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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

PUBLIC COPY

U.S. Citizenship and Immigration Services

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[redacted]

DATE: NOV 14 2011 OFFICE: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

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,

Perry Rhew
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 remain denied.

The petitioner claimed on the Form I-129 to be a full-service restaurant with five employees, gross annual income of $350,000, and net annual income of $30,000. It seeks to employ the beneficiary as a "training development specialist" 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 the basis of her determination that the petitioner failed to demonstrate that its proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's responses to the director's request for additional evidence; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review of the entire record, we find that the petitioner has failed to overcome the director's ground for denying this petition. Beyond the decision of the director, we find additionally that the petitioner has failed to demonstrate: (1) that the petition is supported by a certified labor condition application (LCA) which corresponds to it and (2) that the beneficiary is qualified to perform the duties of a specialty occupation.

The Proposed Position Does Not Qualify For Classification as a Specialty Occupation

The first issue before us on appeal is whether the proposed position qualifies for classification 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 [1] 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 [2] 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 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 proposed 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 has entitled its proposed position "training and development specialist" and, in its May 22, 2009 letter of support, stated that it is in the preliminary stages of expansion, and that it plans to establish a culinary training area so that it may conduct on-the-job training for its employees, which will develop and enhance the skills of its employees. The petitioner stated that the beneficiary's responsibilities would include the following:

- Developing, planning, and organizing on-the-job training activities;
- Developing culinary procedure training manuals;
- Establishing company policies and procedures for culinary employees;
- Evaluating and recording training activities and program effectiveness;
- Designing, planning, organizing, and directing training and orientation programs for employees; and
- Screening, hiring, and assigning workers to positions based upon their qualifications.

The petitioner's representative expanded upon these duties, and provided percentages of time to be spent performing each duty, in her October 5, 2009 response to the director's request for additional evidence.

In making our determination as to whether the proposed position qualifies for classification as a specialty occupation, we turn first 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)*, a resource upon which we routinely rely 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)).

The petitioner contends on appeal that the duties of the proposed position align with those of a postsecondary teacher, as the duties of that occupation are described in the *Handbook*. In pertinent part, the *Handbook* states the following regarding postsecondary teachers:

> Postsecondary teachers instruct students in a wide variety of academic and vocational subjects beyond the high school level. Most of these students are working toward a degree, but many others are studying for a certificate or certification to improve their knowledge or career skills. Postsecondary teachers include college and

> university faculty, postsecondary career and technical education teachers, and graduate teaching assistants. Teaching in any venue involves forming a lesson plan, presenting material to students, responding to students learning needs, and evaluating students' progress. In addition to teaching, postsecondary teachers, particularly those at 4-year colleges and universities, perform a significant amount of research in the subject they teach. They also must keep up with new developments in their field and may consult with government, business, nonprofit, and community organizations.
>
> *College and university faculty* make up the majority of postsecondary teachers. . . .
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> * * *
>
> *Graduate teaching assistants*, often referred to as *graduate TAs*, assist faculty, department chairs, or other professional staff at colleges and universities by teaching or performing teaching-related duties. . . .

Handbook, 2010-11 ed., available at http://www.bls.gov/oco/ocos066.htm (accessed October 26, 2011). We do not agree with the petitioner's assertion that these duties align with those of the proposed position. Nor is the petitioner an institution of postsecondary education.

In reaching our conclusion regarding the degree requirements of the petitioner's proposed position, we have compared the position's proposed duties against those described for a range of occupations. Our review has found that virtually all of the proposed position's duties are listed among those described for food service managers and training and development managers and specialists. In pertinent part, the *Handbook* states the following regarding food service managers:

> 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 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.

Managers tally the cash and charge receipts received and balance them against the record of sales, securing them in a safe place. Finally, managers are responsible for locking up the establishment, checking that ovens, grills, and lights are off, and switching on alarm systems.

Technology influences the jobs of food service managers in many ways, enhancing efficiency and productivity. Many restaurants use computers and business software to place orders and track inventory and sales. They also allow food service managers to monitor expenses, employee schedules, and payroll matters more efficiently.

In most full-service restaurants and institutional food service facilities, the management team consists of a *general manager*, one or more *assistant managers*, and an *executive chef*. The executive chef is responsible for all food preparation activities, including running kitchen operations, planning menus, and maintaining quality standards for food service. In some cases, the executive chef is also the general manager or owner of the restaurant. General managers may employ several assistant managers that oversee certain areas, such as the dining or banquet rooms, or supervise different shifts of workers. . . .

In restaurants, mainly full-service independent ones where there are both food service managers and executive chefs, the managers often help the chefs select menu items. Managers or executive chefs at independent restaurants select menu items, taking into account the past popularity of dishes, the ability to reuse any food not served the previous day, the need for variety, and the seasonal availability of foods. Managers or executive chefs analyze the recipes of the dishes to determine food,

> labor, and overhead costs, work out the portion size and nutritional content of each plate, and assign prices to various menu items. Menus must be developed far enough in advance that supplies can be ordered and received in time.
>
> 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.

Id. at http://www.bls.gov/oco/ocos024.htm. The *Handbook's* discussion regarding the duties of training and development managers and specialists also relates to the petitioner's proposed position, as follows:

> Every organization wants to attract, motivate, and retain the most qualified employees and match them to jobs for which they are best suited. Human resources, training, and labor relations managers and specialists provide this connection. . . .
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> * * *
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> There are many types of human resources, training, and labor relations managers and specialists. . . .
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> * * *
>
> Training and development. *Training and development managers and specialists* create, procure, and conduct training and development programs for employees. Managers typically supervise specialists and make budget-impacting decisions in exchange for a reduced training portfolio. Increasingly, executives recognize that training offers a way of developing skills, enhancing productivity and quality of work, and building worker loyalty. Enhancing employee skills can increase individual and organizational performance and help to achieve business results. Increasingly, executives realize that developing the skills and knowledge of its workforce is a business imperative that can give them a competitive edge in recruiting and retaining high quality employees and can lead to business growth.
>
> Other factors involved in determining whether training is needed include the complexity of the work environment, the rapid pace of organizational and technological change, and the growing number of jobs in fields that constantly generate new knowledge and, thus, require new skills. In addition, advances in learning theory have provided insights into how people learn and how training can be organized most effectively.

Training managers oversee development of training programs, contracts, and budgets. They may perform needs assessments of the types of training needed, determine the best means of delivering training, and create the content. They may provide employee training in a classroom, computer laboratory, or onsite production facility, or through a training film, Web video-on-demand, or self-paced or self-guided instructional guides. For live or in-person training, training managers ensure that teaching materials are prepared and the space appropriately set, training and instruction stimulate the class, and completion certificates are issued at the end of training. For computer-assisted or recorded training, trainers ensure that cameras, microphones, and other necessary technology platforms are functioning properly and that individual computers or other learning devices are configured for training purposes. They also have the responsibility for the entire learning process, and its environment, to ensure that the course meets its objectives and is measured and evaluated to understand how learning impacts performance.

Training specialists plan, organize, and direct a wide range of training activities. Trainers consult with training managers and employee supervisors to develop performance improvement measures, conduct orientation sessions, and arrange on-the-job training for new employees. They help employees maintain and improve their job skills and prepare for jobs requiring greater skill. They work with supervisors to improve their interpersonal skills and to deal effectively with employees. They may set up individualized training plans to strengthen employees' existing skills or teach new ones. Training specialists also may set up leadership or executive development programs for employees who aspire to move up in the organization. These programs are designed to develop or "groom" leaders to replace those leaving the organization and as part of a corporate succession plan. Trainers also lead programs to assist employees with job transitions as a result of mergers or consolidation, as well as retraining programs to develop new skills that may result from technological changes in the work place. In government-supported job-training programs, training specialists serve as case managers and provide basic job skills to prepare participants to function in the labor force. They assess the training needs of clients and guide them through the most appropriate training. After training, clients may either be referred to employer relations representatives or receive job placement assistance.

Planning and program development is an essential part of the training specialist's job. In order to identify and assess training needs, trainers may confer with managers and supervisors or conduct surveys. They also evaluate training effectiveness to ensure that employees actually learn and that the training they receive helps the organization meet its strategic goals and achieve results.

Depending on the size, goals, and nature of the organization, trainers may differ considerably in their responsibilities and in the methods they use. Training methods also vary by whether the training predominantly is knowledge-based or skill-based or sometimes a combination of the two. For example, much knowledge-based training

> is conducted in a classroom setting. Most skill training provides some combination of hands-on instruction, demonstration, and practice at doing something and usually is conducted on a shop floor, studio, or laboratory where trainees gain experience and confidence. Some on-the-job training methods could apply equally to knowledge or skill training and formal apprenticeship training programs combine classroom training and work experience. Increasingly, training programs involve interactive Internet-based training modules that can be downloaded for either individual or group instruction, for dissemination to a geographically dispersed class, or to be coordinated with other multimedia programs. These technologies allow participants to take advantage of distance learning alternatives and to attend conferences and seminars through satellite or Internet communications hookups, or use other computer-aided instructional technologies, such as those for the hearing-impaired or sight-impaired.

Id. at http://www.bls.gov/oco/ocos021.htm. As indicated, the duties of the proposed position combine those of food service managers and training and development managers and specialists as those positions are described in the *Handbook.* Having made that determination, we turn next to the *Handbook's* findings regarding the educational requirements for food service managers:

> 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.

Id. at http://www.bls.gov/oco/ocos024.htm. Thus, the *Handbook* explains unequivocally that a bachelor's degree in a specific specialty is not the normal minimum requirement for entry as a food service manager, as it specifically states that most food service managers do not possess a bachelor's degree. Moreover, the fact that "some postsecondary education, including a college degree," is "increasingly preferred" or that some employers recruit management trainees from two- and four-year college hospitality or food service programs is not equivalent to requiring a bachelor's degree in a specific specialty as a normal minimum entry requirement. With regard to the education and training requirements for training and development managers and specialists, the *Handbook* states the following:

> The educational backgrounds of human resources, training, and labor relations managers and specialists vary considerably, reflecting the diversity of duties and levels of responsibility. In filling entry-level jobs, many employers seek college graduates who have majored in human resources, human resources administration, or industrial and labor relations. Other employers look for college graduates with a technical or business background or a well-rounded liberal arts education.

Id. at http://www.bls.gov/oco/ocos021.htm. Based on the *Handbook's* information, employers do not require a bachelor's degree in a specific specialty for training and development managers and specialists. While the *Handbook* reports that a baccalaureate degree is the minimum educational requirement for many positions, it does not indicate that the degrees held by such workers must be *in a specific specialty*, as would be required for the occupational category to be recognized as a specialty occupation.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not rely simply upon a proposed position's title. The specific duties of the 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 beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 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.

As discussed, we have determined that the duties of the proposed largely mirror those listed in the *Handbook* among those normally performed by food service managers and training and development managers and specialists. However, our review has found that this occupation does not normally impose a normal minimum entry requirement of a bachelor's degree in a specific field of study as required by section 214(i)(1)(B) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

Nor do we find convincing the counsel's citations to the Department of Labor's *Occupational Information Network (O*NET™ Online)*. *O*NET™ Online* is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a requirement for a given position, as *O*NET™ Online's* JobZone assignments make no mention of the specific field of study from which a degree must come. As was noted previously, USCIS 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 proposed position. With regard to the Specialized Vocational Preparation (SVP) rating, we note that an SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. Again, USCIS 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 proposed position. For all of these reasons, the *O*NET™ Online* excerpt is of little evidentiary value to the issue presented on appeal.

For all of these reasons, we find that the petitioner has failed to demonstrate that its proposed position qualifies for classification as a specialty occupation under the requirements of the first criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

We turn next to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under

one of the three remaining criteria: a degree requirement as the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

The petitioner has not satisfied the first of the two alternative prongs at 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, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proposed position; and (2) located in organizations that are similar to the petitioner.

Again, 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 at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

As already discussed, the petitioner has not established that its proposed position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Nor has the petitioner submitted evidence that the industry's professional associations have made a degree in a specific specialty a minimum requirement for entry.

Finally, the petitioner's reliance upon the job vacancy advertisements is misplaced. First, it has not submitted any evidence to demonstrate that these advertisements are from companies "similar" to the petitioner. There is no evidence that the advertisers are similar to the petitioner in size, scope, and scale of operations, business efforts, and expenditures. None of the advertisements states the size of the employer, and there is no evidence in the record as to how representative these advertisements are of the advertisers' usual recruiting and hiring practices. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Furthermore, although the companies that placed these particular advertisements do require a bachelor's degree, their advertisements establish, at best, that although a bachelor's degree is generally required, a bachelor's degree, or its equivalent, *in a specific specialty*, is not required.

For all of these reasons, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The petitioner has 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 duties of the proposed position are similar to those of food service managers and training and

development managers and specialists as outlined in the *Handbook*, and the *Handbook* does not indicate that a baccalaureate degree *in a specific specialty*, or its equivalent, is a normal minimum entry requirement for such positions. The duties proposed by the petitioner are no more complex or unique than those outlined by the *Handbook;* to the contrary, the duties proposed by the petitioner largely mirror those outlined in the *Handbook*. The duties discussed by the petitioner appear no more unique, complex, or specialized than those discussed in the *Handbook*. On appeal, the petitioner contends that several factors combine to make the duties of its proposed position so specialized and unique that it qualifies for classification as a specialty occupation. However, we are not persuaded. For example, the petitioner asserts that it is the only Indian restaurant in the State of North Dakota; that North Dakota workers are not capable of performing the duties of the proposed position because they have never heard of, or tasted, Indian food; and that the beneficiary would conduct his training using Indian spices and cooking equipment, and clay ovens. However, the petitioner did not explain *why* those factors require possession of a bachelor's degree, or its equivalent, in specific specialty. Nor is the availability, or non-availability, of workers relevant to that determination. Nor do any other factors listed by the petitioner establish the proposed duties as more unique, complex, or specialized than those described in the *Handbook* as normally performed by food service managers and training and development managers and specialists. Accordingly, the evidence of record does not refute the *Handbook's* information indicating that a bachelor's degree from a specific field of study is not the normal minimum entry requirement for positions such as the one proposed here.

We turn next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*), which requires that the petitioner demonstrate it normally requires a degree or its equivalent for the position. To determine a petitioner's ability to satisfy the third criterion, we normally review its past employment practices, as well as the histories, including the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas.[1] However, the record contains no such evidence.

The fourth criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*), requires the petitioner to establish that the nature of its proposed 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 in the specialty. As previously discussed, the *Handbook* indicates that a baccalaureate degree *in a specific specialty* is not a normal minimum entry requirement. The petitioner has failed to differentiate the duties of the

[1] Even if a petitioner believes or otherwise assert that a proposed position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any job so long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proposed position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation"). Here, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*) based on its normal hiring practices.

proposed position from those described in the *Handbook* and, as such, has failed to indicate the specialization and complexity required by this criterion. The evidence of record, including the factors argued by the petitioner on appeal as rendering the position so specialized and unique that it qualifies for classification as a specialty occupation, does not distinguish the duties of the proposed position as more specialized and complex than those normally performed by food service managers and training and development managers and specialists, which do not normally require, nor are they usually associated with, the attainment of at least a bachelor's degree in a specific field. As a result, the record fails to establish that the proposed position meets the specialized and complex threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(4)*.

For all of these reasons, we agree with the director's determination that the petitioner failed to demonstrate that the proposed position qualifies for classification as a specialty occupation.

The Petitioner Has Not Established that the Petition is Supported by an LCA Which Corresponds to the Petition

Beyond the decision of the director, we note that the certified LCA provided in support of the instant petition lists a Level I prevailing wage level for training and development specialists in Fargo, North Dakota.[2] This indicates that the LCA, which is certified for an entry-level position, is at odds with the statements by the petitioner regarding the complexity of the duties to be performed by the beneficiary.

Given that the LCA submitted in support of the petition is for a Level I wage,[3] it must therefore be concluded that either (1) the position is a low-level, entry position relative to other food service managers; or that (2) the LCA does not correspond to the proposed petition.

While the DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part, the following:

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[2] The Level I prevailing wage for a training and development specialist in Fargo, North Dakota was $29,411 at the time the LCA was certified. The Level II prevailing wage was $34,486; the Level III prevailing wage was $39,562; and the Level IV prevailing wage was $44,637. *See* Foreign Labor Certification Data Center, Online Wage Library, *available at* http:///www.flcdatacenter.com (accessed October 26, 2011).

[3] According to guidance regarding wage level determination issued by the DOL in 2009 entitled *Prevailing Wage Determination Policy Guidance,* at page 7, Level I wage rates, which are labeled as "entry" rates, "are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered."

> For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

(Italics added). The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has not demonstrated that the petition is supported by an LCA which corresponds to the petition, and the petition must be denied for this additional reason.

The Beneficiary Is Not Qualified To Perform the Duties of a Specialty Occupation

Beyond the decision of the director, the petition may not be approved for an additional reason, as the petitioner has failed to demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), in order to qualify to perform services in a specialty occupation, an alien must satisfy 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.

As the beneficiary did not earn a baccalaureate or higher degree from an accredited college or university in the United States, he does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*1*). As he does not possess a foreign degree that has been determined to be equivalent to a baccalaureate or higher degree from an accredited college or university in the United States, she does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*2*). As the petitioner has not demonstrated that the beneficiary holds an unrestricted state license, registration or certification to perform the duties of a specialty occupation, he does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*3*).

The petitioner, therefore, must establish that the beneficiary qualifies to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*), which requires a demonstration that the beneficiary's education, specialized training, and/or progressively responsible experience is equivalent to the completion of a United States baccalaureate or higher degree in the specialty occupation, and that the beneficiary also has recognition of that 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), equating a beneficiary's credentials to a United States baccalaureate or higher degree under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*) is determined by at least one 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.

The record contains a May 15, 2009 evaluation from who found the beneficiary's work experience equivalent to a bachelor's degree in hospitality management awarded by an accredited university in the United States. However, this evaluation does not qualify the beneficiary under 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*), as the petitioner has not demonstrated that possesses the authority to grant college-level credit for training and/or experience in the field at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience in the field. *See Matter of Soffici*, 22 I&N Dec. at 165.

No evidence has been submitted to establish, nor does the petitioner assert, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(*2*), which requires submission of 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).

Nor does the beneficiary qualify under 8 C.F.R. § 214.2(h)(4)(iii)(D)(*3*). As was the case under 8 C.F.R. §§ 214.2(h)(4)(iii)(C)(*1*) and (*2*), the beneficiary is unqualified under this criterion because she did not earn a baccalaureate or higher degree from an accredited college or university in the United States and does not possess a foreign degree that has been determined to be equivalent to a baccalaureate or higher degree from an accredited college or university in the United States.

No evidence has been submitted to establish, nor does the petitioner assert, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(*4*), which requires that the beneficiary submit 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.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) states the following with regard to analyzing an alien's qualifications:

> 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;[4]
>
> (*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

[4] *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. *See* 8 C.F.R. § 214.2(h)(4)(ii).

country; or

(*v*) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Although the record contains evidence regarding the beneficiary's work history, it does not establish that this work experience included the theoretical and practical application of specialized knowledge; that it was gained while working with peers, supervisors, or subordinates who held a bachelor's degree or its equivalent in the field; and that the beneficiary achieved recognition of expertise in the field as evidenced by at least one of the five types of documentation delineated in 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(*5*)(*i*)-(*v*).

Accordingly, the beneficiary does not qualify under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(*5*)(*i*)-(*v*) and therefore does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*). As such, the petitioner has failed to establish that the beneficiary qualifies to perform the duties of a specialty occupation. For this additional reason, the petition may not be approved.

Conclusion

The petitioner has failed to demonstrate that the proposed position qualifies for classification as a specialty occupation. Beyond the decision of the director, the petitioner has also failed to demonstrate: (1) that the petition is supported by an LCA which corresponds to the petition; and (2) that the beneficiary qualifies to perform the duties of a specialty occupation.[5] Accordingly, the beneficiary is ineligible for nonimmigrant classification under section 101(a)(15)(H)(i)(b) of the Act and this petition must remain denied.

The petition will remain 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 and the appeal will be dismissed.

ORDER: The appeal is dismissed.

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[5] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).