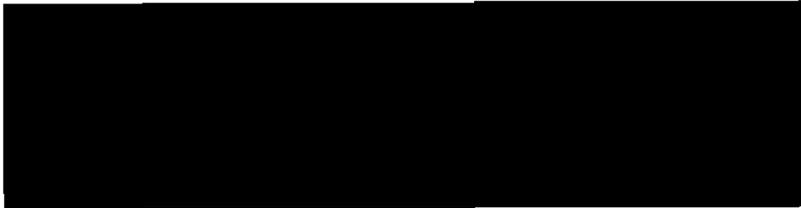


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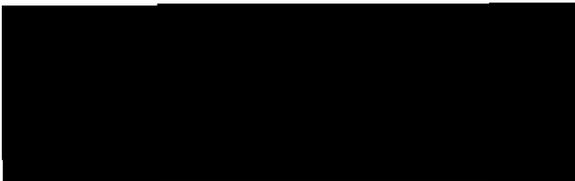
FILE: EAC 07 133 51854 Office: VERMONT SERVICE CENTER Date: APR 01 2011

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:

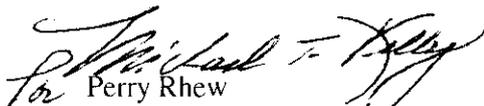


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director initially approved the nonimmigrant visa petition. The director subsequently revoked the petition on March 4, 2009. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be revoked.

The petitioner states that it is a chain of Japanese restaurants. It seeks to employ the beneficiary as a restaurant group manager and to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

This H-1B petition was initially approved on April 18, 2007 with validity dates of October 1, 2007 to September 27, 2010. However, on November 24, 2008, the director issued a Notice of Intent to Revoke (NOIR).

U.S. Citizenship and Immigration Services (USCIS) regulations provide only one avenue for undoing an erroneously issued approval of a petition in the circumstances of this particular case, and that is the Revocation on Notice procedures at 8 C.F.R. § 214.2(h)(1)(iii), which states:

(A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
- (2) The statement of facts contained in the petition was not true and correct; or
- (3) The petitioner violated terms and conditions of the approved petition; or
- (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
- (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

(B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

The AAO finds that the NOIR placed the petitioner on notice that revocation of approval of the petition was contemplated on two grounds within the scope of the revocation-on-notice provisions, namely, (1) that the approved petition contained untrue statements of fact, and (2) that the approval of the petition violated the

regulatory requirements regarding H-1B beneficiary qualification (at 8 C.F.R. § 214.2(h)(4)(iii)(C) and (h)(4)(iii)(D)).

As will be evident in the discussion below, the AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner's response to the NOIR failed to overcome the grounds specified in the NOIR for revoking the petition. Accordingly, the appeal will be dismissed, and approval of the petition will be revoked.

In pertinent part, the NOIR states:

It has now come to the attention of USCIS that the consulate has returned the [approved H-1B petition] because it appears that the beneficiary does not possess the required qualifications for this position. In addition, evidence that the consulate disclosed makes it appear that the petition approval was obtained by fraud, material representation, or other unlawful means.

The beneficiary's work experience appears to have been greatly exaggerated. For instance, it was stated that the beneficiary worked at Hare restaurant in Japan from February 1996 to August 2006, a misrepresentation or typo of ten (10) years.

The petition material attempts to show that the beneficiary had progressively responsible positions in the restaurant industry which amounts to the equivalent of a Bachelor's degree in culinary arts. A closer look at the documentation shows that the beneficiary has worked a series of part-time jobs in cafes and restaurants in Japan, mostly as a waiter. The beneficiary did not speak English well enough for the interview to continue in English and a Japanese/English translator was provided for the interview. The consular office concluded that the petitioning company has willfully misrepresented the position and the beneficiary's qualifications, going so far as to provide inaccurate translation of employment letters. The consular officer also determined that the beneficiary does not have the equivalent of a Bachelor's Degree in Culinary Arts, [and therefore] he is unqualified for the job of "Restaurant Group manager" and the position as represented does not exist.

The petitioner responded to the NOIR on December 29, 2008. However, finding that the petitioner did not adequately respond to the grounds for revocation specified in the NOIR, the director issued a decision revoking approval of the petition.

Counsel for the petitioner filed an appeal on April 6, 2009. Counsel argues that any misrepresentations made resulted from a typo in the translation and that no clear fraud was established. Counsel further asserts that the credential evaluation submitted was based only on the correct dates of the beneficiary's employment, and not the dates that were misrepresented.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's NOIR; (3) the petitioner's response to the NOIR; (4) the notice of decision; and (5) Form I-290B

with counsel's brief and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons discussed below, the AAO finds that the evidence submitted on appeal is not sufficient to establish that the beneficiary is qualified to perform in the duties of a specialty occupation requiring at least a bachelor's degree or the equivalent in culinary arts, food and beverage management, or a related field. Accordingly, the decision of the director will not be disturbed. The appeal will be dismissed, and the petition will be revoked.

The AAO affirms the director's finding that the petitioner did not submit sufficient documentation to show that the beneficiary qualifies to perform services in any specialty occupation requiring a degree in culinary arts or a related field under 8 C.F.R. § 214.2(h)(4)(iii)(C).

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), for purposes of paragraph (h)(4)(iii)(C)(4) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit

programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

(3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

(4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

In accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D)(5):

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; 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 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 occupation;

(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 beneficiary does not hold a U.S. degree in culinary arts or a related field, and his foreign degree has not been determined to be the equivalent of a U.S. degree in culinary arts or a related field. Instead, it has been

found to be the equivalent to a bachelor's degree in geography. Therefore, pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), in order for the beneficiary to qualify for a specialty occupation requiring a degree in culinary arts or a related field, the record must demonstrate that he has education, specialized training, and/or progressively responsible experience equivalent to a U.S. baccalaureate or higher degree in culinary arts, as well as recognition of his expertise through progressively responsible positions directly related to this specialty.

In support of the petition, the petitioner provided a credential evaluation written by [REDACTED] [REDACTED] stating that the beneficiary's education and experience amount to the equivalent of a U.S. bachelor's degree in culinary arts. The information provided regarding [REDACTED] is as follows:

[REDACTED] has prepared more than 25,000 evaluations from 130 countries since August 1997. The credentials represent secondary school to post-doctoral levels of education and areas of specialization such as engineering, law, and medicine. [REDACTED] has eighteen years of corporate experience and eight years of teaching and administrative experience at the post secondary level. She is a member of NAFSA: Association of International Educators and the American Association of Collegiate Registrars and Admission Officers (AACRAO). [REDACTED] is [REDACTED]

The AAO finds that the evaluation from [REDACTED] together with the supporting documentation submitted, does not meet the standard described in 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). Because the evaluation examines a combination of foreign education and experience, rather than just the beneficiary's education, the petitioner must demonstrate that [REDACTED] has the authority to grant credit for training and/or work experience in the specialty at an accredited college or university that has a program for granting such credit based on an individual's training and/or work experience, which is a requirement under the regulation. Such evidence was not provided and, moreover, it appears that [REDACTED] is not affiliated with an accredited college or university. Therefore, the evaluation does not meet the standard of 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

Aside from the decisive fact that the evidence of record does not establish [REDACTED] as competent under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) to evaluate experience, the AAO finds that the content of her evaluation of the beneficiary's experience would merit no weight even if [REDACTED] were qualified under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). [REDACTED] basically summarizes the skeletal certificates of four of the beneficiary's former employers, which describe the beneficiary's experience only in generalized and generic terms, and she then concludes, without analysis, that these letters affirm three years and four months of experience in the culinary arts. These certificates do not provide the beneficiary's job duties at his prior employers and several of the certificates do not even provide his job title. As this evaluation does not establish a substantive basis for its conclusion, it would have no probative value even if it were rendered by an official qualified under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). 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).

Regarding the allegations of fraud, the U.S. Embassy found that the translations from Japanese to English of the beneficiary's prior employment certificates, which were prepared by the petitioner's Vice President, were either inaccurate and/or contradicted statements made by the prior employers in the certificates or verbally when the prior employers were contacted by the U.S. Embassy as well as statements made by the beneficiary during his visa interview. 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). The petitioner has not provided sufficient documentation to overcome the allegations that the petitioner misrepresented the beneficiary's experience (whether these misrepresentations were intentional or not). However, even without a finding of fraud, it is clear from the foregoing that the beneficiary is not eligible to perform the duties of a specialty occupation requiring at least a bachelor's degree or the equivalent in culinary arts or a related field.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), USCIS may determine that the beneficiary has the equivalent of a degree in culinary arts or a related field if he has a combination of education, specialized training, and/or work experience in areas related to this specialty. The evaluation on record is not supported by specific evidence. As discussed previously, the four certificates from the beneficiary's former employers do not contain enough detail to determine how many years of experience the beneficiary has in the culinary arts, and whether this experience was gained while working with peers, supervisors, and subordinates who have a degree or its equivalent in the culinary arts, or a related field. Finally, the record lacks the required showing of the beneficiary's expertise in culinary arts or a related field. The evidence does not establish that the beneficiary is qualified to perform a specialty occupation. Therefore, the AAO affirms the director's finding that the beneficiary is not qualified to perform the duties of a specialty occupation. Accordingly, the AAO shall not disturb the director's revocation of the petition.

Although the director did not address the issue of whether or not the proffered position is a specialty occupation, the AAO notes that a finding that the proffered position is not a specialty occupation could form a basis for revocation. Therefore, the AAO will next examine whether the proffered position qualifies as a specialty occupation. Beyond the decision of the director, the AAO finds that the petitioner's proffered position does not qualify as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment 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 one 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 also 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 (5<sup>th</sup> 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 occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

The petitioner states that it is seeking the beneficiary's services as a restaurant group manager. In the letter of support submitted with the petition, the petitioner describes the proffered position as follows:

[The beneficiary] will serve [our restaurants] located in Atlanta, Nashville and Dallas in the specialty occupation of Restaurant Group Manager. He will be headquartered out of the Atlanta restaurant. In carrying out his duties, [the beneficiary] will report directly to me in my capacity as Vice President and General Manager of [the petitioner]. In his professional occupation, [the beneficiary] will direct and oversee policy decisions with regard to food and beverage activities at all three of our restaurants. He will also implement programs to improve the food and beverage activities as well as ensure staff training in new procedures to improve the food and beverage activities as well as ensure staff training in new procedures to improve customer service. Further, [the beneficiary] will interview and recommend new hires, arrange staff schedules and oversee and coordinate menus and food production issues. Additionally, he will handle payroll and inventory actions, seating arrangements, banquets and special events. Finally, he will [be] responsible for public relation matters to promote restaurant services.

The petitioner states that the proffered position requires at least a bachelor's degree in culinary arts, food and beverage management, or a related field.

According to the 2010-11 online edition of the Department of Labor's *Occupational Outlook Handbook (Handbook)*, food service managers:

[a]re 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 are generally responsible for all administrative and human-resource functions of the business, including recruiting new employees and monitoring employee performance and training.

Managers interview, hire, train, and when necessary, fire employees. Retaining good employees is a major challenge facing food service managers. Managers recruit employees at career fairs and at schools that offer academic programs in hospitality management or culinary arts, and arrange for newspaper advertising to attract additional applicants. 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. If employees are unable to work, managers may have to call in alternates to cover for them or fill in themselves. Some managers may help with cooking, clearing tables, or other tasks when the restaurant becomes extremely busy.

Food service managers ensure that diners are served properly and in a timely manner. They investigate and resolve customers' complaints about food quality and 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, 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. . . .

The proffered duties as described by the petitioner, which include improving food and beverage service, training staff to improve customer service, interviewing staff, and handling payroll, appear to clearly fall within the *Handbook's* section on food service managers. The *Handbook* indicates that *most* food service managers:

[h]ave less than a bachelor's degree; however, some postsecondary education, including a college degree, is increasingly preferred for many food service manager positions. Many food service management companies and national or regional restaurant chains recruit management trainees from 2- and 4-year college hospitality or food service management programs, which require internships and real-life experience to graduate. While these specialized degrees are often preferred, graduates with degrees in other fields who have demonstrated experience, interest, and aptitude are also recruited.

Therefore, the *Handbook* does not indicate that entry into positions in this occupation normally requires at least a bachelor's degree, or the equivalent, in a specific specialty. Because the *Handbook* indicates that entry into the food service management occupation does not normally require a degree in a specific specialty and as the limited extent to which the evidence of record develops the proffered position and its duties does not distinguish the proffered position from the general level of food service managers requiring no more than a bachelor's degree without particular specialization, the *Handbook* does not support the proffered position as being a specialty occupation.

As the evidence of record does not establish that the particular position here proffered 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, 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 alternatively requires a petitioner to establish that a bachelor's degree, in a

specific specialty, 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. Additionally, the petitioner has not submitted advertisements from other employers similar to the petitioner demonstrating that they require at least a bachelor's degree or equivalent experience in a specific specialty for their food service managers.

The petitioner has not satisfied 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." The evidence of record does not refute the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for food service managers, including degrees not in a specific specialty related to food service management. Moreover, as mentioned previously, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than food service manager positions that 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).

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 proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than food service manager positions that are not usually associated with a degree in a specific specialty. Although in response to the NOIR, the petitioner states that "[i]t is imperative that in the Management position, there is a Japanese native who not only understand[s] the culture but also [helps] keep tradition alive in our operation. . . .", the petitioner does not provide an explanation of how being a Japanese native is essential to performing the proffered duties as described, which do not appear to be more complex than the generic duties listed in the *Handbook's* description of food service managers. Moreover, requiring that the person who fills the proffered position understand Japanese culture does not demonstrate that the proffered position is a specialty occupation. Based on the petitioner's response to the NOIR, it appears that the petitioner's primary reason for hiring the beneficiary in the proffered position is because he is Japanese with some restaurant experience, rather than because the petitioner requires someone to fill the position who

holds at least a bachelor's degree or the equivalent in a specific specialty.

Therefore, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO conducts appellate review on a de novo basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The appeal will be dismissed and the petition revoked. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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