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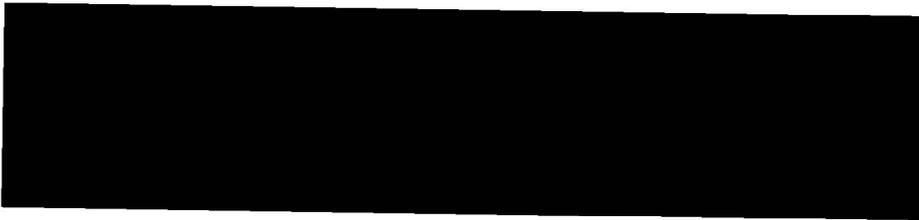
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FILE: WAC 06 192 53387 Office: CALIFORNIA SERVICE CENTER Date: **MAY 29 2008**

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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



Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and dismissed a subsequent motion to reopen and/or reconsider. 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 an ethnic Indian restaurant and catering service that seeks to extend its authorization to employ the beneficiary as a “Chef, Foreign Specialty (Indian) Manager.” The petitioner, therefore, 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). The director denied the petition because the proffered position is not a specialty occupation and the beneficiary is not qualified to perform the duties of a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director’s request for evidence (RFE); (3) counsel’s response to the RFE; (4) the director’s denial letter; (5) counsel’s motion to reopen and/or reconsider; (6) the director’s dismissal letter; and (7) Form I-290B, with counsel’s brief. The AAO reviewed the record in its entirety before reaching its decision.

The first issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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) consistently 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.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered.

The petitioner seeks the beneficiary’s services as a “Chef, Foreign Specialty (Indian) Manager.” Evidence of the beneficiary’s duties includes: the petitioner’s May 23, 2006 letter in support of the petition and counsel’s January 15, 2007 response to the director’s RFE. As stated by the petitioner, the proposed duties are as follows:

- Plan and coordinate menus;
- Direct the cooking of North Indian dishes, appetizers, dinners, and desserts in accordance with recipes, methods, and diner’s request;
- Prepare and season meats, sauces, vegetables, and marinades prior to cooking;
- Estimate food consumption for large parties and catering orders;
- Order supplies and price menu items; and
- Train new kitchen staff members.

The director found that the proposed executive chef/food service manager duties do not require a bachelor’s degree. Citing the Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)*, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its

equivalent in a specific specialty. The director concluded that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel asserts, in part, that the motion to reopen was improperly “denied” as it was filed with the following new evidence: a certification from the American Culinary Association pertaining to the beneficiary’s qualifications; copies of Internet job postings; and an additional credentials evaluation from Mercy College. Counsel states that one of the director’s grounds for denial, namely, that the recognition of expertise should have been from two recognized authorities, was never previously mentioned by the director. Counsel also asserts that the director’s finding that the employers reflected in the Internet job postings are dissimilar from the petitioner, is incorrect.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; 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. Factors often considered by CIS when determining these criteria 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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with counsel that the proffered position is a specialty occupation. No evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is required for a chef job. Although the *Handbook* indicates that executive chefs and head cooks who work in fine restaurants require many years of training and experience, it does not specify that executive chef and head cook positions require a baccalaureate degree in a specific specialty or an equivalent thereof. The *Handbook*, under the category of Chefs, Cooks, and Food Preparation Workers, indicates:

Some chefs and cooks may start their training in high school or post-high school vocational programs. Others may receive formal training through independent cooking schools, professional culinary institutes, or 2- or 4-year college degree programs in hospitality or culinary arts. . . . Many chefs are trained on the job, receiving real work experience and training from chef mentors in the restaurants where they work.

The *Handbook* also recognizes: “Formal programs, which may offer training leading to a certificate or a 2- or 4-year degree, are geared more for training chefs for fine-dining or upscale restaurants.”

The AAO observes that the *Handbook* does not specifically discuss lead chef/head chef positions at small, independently owned restaurants but does provide a general understanding of the educational requirements for an individual to perform the duties of a lead chef/head chef. The variety of paths available to enter into a lead chef/head chef position precludes the conclusion that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the proffered position. Accordingly, the petitioner has not established that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the position of “Chef, Foreign Specialty (Indian) Manager.” Of further note, although information on the petition reflects that the petitioner was established in 1993, has \$1,291,362.00 in gross annual income, and 12 employees, the petitioner has not submitted any evidence in support of these claims such as federal income tax returns and quarterly wage reports. 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)). The petitioner has failed to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

Regarding parallel positions in the petitioner’s industry, counsel submits Internet job postings for chef/restaurant manager positions. Counsel’s assertion that the director’s finding that the employers reflected in the Internet job postings are dissimilar from the petitioner is incorrect, is noted. Counsel submitted the following Internet job postings on motion: an “executive sous chef” for the ARAMARK operation at the E.N. Morial Convention Center in New Orleans; an executive chef for ARAMARK in Indianapolis, Indiana; and an executive chef for a “high-volume” Italian restaurant in Irvine, California. It is noted that only one of the three job postings specifies the requirement of a bachelor’s degree. The posting for the “executive sous chef” stipulates the requirement of a bachelor’s degree or related culinary degree (preferably a “CEC”) with 4+ years of industry and culinary management experience. It is noted that a certified executive chef degree/certificate and 4+ years of industry and culinary management experience are not necessarily the equivalent of a bachelor’s degree. 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. Likewise, the posting for the executive chef in Indianapolis, Indiana stipulates the requirement of a bachelor’s degree or related culinary degree with 5+ years of industry and culinary management experience. Again, a culinary degree with 5+ years of industry and culinary experience are not necessarily the equivalent of a bachelor’s degree. This information confirms the position of the DOL in its *Handbook*, namely that executive chef/food service manager jobs do not require a bachelor’s degree in a specialty. Moreover, the job posting for the executive chef position in the “high volume” Italian restaurant, which stipulates the requirement of a Bachelor of Science degree, fails to offer a meaningful description of the inherent duties and fails to indicate whether it is similar to the petitioner in size, number of employees, or level of revenue. In view of the foregoing, the job postings are not probative.

The record does not include any evidence from firms, individuals, or professional associations regarding an industry standard. In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner has not submitted sufficient documentation to establish that the duties of the proffered position involve duties that are complex or unique; rather the petitioner has provided a general description of

the occupation without identifying any complex or unique tasks pertinent to the petitioner's business that would elevate the position to one that requires the knowledge associated with a bachelor's degree in a specific discipline. 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 now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. Although counsel does not address this issue on appeal, the evidence of record does not establish this criterion. Further, the petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

The prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

Counsel states in his March 21, 2007 letter that the proposed duties are so specialized as to require a background in culinary arts, experience in restaurant and hotel management, and experience as a chef in Indian cooking at an upscale Indian restaurant. The petitioner, however, has not established that the proposed duties exceed in scope, specialization, or complexity those usually performed by chefs/food service managers, occupational categories that do not require a baccalaureate or higher degree in a specific specialty. Further, as indicated earlier in this decision, the petitioner's unsupported claims regarding the basic information of its business do not establish a requirement for a bachelor's degree level of knowledge in a specific discipline requisite for this criterion. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation.

The final issue in this proceeding is whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of a specialty occupation. Specifically, the director found that the petitioner had not established that the beneficiary's education, training, and work experience qualifies him for the proffered position.

On appeal, counsel states, in part, that the evidence of record, in addition to the certification from the American Culinary Association and the additional credentials evaluation from Mercy College submitted on motion, demonstrate that the beneficiary is qualified for the proffered position.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien 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.

The record contains the following documentation pertaining to the beneficiary's qualifications:

- An advisory opinion dated March 14, 2007, from the "Director of Education – certification" of the American Culinary Association, opining that the beneficiary possesses "an extremely high level of expertise in the field of culinary arts" and "is clearly prominent in his field of endeavor and qualifies for a specialized knowledge occupation by the industry standard";
- A work experience evaluation report dated March 12, 2007, from Professor [REDACTED] of Mercy College, who finds that the beneficiary's three-year program in hotel management in India is the equivalent of "three years full-time tertiary program of studies in Hotel Management from a regionally accredited institution of higher education in the United States," and who concludes that the beneficiary has, as a result of education and work experience, the equivalent of a Bachelor of Arts degree in hotel management and catering technology from a regionally accredited institution of higher education in the United States;
- An undated evaluation of education, training, and experience from The Trustforte Corporation, concluding that the beneficiary completed the equivalent of an Associate of Arts Degree, or two years of study toward a Bachelor of Arts degree in culinary arts, from an accredited institution of higher education in the United States, and that, as a result of the beneficiary's education and approximately eleven years of professional training and work experience in culinary arts and related areas, the beneficiary has the equivalent of a Bachelor of Arts degree in culinary arts from an accredited institution of higher education in the United States;
- An academic evaluation dated December 20, 2006, from The Trustforte Corporation, concluding that the beneficiary's diploma in Hotel Management and Catering Technology is the

equivalent of an Associate of Arts degree in Culinary Arts from an accredited institution of higher education in the United States;

- An evaluation dated November 11, 2003, from the International Evaluation Services, L.L.C., concluding that the beneficiary's diploma in Hotel Management & Catering Technology is the equivalent of three years of undergraduate study in Hotel Management & Catering Technology from an accredited institution in the United States, and that the beneficiary's educational background and professional training in conjunction with over seven years of documented professional experience are the equivalent of a U.S. Bachelor of Hotel Management & Catering Technology degree;
- A letter dated December 21, 2005, and a "Leaving Certificate" dated April 1, 1997, from the principal of Rizvi Education Society's Rizvi College of Hotel Management & Catering Technology, certifying that the beneficiary was a student of the institute from 1992 – 1995, and his reason for leaving as "Passed out";
- A letter dated July 2, 2001, from the director of Hotel Sury in India, certifying that the beneficiary was employed as a chef from April 25, 2000 to June 30, 2001;
- A letter dated March 16, 2000, from the Shipboard Personnel Director of Carnival Cruise Lines in Miami, Florida, verifying the beneficiary's employment at Carnival Cruise Lines since March 15, 1998, and his current position as assistant cook;
- A letter dated March 15, 1998, from the manager of an Indian hotel, name unintelligible, certifying that the beneficiary was employed as a "Chef in Indian Kitchen" from March 8, 1996 to March 10, 1998;
- A letter dated March 14, 1997, from the vice president of the business Blue Diamond, location not specified, certifying that the beneficiary was engaged as an apprentice "Commis-III" from April 7, 1996 to March 5, 1997;
- A letter dated October 30, 1995, from the personnel manager of GOA Renaissance Resort, in India, certifying that the beneficiary underwent training as Hotel Operations Trainee from August 1, 1995 to October 16, 1995;
- A letter dated November 10, 1994, from the personnel manager of the Indian business, Hotel Sagar Plaza, certifying that the beneficiary underwent practical training in its food and beverage continental department from October 14, 1994 to November 10, 1994;
- A letter dated December 2, 1993, from the personnel manager of the Indian business, Hotel Sagar Plaza, certifying that the beneficiary underwent practical training in its food and beverage production and service department from November 1– 30, 1993; and

- A resume for the beneficiary

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.

The AAO acknowledges counsel's assertion that the advisory opinion from the American Culinary Association demonstrates that the beneficiary is qualified for the proffered position. As noted above, the evaluator in the March 14, 2007 advisory opinion asserts that the beneficiary possesses "an extremely high level of expertise in the field of culinary arts" and that "he is clearly prominent in his field of endeavor and qualifies for a specialized knowledge occupation by the industry standard." The writer, however, does not relate his conclusions to specific, concrete aspects of the beneficiary's educational, training, and employment background to demonstrate a sound factual basis for his conclusions about the beneficiary's prominence in his field and/or his level of specialized knowledge. CIS 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, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). As the opinion of the writer is not based on a factual foundation, the AAO does not find it probative in this matter.

The AAO also acknowledges counsel's assertion that the evidence of record, which includes the additional credentials evaluation from Mercy College submitted on motion, demonstrates that the beneficiary is qualified for the proffered position. The AAO finds that not all of the credentials evaluations in the evidence of record are consistent. Specifically, the March 12, 2007 work experience evaluation report from Professor [REDACTED] of Mercy College, concluding that the beneficiary's three-year program in hotel management in India is the equivalent of "three years full-time tertiary program of studies in Hotel Management from a regionally accredited institution of higher education in the United States," and the November 22, 2003 evaluation from

the International Evaluation Services, L.L.C., concluding that the beneficiary's diploma in Hotel Management & Catering Technology is the equivalent of three years of undergraduate study in Hotel Management & Catering Technology from an accredited institution in the United States, conflict with the December 20, 2006 academic evaluation from The Trustforte Corporation, concluding that the beneficiary's diploma in Hotel Management and Catering Technology is the equivalent of an Associate of Arts degree in Culinary Arts from an accredited institution of higher education in the United States. The record contains no explanation for this inconsistency. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Moreover, although The Trustforte Corporation and the International Evaluation Services, L.L.C. both conclude that, as a result of the beneficiary's education and professional training and work experience in culinary arts, the beneficiary holds a bachelor's degree in a culinary-related field, 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). In view of the foregoing, the evaluations carry no weight in these proceedings. CIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). Of further note, the record contains no evidence that the Rizvi College of Hotel Management & Catering Technology is either recognized or accredited as an institution of higher education in India.¹ Also noted is that none of the employment letters contains a comprehensive description of the beneficiary's duties.

It is also noted that in his March 12, 2007 work experience evaluation report, Professor ██████████ asserts that Mercy College "has been given the authority by the Board of Regents in the State of New York to grant degrees in Hotel Management for students who have the necessary credits and units in Hotel Management, derived from formal education and/or work experience." The record, however, does not contain evidence that Professor Jelen is 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, as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). 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.

¹ It is also noted that the Rizvi College of Hotel Management & Catering Technology does not appear on the Electronic Database for Global Education (EDGE) website at <http://aacraoedge.aacraoedge.org> as an accredited institution.

In view of the foregoing, the AAO finds that the record lacks documentary evidence to substantiate counsel's assertion that the evidence of record demonstrates that the beneficiary is qualified for a specialty occupation. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As related in the discussion above, the petitioner has failed to establish that the beneficiary has the requisite qualifications to perform the duties of a specialty occupation. For this additional reason, the petition will 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.

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