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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

D2

[Redacted]

Date: **FEB 07 2012** Office: VERMONT SERVICE CENTER File: [Redacted]

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:

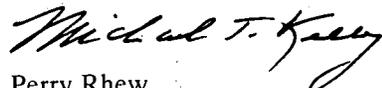
[Redacted]

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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on May 12, 2009. The petitioner indicated that it is a restaurant with 4 to 6 employees and a gross annual income of approximately \$74,700.¹

Seeking to employ the beneficiary in what it designates as a restaurant management development specialist position, the petitioner filed this H-1B petition in an endeavor 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).

The director denied the petition on November 13, 2009, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A). On appeal, counsel asserts that the director's basis for the denial was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and documentation in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established that the proffered position qualifies as a specialty occupation within the meaning of the controlling statutory and regulatory provisions. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed. The petition will be denied.

In this matter, the petitioner indicated on the Form I-129 and supporting documentation that it seeks the beneficiary's services as a restaurant management development specialist on a part-time basis (16 hours per week) at a salary of \$15,924.48 per year (\$19.14 per hour). In its letter of support dated March 29, 2009, the petitioner stated that the beneficiary would be employed to perform the following duties:

- Develop an understanding of [the petitioner's] key business objectives in order to translate those into effective training programs;
- Lead and manage all activities related to the planning, development and organization of training programs;

¹ In a letter of support, dated March 29, 2009, the petitioner stated that it has 4 employees. On the Form I-129, which is dated March 30, 2009, the petitioner stated that it currently has 6 employees. The documents were submitted concurrently to USCIS.

- Work as a strategic partner across the organization to build strong relationships to align programs with strategy;
- Evaluate training programs, establish training measures and execute learning activities;
- Plan and oversee training budget; align allocated resources and staff to ensure maximum efficiency and effectiveness;
- Investigate opportunities to expand training offerings among other business units;
- Develop, design and execute effective learning programs using blended training methods to maximize learning;
- Evaluate, develop and mentor training staff to foster an environment of continuous improvement.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for evidence (RFE) on August 4, 2009. The director requested the petitioner submit additional documentation to demonstrate that the proffered position is a specialty occupation, including a detailed description of the proffered position with the approximate percentage of time for each duty the beneficiary will perform.

In response to the director's RFE, the petitioner submitted a document entitled [REDACTED] [REDACTED]." The following duties were provided for the position restaurant management development specialist:

- Update knowledge of concerned New York state and federal government requirements involving the food and restaurant business;
- Update knowledge on concerned New York state and federal government requirements involving employment and work-related standards for restaurant workers;
- Ensure compliance with all New York state and federal government requirements regarding standards for restaurant workers;
- Plan and design development programs for restaurant workers to meet the company and government standards;
- Plan, design, introduce and make available additional and new menu to customers especially Australian food and all culinary culture that goes with

elevating the restaurant services as one of New York city's authentic Australian restaurant[s];

- Educate and train restaurant workers on the Australian culinary culture from cooking food to serving them to customers;
- Oversee that service is execute according to his plans and [AAO note: No further information was provided.]

Although the petitioner claimed that the beneficiary will serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on November 13, 2009.

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. The AAO will first make some preliminary findings that are material to this decision's application of the H-1B statutory and regulatory framework to the proffered position as described in the record of proceeding.

The title of the proffered position, restaurant management development specialist, is amorphous and may include a range of duties, some of which may be performed with experience alone, some of which may require a general bachelor's degree, and some of which may require a bachelor's or higher degree in a specific discipline. To determine whether this restaurant management development specialist position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position; such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program in a specific discipline. The AAO finds that the petitioner has not done so.

The petitioner provided two descriptions of the proffered position but did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks. Although the director specifically requested the petitioner provide the percentage of time the beneficiary would spend on each job duty, the petitioner failed to submit this information. Thus, the petitioner has not established which tasks are major functions of the proffered position nor has it established the frequency with which each of the duties will be performed (e.g., regularly, periodically or at irregular intervals). As a result, the AAO cannot discern the primary and essential functions of the proffered position.

Moreover, as a matter critically important in its determination of the merits of this appeal, the AAO finds that, as reflected in the descriptions of the position as quoted above, the petitioner describes the proposed duties in terms of generalized and generic functions that do not convey either the substantive nature of the work that the beneficiary would actually perform, any

particular body of highly specialized knowledge that would have to be theoretically and practically applied to perform it, or the educational level of any such knowledge that may be necessary.

The substantive requirements of the beneficiary's duties, listed above, are questionable when viewed in terms of the size, scope and nature of the petitioning entity's business operations.² As described, the duties fail to communicate either the actual work entailed or an adequate correlation between that work and the petitioner's stated business operations. For instance, the abstract level of information provided regarding the proffered position and the duties comprising it is exemplified by the phrases "[i]nvestigate opportunities to expand training offerings among other business units;" "[w]ork as a strategic partner across the organization to build strong relationships to align programs with strategy;" and "evaluate, develop and mentor training staff to foster an environment of continuous improvement."

More specifically, the petitioner failed to provide any information or evidence that its 4 to 6 employee business includes "other business units" in connection with the beneficiary's duty to "[i]nvestigate opportunities to expand training offerings among other business units." The petitioner's intended task for the beneficiary to "[w]ork as a strategic partner across the organization to build strong relationships" is also unclear, given the size, scope and nature of the petitioner's business operations. Furthermore, the petitioner claims that the beneficiary will "[e]valuate, develop and mentor training staff." However, the petitioner's reference to "training staff" is unclear as the evidence of record does not identify any "training staff," for the beneficiary to "evaluate, develop and mentor."

Furthermore, the petitioner claims that the beneficiary will "update knowledge" and "ensure compliance" of state and federal government requirements. However, the petitioner does not describe the actual duties involved in these tasks. Furthermore, the petitioner does not explain the necessity for the petitioner to hire someone now to specifically perform this function, after the petitioner has been in business for a number of years (since 2005). The petitioner claims that the beneficiary will "educate and train restaurant workers on the Australian culinary culture from cooking food to serving them to customers."³ The petitioner also asserts that the beneficiary will

² As previously noted, the petitioner reported that its staff consists of 4 to 6 employees. The AAO notes that it is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. *See EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position. In matters where a petitioner's business is relatively small, the AAO reviews the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in position requiring a level of knowledge that may be obtained only through a baccalaureate degree or higher in or its equivalent.

³ The petitioner provided a document entitled [REDACTED] listing the job titles, duties, educational requirements and number of employees for each position at the restaurant. The petitioner indicated that its staff consists of the owner, an operations manager, waiters/waitresses, a delivery service worker and a dishwasher. Upon review of the job duties, the AAO notes that none of the employees are

"[p]lan, design, introduce and make available additional and new menu to customers." As with the other duties described in this record of proceeding, these tasks fail to communicate (1) the actual work that the beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty.

Based upon a complete review of the record, the AAAO finds that the petitioner has not provided an adequate description of the specific duties and responsibilities to be performed by the beneficiary as a "restaurant management development specialist" in relation to the petitioner's particular business. Furthermore, the insufficiently described functions said to comprise the proffered position are not in themselves indicative of the need for attainment of a particular level of education in a body of highly specialized knowledge in a specific specialty.

The AAO will now address the petitioner's stated educational requirements for the proffered position. It must be noted that in its letter of support, the petitioner informed USCIS that "[o]ur minimum requirement for the position Management Development Specialist is a bachelor's degree in Business Administration or Management or a related field."⁴ The petitioner's claimed

responsible for preparing and cooking food for the restaurant. The petitioner claims that the beneficiary will "educate and train restaurant workers on the Australian culinary culture from cooking food to serving them to customers." However, based upon the information provided by the petitioner, it is not clear who the beneficiary will "train" to cook and how the beneficiary will be relieved from performing the actual duties of cooking. Moreover, the petitioner fails to establish how this work would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in specific specialty.

The AAO also notes that the petitioner described the beneficiary's qualifications by stating that, in addition to possessing a "bachelor's degree in Business Administration," the beneficiary "has extensive culinary and restaurant management experience in Australia." The AAO finds the petitioner's characterization of the beneficiary's professional experience in Australia questionable based upon a review of the beneficiary's resume, which was submitted with the Form I-129 petition. The beneficiary's resume indicates that his professional experience is the following: Kitchen Hand from October to December 2000 in Australia; Kitchen Hand/Cook from September to December 2000 in Australia; Entrepreneur of wholesale retail of imported bags, wallets and RTW from July 1996 to July 1998 in the Philippines; Business Partner of a fitness center from May 1994 to June 1996 in the Philippines; Grill Man from November 1993 to February 1994 in the Philippines. No other work experience is listed. The resume indicates that the beneficiary graduated with a B.S. in Commerce from Adamson University in the Philippines in 1986.

⁴ The AAO acknowledges that counsel claims that the beneficiary possesses a bachelor's degree in management. However, USCIS is required to follow long-standing legal standards and determine first, whether the proffered position is a specialty occupation, and second, whether an alien beneficiary is qualified for the position at the time the nonimmigrant visa petition is filed. *See Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation]."). Determining whether a proffered position is a specialty occupation is a separate issue from determining whether a beneficiary is qualified for the proffered position.

entry requirement of at least a bachelor's degree in "Business Administration or Management or a related field" for the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).⁵

In this matter, the petitioner claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation.

It should be noted that, for efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the duties and requirements of the proffered position into each basis discussed below for dismissing the appeal.

Next, the AAO will address the issue of whether the petitioner established that the proffered position is a specialty occupation. Based upon a complete review of the record of proceeding,

⁵ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. See, e.g., *Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; cf. *Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes 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 requiring the following:

- (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 the following:

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 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 proffered position qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position.

The petitioner indicated that the beneficiary would be employed as a restaurant management development specialist. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, 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.

The AAO here incorporates by reference its earlier discussion regarding the abstract, generalized, and generic terms by which the petitioner describes the proposed duties. The petitioner's descriptions of the duties of the proffered position are broad and generic and do not convey either the substantive nature of the specific matters upon which the beneficiary would focus or the practical and theoretical level of knowledge that the beneficiary would have to apply to those matters. Because of the lack of specificity as to the duties the beneficiary would perform on a day-to-day basis, the particular level of knowledge to be applied in this case is not self-evident.

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁶ The two sections of the *Handbook* most relevant to this proceeding are the chapters "Food Service Managers" and "Human Resources, Training, and Labor Relations Managers and Specialists."⁷ The AAO finds that, when compared with the full spectrum of the duties that comprise the occupational categories "Food Service Managers" and "Human Resources, Training, and Labor Relations Managers and Specialists" as described in the *Handbook*, the duties of the proffered position, to the extent that they are depicted in the record of proceeding, indicate that the beneficiary performs some tasks that resemble the duties associated with each of these occupational categories. The AAO finds the proffered position appears to be a combination of occupations as described in the *Handbook*. However, upon review of the relevant occupational categories in the *Handbook*, it must be noted that the *Handbook* does not support the claim that the proffered position qualifies as a specialty occupation.

As will now be discussed, the occupational category "Food Service Managers" does not comprise an occupational group that categorically requires at least a bachelor's degree, or the equivalent, in a specific specialty.⁸ The *Handbook* states, in pertinent part, the following about this occupation:

⁶ All of the AAO's references are to the 2010-2011 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

⁷ For these chapters, see Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2010-11 Edition*, Food Service Managers at <http://www.bls.gov/oco/ocos024.htm> (visited January 22, 2012) and Human Resources, Training, and Labor Relations Managers and Specialists, on the Internet at <http://www.bls.gov/oco/ocos021.htm> (also visited January 22, 2012).

⁸ The petitioner and counsel provided several job announcements for restaurant managers. A review of the job duties (for the relevant announcements that included job duties) indicates that the restaurant manager position falls under the occupational category "Food Service Managers" (not training and development specialists, as asserted by counsel). Counsel stated that the job announcements were provided to show "the hiring practice and industry requirements in the United States for this job position" The job announcements will be discussed in more detail later in the decision; however, it

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.

* * *

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.

* * *

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 limited-service eating places, such as sandwich and coffee shops or fast-food restaurants, managers or food preparation or serving supervisors, not executive chefs, are responsible for supervising routine food preparation operations. (For additional information on these other workers, see material on top executives or on chefs, head cooks, and food preparation and serving supervisors elsewhere in the *Handbook*.)

is noted that they also indicate that the occupation is not a specialty occupation under the statutory and regulatory provisions.

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.

The introduction to the "Training, Other Qualifications, and Advancement" section of this chapter in the *Handbook* states the following:

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

Education and training. 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.

Almost 1,000 colleges and universities offer 4-year programs in restaurant and hospitality management or institutional food service management; a growing number of university programs offer graduate degrees in hospitality management or similar fields. For those not interested in pursuing a 4-year degree, community

and junior colleges, technical institutes, and other institutions offer programs in the field leading to an associate degree or other formal certification.

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

Many larger food service operations will provide or offer to pay for technical training, such as computer or business courses, so that employees can acquire the business skills necessary to read spreadsheets or understand the concepts and practices of running a business. Generally, this requires a long-term commitment on the employee's part to both the employer and to the profession.

As evident in the excerpts above, the *Handbook* does not support the view that the occupational category "Food Service Managers" qualifies as a specialty occupation. The *Handbook* states that the entry requirements vary widely, but that experience in the food services industry is the most common training for food service managers. Most food service managers have less than a bachelor's degree. Thus, the passages do not indicate that these positions normally require a bachelor's degree, or its equivalent, in a specific specialty for entry into the occupation.

The occupational category of "Training and Development Specialists" falls under the chapter "Human Resources, Training, and Labor Relations Managers and Specialists" in the *Handbook*. The AAO observes that the *Handbook* states the following about this occupation:

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.

The section regarding the "Training, Other Qualifications, and Advancement" of the *Handbook's* chapter on "Human Resources, Training, and Labor Relations Managers and Specialists" 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.

Education and training. Although a bachelor's degree is a typical path of entry into these occupations, many colleges and universities do not offer degree programs in personnel administration, human resources, or labor relations until the graduate degree level. However, many offer individual courses in these subjects at the undergraduate level in addition to concentrations in human resources administration or human resources management, training and development, organizational development, and compensation and benefits.

Because an interdisciplinary background is appropriate in this field, a combination of courses in the social sciences, business administration, and behavioral sciences is useful. Some jobs may require more technical or specialized backgrounds in engineering, science, finance, or law. Most prospective human resources specialists should take courses in principles of management, organizational structure, and industrial psychology; however, courses in accounting or finance are becoming increasingly important. Courses in labor law, collective bargaining, labor economics, and labor history also provide a

valuable background for the prospective labor relations specialist. As in many other fields, knowledge of computers and information systems is useful.

An advanced degree is increasingly important for some jobs. Many labor relations jobs require graduate study in industrial or labor relations. A strong background in industrial relations and law is highly desirable for contract negotiators, mediators, and arbitrators; in fact, many people in these specialties have law degrees. A master's degree in human resources, labor relations, or in business administration with a concentration in human resources management is highly recommended for those seeking general and top management positions.

The duties given to entry-level workers will vary, depending on whether the new workers have a degree in human resource management, have completed an internship, or have some other type of human resources-related experience. Entry-level employees commonly learn by performing administrative duties—helping to enter data into computer systems, compiling employee handbooks, researching information for a supervisor, or answering phone calls and handling routine questions. Entry-level workers often enter on-the-job training programs in which they learn how to classify jobs, interview applicants, or administer employee benefits; they then are assigned to specific areas in the human resources department to gain experience. Later, they may advance to supervisory positions, overseeing a major element of the human resources program—compensation or training, for example.

The AAO notes that the *Handbook* does not report that, as an occupational group, "Human Resources, Training, and Labor Relations Managers and Specialists" require at least a bachelor's degree in a specific specialty. The *Handbook* explains that because of the diversity of duties and levels of responsibility, the educational backgrounds of human resources, training, and labor relations managers and specialists vary considerably. (As will be discussed later in the decision, the petitioner indicated on the LCA that its proffered position for the beneficiary is an entry-level position.) The *Handbook* states that 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. Entry-level employees commonly learn by performing administrative duties and entering enter on-the-job training programs.

Despite counsel's assumption to the contrary, the *Handbook* does not indicate that at least a bachelor's degree, or the equivalent, in a specific specialty is normally required for the occupational classification in the United States. Rather, the *Handbook* indicates that the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree. Moreover, as previously discussed, USCIS consistently interprets the term "degree" to mean not just any baccalaureate or higher degree, but one in a *specific specialty* that is directly related to the position. An occupation is not a specialty occupation if a bachelor's degree in any field of study, or in a general field of study, is acceptable. Since there must be a close correlation between the required specialized studies and the position, the acceptance of

college graduates with a technical or business background or a well-rounded liberal arts education, without further specification, does not establish the position as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558. Thus, the *Handbook* does not indicate that this occupation normally require a baccalaureate or higher degree, or its equivalent, in a specific specialty for entry into the occupation.

The AAO finds that the duties of the proffered position do not fall directly within any one occupation within the *Handbook*. There are some aspects of the duties of the proffered position that relate to the occupations cited above; however, none of the occupations encompass all of the duties of the proffered position. The AAO has compared with the responsibilities that comprise the occupational categories as described in the *Handbook* to the duties of the proffered position, to the extent that they are depicted in the record of proceeding. While the beneficiary may perform some tasks in common with these occupations, the beneficiary's duties would not be fully encompassed by any one of these positions. Further, it must be noted that none of the occupations constitute an occupational group that categorically requires a specialty-occupation level of education that is, at least a U.S. bachelor's degree, or the equivalent, in a specific specialty.

The petitioner submitted a copy of the *O*NET OnLine* Summary Report and a printout from the Foreign Labor Certification (FLC) Data Online Wage Library for "Training and Development Specialists."⁹ The AAO notes that these documents are insufficient to establish that the proffered position qualifies as a specialty occupation normally requiring at least a bachelor's degree or its equivalent in a specific specialty. The *O*NET OnLine* and FLC Wage Library printouts do not state a requirement for a bachelor's degree for the occupation. Rather, the occupation "Training and Development Specialists" is assigned a Job Zone Four rating, which groups it among occupations of which "most," but not all, "require a four-year bachelor's degree."¹⁰ Thus, the

⁹ *O*NET OnLine* is accessible at <http://www.onetonline.org/>. As stated on the Home Page of this Internet site, *O*NET OnLine* is created for the U.S. Department of Labor's Employment & Training Administration by the National Center for *O*NET* Development. The *O*NET OnLine* Summary Report for the occupational classification "Training and Development Specialists" is accessible on the Internet at <http://www.onetonline.org/link/summary/13-1151.00> (visited on January 22, 2012). The wage results for the occupation "Training and Development Specialists" on the Internet at the Foreign Labor Certification Data Online Wage Library is available at <http://www.flcdatacenter.com/OesQuickResults.aspx?area=35644&code=13-1073&year=9&source=1> (also visited on January 22, 2012).

¹⁰ The first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of training and development specialists positions require at least a bachelor's degree in a specific specialty, it could be said that "most" training and development specialists positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist.

assignment to a Job Zone Four category does not indicate that at least a bachelor's degree is a standard entry requirement for the occupation. Furthermore, *O*NET OnLine* and the FLC Wage Library do not state that a four-year bachelor's degree for Job Zone Four occupations must be in a specific specialty closely related to the requirements of that occupation. Therefore, the documents are not probative of the proffered position being a specialty occupation.

The petitioner also submitted an "Occupational Profile" printout of the occupation "Training and Development Specialists" from *America's Career InfoNet*. The entry "Most Common Education/Training Level" states "Bachelor's or higher degree, plus work experience." The entry "Related Instructional Programs" states "Human Resources Management/Personal Administration, General; Organizational Behavior Studies." The "Occupational Profile" indicates that 45.5% percent of respondents do not have a bachelor's degree.¹¹ The "Occupational Profile" does not provide any information as to the percentage of respondents who possess at least a bachelor's degree in a *specific specialty*. As such, even if the proffered position were determined to be a "Training and Development Specialists" position, it cannot be determined based upon the "Occupational Profile" submitted by the petitioner that the proffered position qualifies as a specialty occupation normally requiring at least a bachelor's degree or its equivalent in specific specialty is normally the minimum requirement for entry.

The petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that there is a categorical requirement for at least a bachelor's degree in a specific specialty. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that position is one for which a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong 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.

As previously mentioned, the petitioner stated on the Form I-129 petition and initial supporting documents that it is a restaurant with 4 to 6 employees and a gross annual income of approximately \$74,700.

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. at 1102).

¹¹ The "Occupational Profile" limits the responses to "employees aged 25 to 44 in the occupation."

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 or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions. Furthermore, the petitioner did not submit any letters or affidavits to meet this criterion of the regulations.

In the appeal, the petitioner and counsel do not assert that a degree requirement is common to the industry in parallel positions among similar organization.¹² Nevertheless, the petitioner provided eleven job announcements in its response to the RFE. However, upon review of the documents, the AAO finds that they do not establish that similar organizations to the petitioner routinely employ individuals with degrees in a specific specialty, in parallel positions.

The AAO notes that for the petitioner to establish that an advertising organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered).

The petitioner provided the following job announcements:

- A job posting from [REDACTED] The job posting indicates that the company has over 200 restaurants in 32 states, the District of Columbia and Puerto Rico. Thus, the advertisement is for an organization whose size and number of employees far exceeds the petitioner's. Moreover, the posting indicates that candidates "must have a minimum of 2 years of full service restaurant management experience" and that "candidates with a degree in hospitality

¹² In the appeal, counsel states that the director "erred in denying this instant H-1B petition since the grounds cited in its decision are inappropriately directed to the 2nd and 4th criteria [8 C.F.R. §§ 214.2(h)(4)(iii)(A)(2) and (4)] instead of the 1st criterion [8 C.F.R. § 214.2(h)(4)(iii)(A)(1)] which was petitioner's basis in the petition."

In response to the RFE, counsel stated that "as further evidence to the specialty of Restaurant Management Development Specialist requiring a bachelor's degree, at the minimum" the petitioner and counsel provided "job postings for a restaurant manager (OES-SOC Code 13-1073/ OES-SOC Code Title: Training and Development Specialist) showing that the hiring practice and industry requirement in the United States for this job position is at the standard minimum, a bachelor's degree."

Thus, it appears that counsel's position as to whether a degree requirement is common to the industry in parallel positions among similar organization may have changed after the submission of the RFE response. Nevertheless, the AAO conducts an appellate review on a *de novo* basis evaluating the sufficiency of the evidence in the record according to its probative value and credibility. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

management from an accredited institution will also be considered." There is no indication that a bachelor's degree in a specific specialty is required for the position.

- A job posting for an unnamed company for a Management Development Specialist. No further information regarding the employer is provided. The job posting is devoid of sufficient information regarding the organization to conduct a legitimate comparison of the business operations. The job posting does not list any educational requirements for the position.
- A job posting for [REDACTED] (Front of House Manager). The company's website states that it has over 200 restaurants in 38 states, with additional restaurants located in international markets. Thus, the advertisement is for an organization whose size and number of employees far exceeds the petitioner's. The job posting indicates that 2-3 years of prior experience is required. There are no educational requirements for the position.
- A job posting for Legal Sea Food for a Restaurant Manager. The employer's website states that it has restaurant, retail and mail order divisions and employs over 4,000 people. Thus, the advertisement is for an organization whose size, scope and number of employees far exceeds the petitioner's. The job posting indicates that 2-5 years of prior experience is required. There are no educational requirements for the position.
- A job posting for IHOP for a Restaurant Manager. The employer's website states that it has over 1,500 IHOP restaurants located in 50 states and the United States and abroad. Thus, the advertisement is for an organization whose size and number of employees far exceeds the petitioner's. The job posting indicates that prior experience is required. There are no educational requirements for the position.
- A job posting for The Couer de Lion Restaurant & Henley Park Hotel for a Restaurant Manager. The job posting indicates that prior maître d' and management experience is required. There are no educational requirements for the position.
- A job posting for an unnamed company for a Restaurant Wine Manager. No further information regarding the employer is provided. The job posting is devoid of sufficient information regarding the organization to conduct a legitimate comparison of the business operations. The job posting states that formal wine education is preferred. The posting indicates the employer's *preference* that candidates possess formal education; however, a degree is not a minimum requirement for the position.
- A job posting for Outback Steakhouse for a Restaurant Manager. The company has approximately 1,200 locations in 22 countries. Thus, the advertisement is for

an organization whose size and number of employees far exceeds the petitioner's. The job posting indicates that 2 to 5+ years of prior experience is required. There are no educational requirements for the position.

- A job posting for Jason's Deli for a Restaurant Manager. The company has approximately 200 locations. Thus, the advertisement is for an organization whose size and number of employees far exceeds the petitioner's. The job posting does not include any educational requirements for the position.
- A job posting for the Tampa Bay Performing Arts Center – Maestro's Restaurant for a Restaurant Manager. The job posting indicates that the ideal candidate will have 2 to 3 years of prior experience. The job posting does not include any educational requirements for the position.
- A job posting for AGI Management, Inc. for a Restaurant Manager. The job posting indicates that the ideal candidate will have 2 years of prior experience. The job posting does not include any educational requirements for the position.
- A job posting for Dream Management for a Business Development Specialist. The job posting states that the company is an international language corporation and transportation carrier providing solutions to the Federal government and corporate world. Thus, the advertisement is for a dissimilar organization. Furthermore, the job duties of the advertised position include preparing bid proposals, developing business plans, securing new business opportunities, and developing business relationships with government agencies and commercial clients. The job duties of the advertised position do not appear to be similar to the proffered position and the petitioner has not provided any information to demonstrate that they are parallel.¹³

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed.

The AAO finds that the job announcements indicate that a bachelor's degree, or the equivalent, in a specific specialty is *not* a normal minimum entry requirement for this occupational category. In fact, none of the employers require a bachelor's degree or higher in a specific specialty, or the equivalent, for parallel positions.

As a result, the petitioner has failed to establish that at least a bachelor's degree in a specific specialty is the norm for entry into positions that are (1) parallel to the proffered position; and,

¹³ Furthermore, the job posting indicates that a "college degree with a major in Marketing, English or a Business related career" is acceptable for the position. USCIS consistently interprets the term "degree" to mean not just any baccalaureate or higher degree, but one in a *specific specialty* that is directly related to the position.

(2) located in organizations similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that the particular position proffered in this petition is "so complex or unique" that it can be performed only by an individual with at least a bachelor's degree in a specialty occupation.

The petitioner does not assert or provide any documentation to indicate that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty. This is further supported by the [REDACTED] submitted by the petitioner in support of the instant petition. [REDACTED] indicates a wage level based upon the occupational classification "Training and Development Specialists" at a Level 1 (entry level) wage.

Wage levels should be determined only after selecting the most relevant *O*NET* occupational code classification. Then, a prevailing-wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.¹⁴ Prevailing wage determinations start with an entry level wage (i.e. Level 1) and progress to a wage that is commensurate with that of a Level 2 (qualified), Level 3 (experienced), or Level 4 (fully competent worker) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.¹⁵ DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received as indicated by the job description.

The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of

¹⁴ DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* (Revised Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

¹⁵ A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

the wage levels.¹⁶ A Level 1 wage rate is described by DOL as follows:

Level 1 (entry) wage 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.

By virtue of the related wage level specified therein, the [REDACTED] indicates the position is a low-level, entry position relative to others within the occupation. Based upon this wage rate, the beneficiary is a beginning level employee who has only a basic understanding of the occupation. He will be expected to perform routine tasks that require limited, if any, exercise of judgment. The beneficiary will work under close supervision, and he will receive specific instructions on required tasks and expected results. His work will be closely monitored and reviewed for accuracy. Thus, based upon the record of proceeding, including the [REDACTED] it does not appear that the proffered position is so complex or unique that it can only be performed by an individual who has completed a baccalaureate program in a specific discipline that directly relates to the proffered position. Furthermore, the petitioner has not established that 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 in a specific specialty.

It is further noted that although the petitioner asserts that a bachelor's degree is required to perform the duties of the proffered position, the petitioner failed to sufficiently demonstrate how the restaurant management development specialist's duties require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. That is, the record of proceeding does not establish that the petitioner's requisite knowledge and skills for the proffered position can only be obtained through a baccalaureate or higher degree program in a specific specialty, or the equivalent. It appears that the requisite knowledge for the position could be developed via a wide range of unrelated degree programs, from job experience alone, from junior college or community college courses, from training provided by vocational programs or by vendors, or by some combination thereof.

The petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it claims are so complex or unique. While a few related courses may be beneficial in performing certain duties of a restaurant management development specialist position, the petitioner has

¹⁶ DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* (Revised Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position.

The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

Consequently, as the petitioner fails to demonstrate how the proffered position of restaurant management development specialist is so complex or unique relative to other positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position.¹⁷

In the instant matter, it appears that the proffered position of restaurant management development specialist is a new position. In response to the RFE, counsel reported "petitioner

¹⁷ To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

has not yet employed anyone to perform the office of Restaurant Management Development Specialist as of yet." However, the petitioner did not provide any information or documentation regarding its methods for recruiting the beneficiary for the position. Furthermore, no evidence regarding any current or past recruitment efforts for this position was submitted (for example, evidence that recruitment steps were taken but were unsuccessful/canceled or in which the petitioner's plans may have changed). Thus, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty

The AAO notes that the petitioner and counsel claim repeatedly that the duties of the proffered position can only be employed by a degreed individual. While a petitioner may believe or otherwise assert that a proffered 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 occupation as 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 384. In other words, if a petitioner's degree requirement is only symbolic and the proffered 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* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

In the instant case, no evidence was submitted regarding the petitioner's past recruiting and hiring practices. The record of proceeding does not establish that the petitioner normally requires at least a bachelor's degree, or the equivalent, in a specific specialty for the proffered position. Thus, 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 the specific 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 petitioner does not claim, and did not submit any evidence to establish, that the duties of the position are 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 incorporates by reference and reiterates its earlier discussion that the petitioner has failed to establish that the duties of the proffered position are sufficiently specialized and complex that performance would require knowledge at a level associated with at least a bachelor's degree, or the equivalent, in a specific specialty.

The petitioner has not met its burden of proof to establish that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The AAO, therefore, concludes that the proffered position failed to satisfy the criterion 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 any one of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO does not need to examine the issue of the beneficiary's qualifications because the petitioner has not provided sufficient evidence to demonstrate that the proffered 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 the petitioner did not submit an evaluation of the beneficiary's foreign degree or sufficient evidence to establish that the degree is the equivalent of a U.S. bachelor's degree in a specific specialty. As such, since evidence was not presented that the beneficiary has at least a bachelor's degree or the equivalent in a specific specialty, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed, and the petition will be denied.

ORDER: The appeal will be dismissed. The petition will be denied.