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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**



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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: MAR 01 2011

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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)

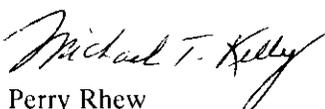
ON BEHALF OF PETITIONER: SELF-REPRESENTED

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,

*for*   
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The director of the Vermont Service Center 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 claims to be a hotel, IT and construction management and development firm. It seeks to employ the beneficiary as a Food & Beverage Manager 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, concluding that the petitioner failed to obtain a Labor Condition Application (LCA) covering the occupational specialty in which the beneficiary will be employed that was certified on or before the date the petition was filed.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE) and the petitioner's response to the RFE; (3) the director's denial letter; and (4) Form I-290B with supporting materials. The AAO reviewed the record in its entirety before reaching its decision.

The first issue the AAO will consider is whether the petitioner established filing eligibility at the time the Form I-129 was received by U.S. Citizenship and Immigration Services (USCIS) on April 1, 2009.

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) as follows:

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission  
.....

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1):

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions.

In matters where evidence related to filing eligibility is provided in response to a director's request for evidence, 8 C.F.R. § 103.2(b)(12) states:

An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed. An application or petition shall be denied where any application or petition upon which it was based was filed subsequently.

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner must obtain a certified LCA from the DOL in the occupational specialty in which the H-1B worker will be employed. See 8 C.F.R. § 214.2(h)(4)(i)(B). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of a labor certification application with the Department of Labor when submitting the Form I-129.

In the instant matter, the petitioner, which is a management company that has a hotel management division, requested H-1B employment for the beneficiary to work as a Food & Beverage Manager. The petitioner also refers to this position as a "Head Chef" in its support letter.

In the Form I-129, the petitioner stated that the beneficiary would work at an address in Myrtle Beach, SC. The LCA was filed for a job with the title of [REDACTED] located [REDACTED]. The occupational code provided was "030," which is for occupations in systems analysis and programming.

The petitioner stated that its hotel management wing owns and operates several properties and provides management of hotel properties for owners and asset managers. The petitioner stated that it needs a Food & Beverage Manager to manage its hotel food and beverage operations as well as participants who are currently enrolled in the petitioner's food and beverage department. The duties are described as follows:

He would be responsible for the developing and supervising of all [food and beverage] outlets including banquets, purchasing, kitchen, stewarding, carryout sales, and all ala carte restaurants. This position is also directly responsible for all beverages, including the Wine Program at DCC. Responsibilities within the Front of the House include quality of food, beverage, and service; in the Back of the [House] he is responsible [for] food quality, presentation, standardized recipes, food and labor cost, and waste management. This position will be expected to train/mentor all FOH and BOH employees and the overall goal of this position is consistent quality in food and service in all facilities of [the petitioner's] hotels nationwide.

The person will also manage the day-to-day activities of [the petitioner's] interns and trainees in [food and beverage], schedule employees, observe performance and conduct reviews and evaluation with assistance from International Recruitment Manager. From time to time he will manage the cultural exchange events in ACP Properties, coordinate the event management with hotel staff and [the petitioner's] Q-1 participants and make budgetary recommendations for the show. He will also be responsible for reviewing the daily checklist of [the petitioner's] hotel staff and international interns. He will also sit in periodic reviews with international professors who send trainees to [the petitioner's] hotels.

For this position we need someone who has a Bachelor's degree or equivalent as all [the petitioner's] minimum requirement to hire any staff is a bachelors degree

or higher. He will resolve problems arising from guest complaints at the culinary department. He will answer inquiries pertaining to hotel policies and services and to train international trainees at [the petitioner's] food & beverage department.

The petitioner also submitted an expert opinion letter from [REDACTED]

reiterates the job description provided by the petitioner in the support letter and adds:

In holding this position, [the beneficiary] will be generally responsible for the day-to-day operations of food and beverage services, in addition to managing both strategic and human resource responsibilities. He will be responsible for maximizing revenue by developing marketing strategies to up-sell products and services to event planners and attendees during the event phase; support senior management of the Food and Beverage Operations budget to achieve or exceed budget expectations; and direct and coordinate inventory control, stock maintenance and monitor wages and expenses and recommend adjustments as needed to achieve goals.

The Food and Beverage Manager is also responsible for hiring, developing and retaining a diverse workforce to deliver excellent products and services. The position requires the incumbent to sustain a work environment that focuses on fair and equitable treatment and associate satisfaction to enable business success; lead by example demonstrating self-confidence, energy and enthusiasm; conduct reward and recognition meeting celebrations for goal and associate achievements; ensure all staff participates in service training and programs; and complete training matrix for all team members and draft evaluation reports. All of these tasks must be accomplished while adhering to relevant labor law. Proper execution of these human resource functions thus requires more than the type of knowledge gained solely through on-the-job experience. Food and Beverage Managers require the sort of theoretical knowledge gained through education in the area of hospitality management or equivalent.

[The petitioner] also has a training and internship wing within the company where the company provides internships and training to university students worldwide in the hospitality and IT industries. Because of this, it is highly critical that [the petitioner] requires a bachelors degree or higher for all of its management positions, including that of Head Chef. Management positions require extensive dealing with university professors to offer performance appraisals and feedbacks on their students. Since all the students enrolled in the internship and training program are either in their final years or already graduated from a four [year] degree program, it makes sense that their trainers and supervisors are at least holders of a Bachelor's level degree.

[REDACTED] alternates between referring to the proffered position as a Food and Beverage Manager and a Head Chef.

The petitioner submitted copies of the beneficiary's foreign degree documents indicating that he obtained a foreign degree in aeronautical engineering along with his certifications and reference letters, but the petitioner did not submit a credential evaluation.

The petitioner also submitted copies of its 2008 profit and loss statements and a company brochure indicating that the petitioner is a consulting firm.

Additionally, the petitioner submitted an organizational chart. On this chart, the title of Head Chef is indicated, but not the title of Food and Beverage Manager. The AAO again notes that the petitioner and [REDACTED] use these two job titles to describe the same position. According to the chart, the Head Chef is responsible only for supervising the Chef and kitchen staff.

The director issued an RFE on July 12, 2009 requesting information regarding the petitioner's client consulting/staffing services, including a letter from the business with ultimate control and authority over the beneficiary's work. The RFE also requested copies of any contracts, a credential evaluation, and a properly filed LCA.

The petitioner submitted a letter from its client, [REDACTED]. On the petitioner's Profit & Loss statement, [REDACTED] paid the petitioner \$534,645 in 2008. The letter from [REDACTED] states that the beneficiary has been offered employment with [REDACTED] as an employee of the petitioner for a three-year period. The beneficiary's job duties are described as follows:

His intended role in the food and beverage department is very important to the smooth operation of our Food and Beverage outlets. [The beneficiary's] major responsibilities will revolve around the management of the back of the house functions including food quality, presentation, standardized recipes, food and labor costs and waste management. Responsibilities also include training of the employees with the overall goal of consistent quality in food and service at all outlets.

Our annual revenues exceed \$5 million dollars for all food and beverage outlets and include four restaurants, grill and pool bar and 20,000 square feet of banquet space.

Additionally, he will take on the responsibilities for managing the day-to-day activities of our intern staff and trainees including scheduling, observing performance, conducting reviews and evaluations as well as coordinating cultural exchange events.

With assistance from our Food and Beverage Manager, [the beneficiary] will learn the front of the house responsibilities and periodically cover a shift when the manager is assigned to another outlet or is schedule[d] off for the day.

It is clear from this letter that the beneficiary will not be working for a hotel or facility owned by the petitioner. Instead, the petitioner is contracting the beneficiary out to its client, [REDACTED] [REDACTED] already employs a full time Food and Beverage Manager and only intends for the beneficiary to cover occasional shifts for this manager after the beneficiary has been fully trained. The AAO therefore finds that the proffered position is, at best, an Assistant Food Service Manager.

The petitioner also submitted a credential evaluation, also written by [REDACTED] which finds that the beneficiary has the equivalent of a U.S. Bachelor of Science Degree in Hotel and Restaurant Management through a combination of his education and experience.

The petitioner also submitted a second LCA, signed by the petitioner on July 7, 2009, and which was filed with, but not certified by the U.S. Department of Labor. This LCA is for a Food Service Manager.

The director denied the petition on July 21, 2009. On appeal, the petitioner submits the second LCA after its certification on July 13, 2009.

As referenced above, the regulations require that before filing a Form I-129, a petitioner must obtain a certified-LCA from the DOL and the LCA must include the beneficiary's anticipated employment. The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. In this matter, the petitioner initially failed to provide an LCA using the correct occupational code and, further, in response to the director's RFE, did not submit a certified LCA to establish that it had complied with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B). The non-existence or unavailability of evidence material to an eligibility determination creates a presumption of ineligibility. See 8 C.F.R. § 103.2(b)(2)(i).

Although the petitioner submits a copy of a certified LCA on appeal, the LCA is DOL-certified on July 13, 2009, a date subsequent to the filing of the Form I-129. Moreover, the second LCA was filed for a Food Service Manager, which, as discussed previously, is not the correct classification of the proffered position. Thus, the record does not show that, at the time of filing the petition, the petitioner had obtained a certified LCA in the occupational specialty. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The petitioner has failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B). The record establishes that, at the time of the petition's filing, the petitioner had not obtained a current certified LCA in the occupational specialty and, therefore, as determined by the director, had failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).

For the reason discussed above, the beneficiary is ineligible for classification as an alien employed in a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the AAO also finds that the petitioner failed to demonstrate that the proffered position qualifies 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 Immigration and Nationality Act (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.

To make its determination whether the employment described qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty 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 in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the Department of Labor’s *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry’s professional association has made a degree in a specific specialty 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)).

To determine whether a particular job qualifies as a specialty occupation, USCIS 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. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor 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.

In this matter, the petitioner states that it seeks the beneficiary's services as a Food Service Manager. However, as discussed previously, the petitioner's client already employs a Food Service Manager. Therefore, at best, the beneficiary would be employed by the petitioner's client as an Assistant Food Service Manager. The AAO notes that under the section on Training, Other Qualifications, and Advancement for Food Service Managers the *Handbook* (2010-11 online edition) states that:

Most food service managers have 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.

Most restaurant chains and food service management companies have rigorous training programs for management positions. Through a combination of classroom and on-the-job training, trainees receive instruction and gain work experience in all aspects of the operation of a restaurant or institutional food service facility. Areas include food preparation, nutrition, sanitation, security, company policies and procedures, personnel management, recordkeeping, and preparation of reports. Training on the use of the restaurant's computer system is increasingly important as well. *Usually, after several months of training, trainees receive their first permanent assignment as an assistant manager.*

(Emphasis added.) Therefore, the *Handbook* indicates that working as an assistant food service manager does not normally require at least a bachelor's degree in a specific specialty.

The AAO notes that some of the duties as depicted in the record are closest to that of a Chef. However, regarding the education and training of chefs, the *Handbook* states that:

While most chefs, head cooks, and food preparation and serving supervisors have some postsecondary training, many experienced workers with less education can still be promoted. Formal training may take place at a community college, technical school, culinary arts school, or a 2-year or 4-year college with a degree in hospitality. A growing number of chefs participate in training programs sponsored by independent cooking schools, professional culinary institutes, 2-year or 4-year colleges with a hospitality or culinary arts department, or in the armed forces. Some large hotels and restaurants also operate their own training and job-placement programs for chefs and head cooks. Executive chefs, head cooks, and sous chefs who work in fine-dining restaurants require many years of training and experience.

As the *Handbook* indicates no specific degree requirement for employment as assistant food managers or chefs, and as it is not self-evident that, as described in the record of proceeding, the proposed duties comprise a position for which the normal entry requirement would be at least a bachelor's degree, or its equivalent, in a specific specialty, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a specific specialty. The AAO further notes that nowhere does the petitioner state that a bachelor's degree or the equivalent in a *specific specialty* is required for the position. Accordingly, the AAO finds that the petitioner has not established its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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. The petitioner has not presented any evidence that parallel firms routinely require at least a bachelor's degree in a specific specialty for chef positions that are parallel to the one proffered here. Additionally, although [REDACTED] states that at least a bachelor's degree is required for Food and Beverage Managers, he does not state that this degree must be in a *specific specialty*. The expert opinion from [REDACTED] can be disregarded because it is for a Food and Beverage Manager position that has duties far exceeding those described by the petitioner's client, [REDACTED], or even those described by the petitioner. Therefore, the position described by professor [REDACTED] is not parallel to the one proffered here. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

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." The evidence of record does not refute the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for chef positions, including degrees not in a specific specialty. As evident in the earlier discussion about the generalized descriptions of the proffered position and its duties, the record lacks sufficiently detailed information to distinguish the proffered

position as unique from or more complex than chef positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

As the record has not established a prior history of recruiting and 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 fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. The AAO here augments its earlier comments regarding the petitioner's failure to establish this criterion. The AAO does not find that the proposed duties, as generically described by the petitioner, reflect a higher degree of knowledge and skill than would normally be required of chefs not equipped with at least a bachelor's degree, or its equivalent, in a specific specialty. Further, the generalized array of proposed duties do not establish a job that would require the beneficiary to possess skills and qualifications beyond those of a chef. The AAO, therefore, concludes that the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Also beyond the decision of the director, the AAO's review of the entire record of proceeding indicates an additional basis for denying the petition, namely, that the petitioner failed to establish that it is qualified to file an H-1B petition, that is, as either (a) a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), or (b) a U.S. agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F).

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), defines an H-1B nonimmigrant as an alien:

(i) who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 1184(i)(1) . . ., who meets the requirements of the occupation specified in section 1184(i)(2) . . ., and with respect to whom the Secretary of Labor determines . . . that the intending employer has filed with the Secretary an application under 1182(n)(1).

The regulation at 8 C.F.R. § 214.2(h)(1)(i) states:

(h) Temporary employees--(1) Admission of temporary employees--(i) General. Under section 101(a)(15)(H) of the Act, an alien may be authorized to come to the United States temporarily to perform services or labor for, or to receive training from, an employer, if petitioned for by that employer. . . .

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(A) identifies a "United States employer" as authorized to file an H-1B petition. "United States employer" is defined at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

*United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee;<sup>1</sup> and
- (3) Has an Internal Revenue Service Tax identification number.

As discussed previously, the documentation submitted, including a letter from [REDACTED], demonstrates that the beneficiary will be employed by [REDACTED], rather than the petitioner. The petitioner did not submit any evidence to establish that the beneficiary will be supervised by employees of the petitioner or that the petitioner would determine the location of employment, the nature of the beneficiary's duties, or the duration of the assignment.

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<sup>1</sup> It is noted that, the United States Supreme Court determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

"In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

*Darden*, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. at 440 (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

The AAO therefore finds that the petitioner has failed to establish that it is or will be a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). The AAO further finds that the petitioner does not appear, and does not claim, to be filing as an agent pursuant to 8 C.F.R. § 214.2(h)(2)(i)(F).

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, in any event, the evaluation from [REDACTED] does not meet the standard described in 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) as no evidence was submitted to establish that [REDACTED] has the authority to grant credit for training and/or work experience, which is a requirement under the regulation. Therefore, the evaluation does not meet the standard of 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) and the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

The AAO conducts appellate review on a de novo basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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 denied.