equipment - monitor, maintain, and repair equipment;
- Products – waste, sales vs. projections.

The letter also provided the following outline of the percentage of time that specific work tasks would require during a 41-hour work week:

- Determine how to reach these goals and make all of the necessary decisions.
(7 hours/week)

- Prepare daily, weekly and monthly inventory of products and optimize the ordering according to the sales. (4 hours/week)
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- Develop and execute the local store marketing plans to maximize sales potential within the community and execute national promotions. (3 hours/week)
- Measure consumer's satisfaction; develop and execute a plan to improve their satisfaction with their [REDACTED] experience. (7 hours/week)
- Maintain critical standards for raw and finished product quality, service speed, cleanliness and sanitation. Calibrate all equipment and follow up on assigned maintenance tasks. (3 hours/week)
- Conduct the implementation of new products and procedures. (2 hours/week)
- Recruit, select, and retain an optimum number of crew, maintenance and management who are enthusiastically dedicated to consumer satisfaction. (2 hours/week)
- Lead in the development, training, supervision, and motivation of all restaurant employees. (3 hours/week)
- Demonstrate and reinforce the leadership behaviors and basic people minimums necessary to gain commitment from crew and leadership. (1 hour/week)
- Oversee and review performance appraisals based on defined goals and objectives. (2 hours/week)
- Plan and conduct leadership team meetings. (1 hour/week)
- Knowledgeable in enforcing and educating crew and managers on all appropriate personnel policies, labor laws, security and safety procedures. (1 hour/week)
- Maintain records for safety and appropriately document contributions and performance in personnel file. (1 hour/week)
- Ensure that all daily paperwork, weekly inventories and statistical reports are completed accurately and on a timely basis. (2 hours/week)

The petitioner's letter of reply to the RFE also stated that it had recruited for the offered position through newspaper classified ads in the Boston Globe and through Internet postings on its web site. The letter further stated that the Internet ad ran continuously for over 6 months, with no response. According to the letter, during the past two years the position had been filled by the two principals. The letter further attested that the husband holds a bachelor's degree in an unspecified discipline, and his wife holds an associate degree in an unspecified discipline. Both have over ten years experience in the restaurant/hospitality business.

The petitioner included copies of the newspaper and Internet advertisements. The newspaper advertisement appeared substantially as follows:

Management
MANAGEMENT
McDonald's looking for mgr.
Fax resume: [Fax number]

The substantive portion of the Internet read: "We are seeking Experienced General Managers (Degree preferred) and Management Trainees. Apply today on-line."

On finding that the evidence remained inadequate after the matters submitted in response to the RFE, the director issued the decision denying the petition. In response, counsel filed the motion to reopen upon which the director rendered the adverse decision that is the subject of the instant proceeding.

The motion included several documents not previously presented.

A copy of a one-page personal information standard form was submitted for each of three former employers whom the petitioner identified as former holders of the proffered position. These sheets indicate that, when hired, these persons represented that they had graduated from the University of Maine, Bridgewater State College, and Northeastern University. Particular degrees are not mentioned. According to the letter that counsel submitted on the motion, the University of Maine graduate worked from "04/30/98 to 01/02/2002"; the Bridgewater State College graduate worked from "08/06/1992 to 05/01/1998"; and the Northeastern University graduate from "05/15/1993 to 09/17/1994."

On motion, the petitioner also submitted copies of the "Full Operation Review" grading sheets that [REDACTED] uses to evaluate the operations of its franchises. The petitioner also included copies of these documents which the beneficiary would have to prepare: financial statements and these forms from the Store Manager's Business System – apparently an automated reporting system: Profit and Loss reports; the Product Sales report; the Daily Store report; the Sales Ledger; the Automatic Order report; the Supervisor Audit Worksheet Deposit Validation form; the Product Mix report; the Inventory Stat report; the QCR Optimum Food Cost report; the Raw Waste/Promo report; the Completed Waste/Promo report; and the Labor Analysis Report.

Also, supplemental opinion letters were submitted from [REDACTED]. [REDACTED] again stated that the complexity of the position offered required a minimum of a bachelor's degree in hotel/restaurant management, or a related field, as a minimum requirement for entry into the position. Professor Stefanelli stated that a bachelor's level education is necessary for the position offered. He further indicated, however, that while a four-year degree is preferred, many companies are forced to "underhire" for competitive reasons, and then further educate and/or train employees.

In his decision on the motion to reopen, the director explained why the additional evidence presented on the motion did not change his earlier determination that the proffered position was not a specialty occupation. In

doing so, the director concentrated on (1) why he discounted Professor Stefanelli's second letter expanding on the information he had presented in his earlier letter, and (2) why he was not persuaded by the evidence about the educational credentials of the previous holders of the proffered position.

Counsel filed this appeal in response to the adverse decision on the motion to reopen. To support his contention that the proffered position is a specialty occupation and that the director's decisions do not accord with the evidence of record, counsel submits a brief and copies of documents previously presented. These documents include: (1) the organization chart; (2) the partnership's tax return information; (3) the letter of support that the petitioner filed with the Form I-129; (4) the two letters from Dean Hadgis; (5) the two letters from Professor Stefanelli; (6) the advertisements for the proffered position that the petitioner had placed in newspapers and on the McDonald's Internet site; (7) the personal information forms completed by the three persons who previously served in the proffered position; (8) the McDonald's Full Operations Review forms; (9) the beneficiary's resume; and (10) the GLS evaluation of education and work experience.

Counsel asserts in part, that the duties of the offered position are so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. In support of this conclusion, counsel states:

The Petitioner also provided evidence that the nature of the specific duties were [sic] so specialized and complex [that] knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree complex. In addition to the general bullet points that were considered and evaluated by the two professors, the Petitioner provided a detailed explanation of the reporting requirements, documentation, quality control, and detail issues demanded by the Food Service/General Manager (see Exhibit 10 [the Full Operations Review forms]).

Upon review of the entire record, the AAO has determined that the evidence is insufficient to qualify the proffered position as a specialty occupation in accordance with any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

CIS has long recognized the *Occupational Outlook Handbook (Handbook)*, published by the Bureau of Labor Statistics, U.S. Department of Labor, as an authoritative source on the duties and educational requirements of a wide variety of occupations.

In the 2002-2003 edition of the *Handbook*, at 55-56, the duties of a food service manager are detailed:

The daily responsibilities of many food service managers can often be as complicated as some of the meals prepared by a fine chef. In addition to the traditional duties of selecting and pricing menu items, using food and other supplies efficiently, and achieving quality in food preparation and service, managers now are responsible for a growing number of administrative and human resource tasks. For example, managers must carefully find and evaluate new ways of recruiting employees in a tight job market. Once hired, managers also must find creative ways to retain experienced workers.

In most restaurants and institutional food service facilities, the manager is assisted in these duties by one or more assistant managers, depending on the size and operating hours of the establishment. In most large establishments, as well as in many smaller ones, the management team consists of a general manager, one or more assistant managers, and an executive chef. . . . In fast-food restaurants and other food service facilities open for long hours – often 7 days a week – several assistant managers, each of whom supervises a shift of workers, aid the manager. . . .

...

On a daily basis, managers estimate food consumption, place orders with suppliers, and schedule the delivery of fresh food and beverages. They receive and check the content of deliveries, evaluating the quality of meats, poultry, fish, fruits, vegetables, and baked goods. To ensure good service, managers meet with sales representatives from restaurant suppliers to place orders replenishing stocks of tableware, linens, paper, cleaning supplies, cooking utensils, and furniture and fixtures. They also arrange for equipment maintenance and repairs, and coordinate a variety of services such as waste removal and pest control.

The quality of food dishes and services in restaurants depends largely on a manager's ability to interview, hire, and, when necessary, fire employees. This is especially true in tight labor markets, when many managers report difficulty in hiring experienced food and beverage preparation and service workers. . . . Once a new employee is hired, managers explain the establishment's policies and practices and oversee any necessary training. Managers also schedule the work hours of employees, making sure there are enough workers present to cover peak dining periods. If employees are unable to work, managers may have to fill in for them. Some managers regularly help with cooking, clearing of tables, or other tasks. . . . They also investigate and resolve customer's complaints about food quality or service. . . .

In addition to their regular duties, food service managers have a variety of administrative responsibilities. Although much of this work is delegated to a bookkeeper in a larger establishment, managers in most smaller establishments, such as fast-food restaurants, must keep records of the hours and wages of employees, prepare the payroll, and fill out paperwork in compliance with licensing laws and reporting requirements of tax, wage and hour, unemployment compensation, and Social Security laws. Managers also maintain records of supply and equipment purchases and ensure that accounts with suppliers are paid on a regular basis. . . .

...

At the conclusion of each day, or sometimes each shift, managers tally the cash and charge receipts received and balance them against the record of sales. In most cases, they are responsible for depositing the day's receipts at the bank or securing them in a safe place. . . .

The duties of the offered position fall within the duties set forth above. It is understood that this particular position is responsible for the overall operation of a high volume business establishment, and that the

beneficiary supervises other assistant managers and employees. Those duties are not, however, inconsistent with those listed in the *Handbook* for Food Service Managers.

The petitioner has not met any of the regulatory requirements to qualify the offered position as a specialty occupation. The *Handbook* notes that a bachelor's degree in restaurant and food service management provides strong preparation for a career in this occupation. Candidates are recruited, however, from two and four-year college hospitality management programs, as well as from technical institutes and other institutions offering programs leading to associate degrees or other formal certification. *Id.* at 56–57. Thus, the petitioner has not established the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), that a baccalaureate or higher degree, or its equivalent, is normally the minimum requirement for entry into the position. This finding is consistent with the opinion offered by Professor Stefanelli on October 10, 2002, wherein the professor acknowledged that many companies prefer baccalaureate level education, but that many hire individuals with lesser levels of education and then provide additional education, training, and/or experience.

The petitioner also failed to establish any of the remaining three criteria:

First, it was not established that a degree requirement was common to the industry in parallel positions among similar organizations, or alternatively, that the position was so complex or unique that it can be performed only by an individual with a degree. The opinion letters from Dean Hadgis and Professor Stefanelli do not offer convincing evidence that a degree requirement is standard in the industry. The letters offer the opinion of the learned writers, but no corroborating evidence is presented in support of those opinions. As noted above, those opinions are contradictory to the Department of Labor's findings noted in the *Handbook*. Furthermore, the duties offered to the beneficiary are common in the industry for food service managers, and are not unusually complex or unique. The AAO may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Second, the petitioner has not established that it normally requires a degree in a specific specialty, or its equivalent for the position. The petitioner states that the position has been performed by the CEO and his wife in recent years, and that both have bachelor's degrees or the equivalent thereof. The record does not disclose the educational discipline of either degree holder. It is, therefore, impossible to determine whether either holds a degree in a related specialty. Furthermore, the record is not sufficient to determine that the CEO's wife possesses the equivalent of a bachelor's degree based upon her associate degree and work experience. The record does not reflect that her experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation, or that she has recognition of expertise in the specialty. 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). The petitioner did not submit evidence of the past managers' educational background. A statement in an employee folder that an employee has a certain level of education in an unspecified discipline is not sufficient to establish that the employee had baccalaureate level education in a specific related specialty. Next, there is the matter of the advertisements that the petitioner stated that it had placed on the Internet and in the *Boston Globe* for the proffered position. The record contains an August 23, 2002 copy of an Internet advertisement for the proffered position. However, this advertisement postdates the filing of the petition. What's more, this advertisement just stated a preference

(“degree preferred”), not a requirement for a degree, and it did not specify any particular major or area of concentration. It is also noted that the bottom section of one of the *Boston Globe* billing documents contains a copy of a four-line advertisement that appears to predate the filing of the petition. This advertisement identifies the open position only as “management,” provides a fax reply number, and states “McDonald’s looking for mgr.” The relevant aspects of both the newspaper and the Internet advertisements are that, first, they did not require candidates to possess at least a bachelor’s degree, and, second, they did not limit the petitioner’s degree preference to a specific specialty closely related to food service management duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, the record’s information on the promotion-from-within policy indicates that McDonald’s recognizes that workers should be able to advance through the ranks from initial hire as a kitchen crew member to food service manager in charge of a McDonald’s fast food restaurant without a bachelor’s degree in any academic area, let alone a bachelor’s degree in a specific specialty required by the position.

Finally, the duties of the offered position are not so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. The listed duties are similar to those listed in the *Handbook*, and appear to be common in the industry among similar organizations. The fact that the petitioner’s franchisor has stringent reporting requirements, or that the petitioner’s business is a high volume business, does not render the duties of the position so specialized or complex that a bachelor’s level education is required to perform them. Indeed, the *Handbook* states the contrary. *Handbook* at 56-57.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. It is, therefore, concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

Beyond the director’s decision, the evidence of record does not establish that the beneficiary is qualified to perform services in any food services specialty occupation in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(C) and related regulations.

Section 214(i)(2) of the Act, 8 U.S.C. §1184(i)(2), states, in pertinent part, that an alien applying for classification as an H-1B nonimmigrant worker must have completed a degree in the specialty that the occupation requires, and that, if he or she does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

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

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

To qualify the beneficiary in this proceeding, the evidence must demonstrate that the he meets the criterion at either section 2 or 4, because in this particular proceeding there is no evidence relevant to sections 1 or 3.

Section 2 has two evidentiary elements. First, the evidence of record must include a determination by a reputable foreign-degree evaluating service that the beneficiary's foreign degree is equivalent to at least a U.S. baccalaureate degree. Second, the U.S.-equivalent degree must be in a course of studies that conveys highly specialized knowledge, both theoretical and applied, upon which the beneficiary would have to draw in order to perform the proffered position.

The GLS evaluation opines, in part, that the beneficiary has achieved "the equivalent of a Bachelor's Degree in Restaurant, Culinary, and Catering Management from a regionally accredited institution of higher education in the United States" based upon a combination of six years of work at McDonald's fast food restaurants and a U.S.-equivalent degree in engineering physics.

The AAO accepts that part of the GLS evaluation that opined that the beneficiary holds the equivalent of a U.S. "Combined Bachelor and Master of Science Degree in Engineering Physics," because that opinion is based upon a foreign degree and associated coursework that is documented in the record. However, a degree in engineering physics is not, in the language of 8 C.F.R. § 214.2(h)(4)(iii)(C)(2) a "degree required by the specialty occupation" if one assumes that the proffered position is a specialty occupation in the food services industry. To qualify the beneficiary, his foreign U.S.-equivalent degree would have to be in a precise and specific course of study that relates directly and closely to the position in question. There must be a close corollary between a beneficiary's specialized studies and the position. *See Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988).

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

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for

granting such credit based on an individual's training and/or work experience;

- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

There is no evidence that the person who authored the GLS evaluation is a section 1 official, that is, one "who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience." There is no evidence regarding sections 2 and 4.

The critical opinion in the GLS evaluation - that the beneficiary has achieved "the equivalent of a Bachelor's Degree in Restaurant, Culinary, and Catering Management from a regionally accredited institution of higher education in the United States" - must be discounted under section 3, as this opinion is partly based on the beneficiary's years of work at McDonald's fast food restaurants. Section 3 recognizes only a foreign credentials evaluation service opinion that is an "evaluation of education," not work experience.¹

¹ It should be noted that the petitioner's July 19, 2002 letter and the GLS evaluation characterized the beneficiary's history with [REDACTED] USA as work experience. The beneficiary stated on his curriculum vitae "[a]s part of a 2 year Training Exchange Program...I started working [on September 25, 2000] in Massachusetts, in [REDACTED] 5 and then Worcester 6, as a Restaurant Manager" and since October 1, 2001, has been "[i]n charge with [sic] the opening and running of a new [REDACTED] MA and continuing till the present." The beneficiary is currently in the United States as the beneficiary of an approved H-3 nonimmigrant trainee visa petition (LIN 02 194 54420), which was filed by [REDACTED]. The H-3 visa is valid only for training that does not place the beneficiary in a position which is in the normal operation of the U.S. petitioner's business, is not a position in which U.S. citizens and resident workers are regularly employed, and is not productive employment. 8 C.F.R. § 214.2(h)(7)(ii)(A). While the AAO does not have the record of proceeding for the approved H-3 nonimmigrant petition, based on information contained within this record it appears that the beneficiary has been engaged in productive employment instead of training while in the United States under the approved H-3 nonimmigrant visa. This employment would be grounds for revocation of approval of the H-3 petition under 8 C.F.R. §§214.2(h)(11)(iii)(A)(3) and (4), and, should the director choose, is sufficient cause for CIS to reexamine the McDonald's Corporation USA H-3 training program.

Only section 5 of 8 C.F.R. § 214.2(h)(4)(iii)(D) remains to be addressed.

When CIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated (1) that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; (2) that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and (3) that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation²;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The evidence of record is also insufficient to qualify the beneficiary under section 5's requirements.

In sum, the beneficiary is not qualified to perform services in any food services specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C) and related regulations. For this additional reason, the petition may not be approved.

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 and the appeal shall accordingly be dismissed.

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

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