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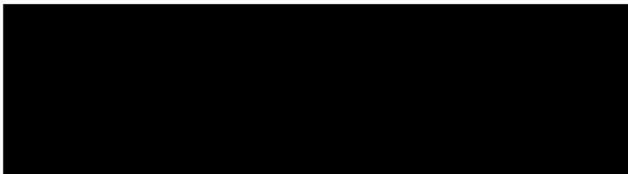
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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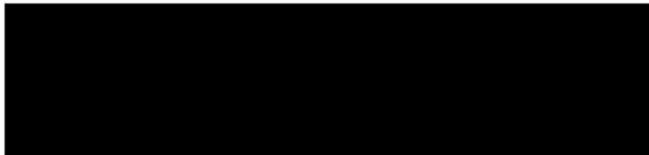
FILE: EAC 07 098 52684 Office: VERMONT SERVICE CENTER Date:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a full-service restaurant, privately owned and independent of any restaurant chain, featuring 28 tables and an open-kitchen setup. To employ the beneficiary as its restaurant manager/operations manager, the petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on each of two separate grounds, namely, the petitioner's failures to establish (1) that the proffered position is a specialty occupation, and (2) that the beneficiary is qualified to serve in a specialty occupation.

The present petition was filed on February 23, 2007. As indicated at Part 2 of the Form I-129 and elsewhere in the record, it was filed to amend the previously filed petition with Form I-129 receipt number EAC 06 152 528860.

On May 29, 2007, the director issued a Notice of Intent to Deny (NOID), which noted several apparent defects upon which the director intended to deny the present petition. On June 27, 2007, counsel filed a response, consisting of a letter from counsel and nine sets of documents in support of the arguments presented in counsel's letter. Only two sections of the NOID relate to the issues upon which the director based her decision to deny the petition.¹ The first section relates to the beneficiary's qualifications:

[I]t appears the Service may have erred in evaluating that the beneficiary is eligible for a specialty occupation. Nothing was submitted to clearly demonstrate that the beneficiary possessed at least a baccalaureate degree in the field of the proffered position, or in a closely related field. Further, if the beneficiary possessed at least a bachelor's degree is [sic] in a closely related field it must clearly be demonstrated how it relates.

The other section of the NOID that is relevant to the issues on appeal conveys the director's intent to deny for insufficient evidence that the petitioner is proffering a specialty occupation position:

Also, according to the Occupational Outlook Handbook the scope of the position must be considered to determine if it can be classified as requiring a bachelor's

¹ The AAO notes that the NOID specified two additional grounds for intended denial, namely: a Labor Condition Application certifying an employment period ending one month earlier than that requested in the Form I-129; and the possibility that the beneficiary was not in status when the petition was filed. The language of the director's decision indicates that the petitioner's NOID response resolved both issues to her satisfaction.

degree. The information contained in the record shows the restaurant to have been established in the year 2005 with a present employee contingent of twelve people. Nothing indicates that the position is so that it does not perform routine duties other than [sic] that of Restaurant Manager and/or that the size and scope of the company can perform such a function.

The following paragraph of the director's decision convey her determination that the response to the NOID was not sufficient to overcome either the specialty occupation or the beneficiary-qualification ground of the NOID:

After thorough review of the position's description, beneficiary's training and experience, scope of the company and employment history, as well as other documentation of record, it is found to be insufficient and unconvincing that the job offered qualifies as a "specialty occupation" pursuant to section 101(a)(15)(H)(i)(b) of the Act and that the beneficiary qualifies for classification within the meaning of section 101(a)(15)(H)(i)(b) of the Act.

On appeal, counsel contends that, contrary to the director's decision, the evidence of record establishes both that the petitioner is proffering a specialty occupation position and that the beneficiary is qualified to serve in that type of specialty occupation position.

As will be discussed below, the AAO finds that the petitioner has established neither that the proffered position is a specialty occupation position nor that the beneficiary is qualified to serve in a specialty occupation. Accordingly, the director's decision to deny the petition shall not be disturbed.

The AAO will first address the specialty occupation issue.

Counsel's assertions about the proffered position satisfying specialty occupation criteria and about the beneficiary being qualified for service in a specialty occupation are noted, but they merit no weight, as they are not supported by documentary evidence in the record. 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).

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

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation “which [1] 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 [2] 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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R.

§ 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

On the Form I-129, the petitioner describes itself as a full-service restaurant with 12 employees, a gross annual income of \$386,310 and a net annual income of \$4,264.

Below, verbatim, is the list of duties that the petitioner provides as the proffered position’s job description:

- Test food by tasting and smelling it in order to ensure palatability and flavor conformity.
- Direct and coordinate all restaurant operations, including flow of food, food preparation methods, menu planning and pricing, develop new menu items, inventory management, quality control, portion sizes, and garnishing and presentation of food.
- Direct, coordinate and participate in the development of marketing strategies and implement advertising and promotional campaigns to increase business.
- Requisition and purchase of supplies, equipment and food and beverages. Schedule and receive food and beverage deliveries, inspecting delivery contents in order to verify product quality and quantity.
- Attend to client needs, ensuring the set standards of customer service are kept. This includes investigating and resolving complaints regarding food quality, service or accommodations.
- Review financial statements, sales and activity reports, and other performance data to ensure productivity and goal achievement and to determine areas needing cost reduction and program improvement.

- Monitor budget and payroll records, and review financial transactions in order to ensure that expenditures are authorized and budgeted.
- Make bank deposits, review daily sales, monitor cash flow and ensure all accounting data is provided to the accountant on a monthly basis.
- Provide updates to the restaurant owner on the financial health and profitable growth of the operation. Determine future financial goals and overall restaurant objectives.
- Establish and implement restaurant policies, goals, objectives, and procedures, conferring with owner and staff members as necessary.
- Manage staff, preparing work schedules and assigning specific duties in order to optimize productivity and ensure efficient use of products and the timely preparation of food.
- Determine staffing requirements, and interview, hire and train new employees, or oversee those personnel processes. Ensure adherence to all applicable labor laws.
- Establish and keep standards for personnel performance and customer service. Motivate staff to achieve set standards and surpass them.
- Monitor compliance with health, safety and fire regulations and standards regarding food preparation and serving, and building maintenance. Ensure all set food safety procedures are adhered in order to prevent food borne illnesses and contamination. Oversee cleaning and maintenance of equipment and facilities.
- Keep records required by government agencies regarding sanitation, and food subsidies when appropriate.
- Keep abreast of new food service trends and challenges[.]

The petitioner has not presented sufficient evidence to satisfy any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) and thereby establish that the proffered position requires the practical and theoretical application of a body of highly specialized knowledge that is acquired by at least a bachelor's degree, or its equivalent in a specific specialty, as required by the Act.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which assigns specialty occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

The AAO recognizes the Department of 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. The AAO finds that, to the extent it is described in the record, the proffered position comports with the general duties that the 2008-2009 edition of the *Handbook* aligns with the occupational category Food Service Managers. The "Nature of the Work" section of the *Handbook's* chapter on food service managers contains these comments about usual duties:

Food service managers are responsible for the daily operations of restaurants and other establishments that prepare and serve meals and beverages to customers. Besides coordinating activities among various departments, such as kitchen, dining room, and banquet operations, food service managers ensure that customers are satisfied with their dining experience. In addition, they oversee the inventory and ordering of food, equipment, and supplies and arrange for the routine maintenance and upkeep of the restaurant's equipment and facilities. Managers generally are responsible for all of the administrative and human-resource functions of running the business, including recruiting new employees and monitoring employee performance and training.

Managers interview, hire, train, and when necessary, fire employees. . . . Managers oversee the training of new employees and explain the establishment's policies and practices. They schedule work hours, making sure that enough workers are present to cover each shift. . . .

Food service managers ensure that diners are served properly and in a timely manner. They investigate and resolve customers' complaints about food quality or service. They monitor orders in the kitchen to determine where backups may occur, and they work with the chef to remedy any delays in service. Managers direct the cleaning of the dining areas and the washing of tableware, kitchen utensils, and equipment to comply with company and government sanitation standards. Managers also monitor the actions of their employees and patrons on a continual basis to ensure the personal safety of everyone. They make sure that health and safety standards and local liquor regulations are obeyed.

In addition to their regular duties, food service managers perform a variety of administrative assignments, such as keeping employee work records, preparing the payroll, and completing paperwork to comply with licensing laws and tax, wage and hour, unemployment compensation, and Social Security laws. Some of this work may be delegated to an assistant manager or bookkeeper, or it may be contracted out, but most general managers retain responsibility for the accuracy of business records. Managers also maintain records of supply and equipment purchases and ensure that accounts with suppliers are paid.

Managers tally the cash and charge receipts received and balance them against the record of sales. . . .

[T]o minimize food costs and spoilage, many managers use inventory-tracking software to compare sales records with a record of the current inventory. . . . Computers also allow restaurant and food service managers to keep track of employee schedules and paychecks more efficiently.

Food service managers use the Internet to track industry news, find recipes, conduct market research, purchase supplies or equipment, recruit employees, and train staff. . . .

* * *

Managers or executive chefs estimate food needs, place orders with distributors, and schedule the delivery of fresh food and supplies. They plan for routine services or deliveries, such as linen services or the heavy cleaning of dining rooms or kitchen equipment, to occur during slow times or when the dining room is closed. Managers also arrange for equipment maintenance and repairs, and coordinate a variety of services such as waste removal and pest control. Managers or executive chefs receive deliveries and check the contents against order records. They inspect the quality of fresh meats, poultry, fish, fruits, vegetables, and baked goods to ensure that expectations are met. They meet with representatives from restaurant supply companies and place orders to replenish stocks of tableware, linens, paper products, cleaning supplies, cooking utensils, and furniture and fixtures.

The *Handbook's* information on educational requirements in the food-service-manager occupation indicates that positions such as the one proffered in this petition do not normally require at least a bachelor's degree or the equivalent in a specific specialty. This is evident in the following excerpt from the "Training, Other Qualifications, and Advancement" section of the *Handbook's* chapter on food service managers:

Experience in the food services industry, whether as a cook, waiter or waitress, or counter attendant, is the most common training for food service managers. Many restaurant and food service manager positions, particularly self-service and fast-food, are filled by promoting experienced food and beverage preparation and service workers.

Education and training. Experience as a waiter or waitress, cook, or counter help is the most common way to enter the occupation. Executive chefs, in particular, need extensive experience working as chefs. Many food service management companies and national or regional restaurant chains recruit management trainees from 2- and 4-year college hospitality management programs, which require internships and real-life experience to graduate. Some restaurant chains prefer to hire people with degrees in restaurant and institutional food service management, but they often hire graduates with degrees in other fields who have demonstrated experience, interest, and aptitude.

Postsecondary education is preferred for many food service manager positions, but it is not a significant qualification for many others: More than 40 percent of food service managers have a high school diploma or less; less than one-quarter have a bachelor's or graduate degree. However, a postsecondary degree is preferred by higher end full-

service restaurants and for many corporate positions, such as managing a regional or national restaurant chain or franchise or overseeing contract food service operations at sports and entertainment complexes, school campuses, and institutional facilities. A college degree also is beneficial for those who want to own or manage their own restaurant.

Almost 1,000 colleges and universities offer 4-year programs in restaurant and hospitality management or institutional food service management; a growing number of university programs offer graduate degrees in hospitality management or similar fields. For those not interested in pursuing a 4-year degree, community and junior colleges, technical institutes, and other institutions offer programs in the field leading to an associate degree or other formal certification.

Both 2- and 4-year programs provide instruction in subjects such as nutrition, sanitation, and food planning and preparation, as well as accounting, business law and management, and computer science. Some programs combine classroom and laboratory study with internships providing on-the-job experience. In addition, many educational institutions offer culinary programs in food preparation. Such training can lead to careers as cooks or chefs and provide a foundation for advancement to executive chef positions.

Next, for the reasons discussed below, the AAO accords no significant evidentiary weight to either the Advisory Opinion Report (Opinion Report) from ██████████, who identifies herself as the president of Global Education Group, Inc. (GECI), or to the Expert Opinion Evaluation submitted by ██████████ of the Rochester Institute of Technology. USCIS 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, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The cover letter by which ██████████ introduces this document describes GECI as a “foreign credential evaluation firm” and indicates that ██████████ academic qualifications and professional experience are in “the field of international education (including transfer credit assessment and foreign credit evaluation),” as demonstrated in her attached resume. That resume, which lists Ms. ██████████ work experience and academic degrees as a Master of Business Administration and a Bachelor of Arts in International Studies and Spanish/Latin American Studies, does not indicate that ██████████ has professional experience in, or academic expertise on, the occupation on which she opines; has conducted studies of that occupation; or has been recognized as an expert on that occupation. Further, ██████████ Opinion Report states that her opinion as to the academic requirement for the proffered position is based “upon her academic qualification and professional experience” not in restaurant management, food service management, hospitality management, or any related segment of the hospitality industry, but in “the field of international education.” On the basis of this information, the AAO finds that ██████████ lacks sufficient competence to be regarded

as an expert on the occupation on which opines, and that, therefore, her opinion does not merit any deference.

The AAO also discounts the Opinion Report because of its failure to provide substantive analysis as to how the author reached the findings upon which she based her conclusion about the educational requirements of the proffered position. The Opinion Report's discussion merely lists the duties of the proffered position; states that those "aforementioned job duties are tasks that would require academic knowledge acquired in four years of academic study towards the U.S. Bachelor's degree in Hospitality Management, Culinary Arts, or related area at a regionally accredited university in the United States or foreign equivalent"; and lists over two dozen "university level" courses that would provide the knowledge that the author opines as necessary for the proffered position. Further, Ms. [REDACTED] has provided no indication that she has observed the petitioner's business operations, reviewed any of the business matters which would engage the petitioner, or otherwise obtained facts that would support her conclusion. Thus, she has not provided a factual basis by which USCIS may reasonably conclude that her opinion is well founded and reliable. Also, the AAO finds a material element of unreliability in the Opinion Report's failure to address the *Handbook's* information that suggest that the proffered position is not one that would normally require at least a bachelor's degree level of knowledge in a specific specialty.

In the document that he entitles "Expert Opinion Evaluation," [REDACTED] addresses the generic "position of Restaurant Manager," and opines that "at least a Bachelor's degree in the area of Hospitality Management, or a related field, from an accredited institution of higher learning" is "considered necessary by people in the industry seeking to hire a Restaurant Manager in the field of Hospitality Management and thus . . . is considered an industry standard requirement for the position"; that "the position of Restaurant Manager requires the theoretical and practical application of an advanced [sic] highly specialized body of knowledge in the field of Hospitality Management, which requires the attainment of at least a Bachelor's degree or its equivalent as the minimum requirement for entry into the occupation"; that, in his opinion, "the position of Restaurant Manager has responsibilities and authority commensurate with professional standing" and requires "skill in the area of Hospitality Management [that] requires at least college-level academic training, including knowledge that is acquired in classes offered at Bachelor's-level Hospitality Management programs"; and that, in his opinion, "the position of Restaurant Manager is clearly a specialty position, and requires the services of someone with the minimum of a Bachelor's degree in Hospitality Management or a related field."

For the following reasons the AAO finds that [REDACTED]'s document is not probative. All of [REDACTED]'s statements about the "Restaurant Manager position" are conclusory in that the professor does not cite studies, treatises, surveys, statistical analyses, or any other factual basis for them. As such, the document does not demonstrate the accuracy and reliability of its statements. Furthermore, [REDACTED]'s statements about educational requirements conflict with the Department of Labor's information in the *Handbook*, which the professor does not address.

Because of the fundamental deficiencies discussed above, the AAO discounts the submissions of and [REDACTED] as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) as a reasonable exercise of its discretion.

As discussed above, the evidence of record does not establish that the particular position proffered here is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties. Therefore, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS 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 already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Also, there are no submissions from professional associations, individuals, or firms in the petitioner's industry. As noted earlier in this decision, the AAO accords no weight to Professor Sackler's statement that there is an industry-wide degree standard, as he provided no empirical basis for the statement.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." As evident in the petitioner's list of duties quoted earlier in this decision, any of the proposed duties that may involve deliberation and discretion are described in exclusively generalized and generic terms, such as "[d]irect and coordinate all restaurant operations, including flow of food, food preparation methods, menu planning and pricing," "[p]rovide updates to the restaurant owner on the financial health and profitable growth of the operation," and "[d]etermine future financial goals and overall restaurant objectives," that lack substantive details to distinguish the proffered position as unique from or more complex than the usual range of restaurant-management positions that the *Handbook* indicates can be performed by persons without a specialty degree or its equivalent.

As the record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO acknowledges that in his letter the owner of the

petitioning firm states that he, the only manager so far working for the petitioner, has a culinary degree. However, the AAO notes the record's copy of the owner's diploma indicates that he holds only an Associate's degree. Further, the petitioner's one owner/manager's educational qualifications are not sufficient to establish a recruiting and hiring history.

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The limited and generalized extent in which the proposed duties are described substantially comport with the generalized duties described in the *Handbook*, which does not attribute to them a usual association with a degree in a specific specialty.

For the reasons discussed above, the AAO finds that the petitioner has not established that the proffered position qualifies as specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

With regard to the second ground of denial, the director's decision on the beneficiary qualification issue was also correct: the petitioner has not established that the beneficiary is qualified to serve in a specialty occupation in accordance with the regulations at 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D).

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:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
 - (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The degree referenced by section 214(i)(1)(B) of the Act means one in a specific specialty that is characterized by a body of highly specialized knowledge that must be theoretically and practically applied in performing the duties of the proffered position.

In implementing 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (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 record contains no evidence of the degree or licensure factors specified in the first three criteria of 8 C.F.R. § 214.2(h)(4)(iii)(C), above.

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) would require 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;²
- (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

² The petitioner should note that, in accordance with this provision, USCIS may accept a credentials evaluation service's evaluation of *education only*, not experience.

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. . .

The petitioner has submitted no evidence regarding any of the first four criteria of 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), above. In this regard, the AAO notes that the Evaluation Report from the educational evaluation service Foundation for International Services (FIS), submitted for its degree-equivalency conclusion about the beneficiary's training and work experience, does not merit consideration under any of those criteria. As evident at 8 C.F.R. § 214.2(h)(4)(iii)(D)(3), USCIS recognizes educational evaluation services, such as FIS, as competent to testify only in the area of the U.S. educational equivalency of a beneficiary's foreign formal education, and not on the educational equivalency of training and/or work experience. Therefore, the FIS evaluation carries no weight in these proceedings. USCIS 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). Aside from this fatal defect, the AAO further notes that the FIS Evaluation Report has no substantive content, as it just generally lists beneficiary documents upon which it is based, without providing copies, and then declares a conclusion without analysis.

Next, according to its express terms, to satisfy the beneficiary qualification criterion at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), a petitioner must demonstrate three years of specialized training and/or work experience for each year of college-level training the alien lacks. This provision allows crediting only training and/or work experience that the petitioner establishes as "specialized" according to the following standards:

[I]t 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 occupation³;

³ *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.

- (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 regarding the beneficiary's training and experience does not meet the above standards and therefore does not merit USCIS recognition as equivalent to at least a bachelor's degree in a specific specialty.

None of the letters from the beneficiary's former employers have details showing that the beneficiary's work included the theoretical and practical application of specialized knowledge required by a specialty occupation and that it was performed while working with peers, supervisors, or subordinates who have a degree or its equivalent in a specialty occupation. Likewise, the certificates of training, including the one for a three-year in-service traineeship in Professional Cookery, are not accompanied by documentary evidence establishing the substantive nature of the training and that it required the theoretical and practical application of specialized knowledge required by a specialty occupation. Furthermore, the petitioner has not presented a type of evidence of professional recognition of expertise in the claimed specialty required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

For the reasons discussed above, the petitioner has not established that the beneficiary is qualified to serve in a specialty occupation in accordance with the regulations at 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D).

Counsel notes that this petition is filed as an amendment to a previously already approved petition for which the approval period is still in effect. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged

errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

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