



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF K-K-, LLC.

DATE: MAY 22, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a restaurant, seeks to temporarily employ the Beneficiary as an “executive chef” under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director of the California Service Center denied the petition, concluding that the evidence of record does not establish that the proffered position qualifies as a specialty occupation.

On appeal, the Petitioner submits additional evidence and asserts that the Director erred in the decision. Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

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 regulation at 8 C.F.R. § 214.2(h)(4)(ii) largely restates this statutory definition, but adds a non-exhaustive list of fields of endeavor. In addition, the regulations provide that the proffered position must meet one of the following criteria to qualify as a specialty occupation:

- (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.

8 C.F.R. § 214.2(h)(4)(iii)(A). We have consistently interpreted the term “degree” to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing “a degree requirement in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular position”); *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

II. PROFFERED POSITION

In the H-1B petition, the Petitioner stated that the Beneficiary will serve as an “executive chef” on a part-time basis for its seven-person restaurant. According to the Petitioner, it has a gross annual income of \$600,000 and no net income.

In response to the Director’s request for evidence (RFE), the Petitioner provided the following job duties for the position:¹

- Manage personnel, other human resources, and restaurant facility. This includes conferring with restaurant-operation personnel in conducting job interviews, hiring, training, developing, and disciplining subordinate personnel; managing staff and personal issues; scheduling and recruiting; conducting kitchen-staff performance reviews; and conducting ongoing staff meetings to discuss matters at hand, to implement the latest training and development activities, and to ensure all service standards are followed. In addition, this includes managing repairs and maintenance of the restaurant building and facility; controlling non-perishable inventory; participating actively in the restaurant’s operations-related meetings to ensure implementation of the restaurant’s standards; liaising with and representing the restaurant in all regulatory-agency requirements; and ensuring, overall, that the restaurant’s standards of outstanding quality and service are met. 20%
- Manage budgets and financial analysis. This includes reviewing financial records and monitoring budgets to ensure efficient operation and to ensure expenditures are within

¹ We modified the format and contents slightly in the interest of brevity; however, we thoroughly reviewed the Petitioner’s entire job description.

budgetary guidelines; accounting for all sales and generating required sales-related reports; understanding and producing all necessary food and beverage reports including china, glassware, linen, and silverware inventories; preparing food-management, restaurant-closing, restaurant-opening, and other required reports; and managing and enhancing inventory controls. 20%

- Manage the restaurant and marketing. This includes managing the front and back of the house during service hours; overseeing all kitchen activities; supervising, managing, and overseeing food and beverage services in order to maintain established operations standards to maximize the restaurant's profits; interacting with guests and nurturing guest relations; and planning, coordinating, and implementing special events while maintaining online orders generated through the connections with "app" services. 20%
- Manage menus and business development. This includes managing and planning of food and beverage items and menus; amending and maintaining the restaurant's food list; working with junior chefs and the owner in the development of creative and innovative food menus; developing and coordinating shift-strategy assignments of personnel to ensure economical use of food and timely preparation and service; and managing food and beverage costs. 20%
- Produce fine culinary delicacies. 20%

According to the Petitioner, the position requires a bachelor's degree in hotel management or culinary arts.

III. ANALYSIS

For the reasons set out below, we have determined that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation.² Specifically, the record does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.³

A. First Criterion

We turn first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position. To inform this inquiry, we recognize the U.S. Department of

² Although some aspects of the regulatory criteria may overlap, we will address each of the criteria individually.

³ The Petitioner submitted documentation in support of the H-1B petition, including evidence regarding the proffered position and its business operations. While we may not discuss every document submitted, we have reviewed and considered each one.

Labor's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁴

On the labor condition application (LCA)⁵ submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category "Chefs and Head Cooks" corresponding to the Standard Occupational Classification code 35-1011.

The *Handbook* subchapter entitled "How to Become a Chef or Head Cook" states, in pertinent part: "Most chefs and head cooks learn their skills through work experience." Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook*, Chefs and Head Cooks, (2016-17 ed.). The *Handbook* also states: "Although postsecondary education is not required for chefs and head cooks, many attend programs at community colleges, technical schools, culinary arts schools, and four-year colleges. Candidates are typically required to have a high school diploma or equivalent to enter these programs." *Id.*

The *Handbook* does not support the Petitioner's assertion that a bachelor's degree is necessary for entry into this occupation. Rather, according to the *Handbook*, postsecondary education is not required for these positions. This passage of the *Handbook* emphasizes the importance of work experience and does not indicate that there are any specific degree requirements for these jobs.

The Petitioner has not provided documentation from a probative source to substantiate its assertion regarding the minimum requirement for entry into this particular position. Thus, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

B. Second Criterion

The second criterion presents two alternative prongs: "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[.]" 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) (emphasis added). The first prong casts its gaze upon the common industry practice, while the alternative prong narrows its focus to the Petitioner's specific position.

⁴ All of our references are to the 2016-2017 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/ooh/>. We do not, however, maintain that the *Handbook* is the exclusive source of relevant information. That is, the occupational category designated by the Petitioner is considered as an aspect in establishing the general tasks and responsibilities of a proffered position, and we regularly review the *Handbook* on the duties and educational requirements of the wide variety of occupations that it addresses. To satisfy the first criterion, however, the burden of proof remains on the Petitioner to submit sufficient evidence to support a finding that its particular position would normally have a minimum, specialty degree requirement, or its equivalent, for entry.

⁵ The Petitioner is required to submit a certified LCA to demonstrate that it will pay an H-1B worker the higher of either the prevailing wage for the occupational classification in the "area of employment" or the actual wage paid by the employer to other employees with similar experience and qualifications who are performing the same services. See *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 545-546 (AAO 2015).

1. First Prong

To satisfy this first prong of the second criterion, the Petitioner must establish that the “degree requirement” (i.e., a requirement of a bachelor’s or higher degree in a specific specialty, or its equivalent) is common to the industry in parallel positions among similar organizations.

In determining whether there is such a common degree requirement, factors often considered by us include: 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)).

As previously discussed, the Petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports a requirement for at least a bachelor’s degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter.

In support of this criterion, the Petitioner submitted copies of job announcements placed by other employers. However, upon review of the documents, we find that the Petitioner’s reliance on the job announcements is misplaced. Specifically, some of the postings do not indicate that at least a bachelor’s degree in a directly related specific specialty (or its equivalent) is required.⁶ For instance, one of the postings states that a bachelor’s degree in culinary is preferred. A *preference* for a degree in a field is not necessarily an indication of a minimum *requirement*. In addition, the posting for [REDACTED] requires a degree or certificate. Furthermore, the advertisement for [REDACTED] requires five years of experience and no degree. The other job postings suggest, at best, that although a bachelor’s degree is sometimes required for executive chef positions, a bachelor’s degree in a *specific specialty* (or its equivalent) is not.⁷

⁶ As discussed, the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor’s or higher degree, but a bachelor’s degree in a specific specialty that is directly related to the duties of the position. See section 214(i)(1)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

⁷ It must be noted that even if all of the job postings indicated that a requirement of a bachelor’s degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the Petitioner has not demonstrated what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that “[r]andom selection is the key to [the] process [of probability sampling]” and that “random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error”).

As the documentation does not establish that the Petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary.⁸ That is, not every deficit of every job posting has been addressed.

In response to the RFE, the Petitioner submitted a letter from [REDACTED] of [REDACTED] [REDACTED] asserts that the company decided “to look” for candidates for its executive chef position who hold a bachelor’s degree or higher in restaurant/hotel management or similar, along with five years of related experience. While [REDACTED] states that the company has been in business since 2008, he does not provide the number of people who have held the position or describe their specific credentials. The letter is not supported by evidence or sufficient information that this organization “routinely employ[s] and recruit[s] only degreed individuals.” *See id.*

The Petitioner also provided a letter from [REDACTED] of [REDACTED] which operates a meal delivery mobile app.⁹ [REDACTED] states that “Indian restaurants, especially in the midst of the very saturated [REDACTED] market, must have as an Executive Chef someone who has a bachelor’s degree in Restaurant/Hotel Management or similar.” Further, [REDACTED] states that “[w]ithout divulging confidential information, I attest that sales figures support this conclusion for our business as a result.” However, [REDACTED] does not provide documentary evidence to corroborate his claims. His testimony does not sufficiently substantiate his conclusions, such that we can conclude that the Petitioner has shouldered its burden of proof. For example, he does not reference, cite, or discuss probative studies, surveys, industry publications, authoritative publications, or other sources of empirical information which he may have consulted to complete the evaluation.

On appeal, the Petitioner submits a letter from [REDACTED] dean of career technical education and economic development at [REDACTED]. Upon review, we find that [REDACTED] provides inconsistent information regarding the requirements for the proffered position. For instance, [REDACTED] states that a bachelor’s degree in culinary arts is required for the position. However, in the same letter, he states: “Work experience is the most important requirement for Executive Chef positions, though a Bachelor’s degree in culinary arts or a related hospitality field is recommended.” The record lacks an explanation for this inconsistency. Further, a *recommendation* for a degree in a field is not necessarily an indication of a minimum *requirement*.

Furthermore, the record does not include evidence that [REDACTED] has for example, published, conducted research, run surveys, or engaged in an enterprise, pursuit, or employment – academic or otherwise – regarding the minimum education requirements for the performance of the duties of the

⁸ The Petitioner did not provide any independent evidence of how representative the job postings are of the particular advertising employers’ recruiting history for the type of job advertised. As the advertisements are only solicitations for hire, they are not evidence of the actual hiring practices of these employers.

⁹ Notably, the letters from [REDACTED] and [REDACTED] are almost identical to each other. More specifically, the wordings of the letters match virtually verbatim, including grammatical and punctuation errors. When letters are worded the same (and include identical errors), it indicates that the words are not necessarily those of the authors and may cast some doubt on the letters’ validity.

proffered position. [REDACTED] references the website [REDACTED] however, similar to the *Handbook*, the website reports that an associate's degree may be sufficient for entry.

In addition, the Petitioner submits a letter from [REDACTED] bases her opinion on her experience as an "author of many peer reviewed articles and professor teaching courses in Food Chemistry and Chemistry." Upon review of [REDACTED] resume, we find that she obtained her experience in Mexico. Yet, [REDACTED] has not demonstrated how her experience in Mexico is relevant for determining whether the proffered position satisfies the applicable statutory and regulatory provisions for a specialty occupation in the United States.

For the reasons discussed, we find that opinion letters lend little probative value to the matter here. *Matter of Caron Int'l*, 19 I&N Dec. 791, 795 (Comm'r 1988) (The service is not required to accept or may give less weight to an advisory opinion when it is "not in accord with other information or is in any way questionable.").

Without more, the Petitioner has not provided sufficient evidence to establish that a bachelor's degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations. Thus, the Petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

2. Second Prong

We will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the Petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

In support of its assertion that the proffered position qualifies as a specialty occupation, the Petitioner described the proffered position and its business operations. In response to the RFE, the Petitioner asserted that it meets this criterion. However, the Petitioner has not sufficiently developed relative complexity or uniqueness as an aspect of the proffered position. For instance, the Petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it may believe are so complex and unique. While a few related courses may be beneficial in performing certain duties of the position, the Petitioner has not demonstrated how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them.

The Petitioner claims that the Beneficiary is well-qualified for the position, and references his qualifications. However, the test to establish a position as a specialty occupation is not the education or experience of a proposed beneficiary, but whether the position itself requires at least a bachelor's

degree in a specific specialty, or its equivalent. The Petitioner did not sufficiently develop relative complexity or uniqueness as an aspect of the duties of the position, and it did not identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. Accordingly, the Petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

C. Third Criterion

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position.

Upon review of the record, we find that the Petitioner did not submit information regarding employees who currently or previously held the position. The record does not establish that the Petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, directly related to the duties of the position. Therefore, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

D. Fourth Criterion

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

The Petitioner claims that its position satisfies this criterion; however, relative specialization and complexity have not been sufficiently developed by the Petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than other positions in the occupational category that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the Petitioner has not demonstrated in the record that its proffered position is one with duties sufficiently specialized and complex to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

IV. CONCLUSION

Because the Petitioner has not satisfied one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it has not demonstrated that the proffered position qualifies as a specialty occupation.

ORDER: The appeal is dismissed.

Cite as *Matter of K-K-, LLC.*, ID# 371342 (AAO May 22, 2017)