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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



82

Date: **JUL 03 2012** Office: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a restaurant with four employees and a gross annual income of \$250,000. It seeks to employ the beneficiary as a chief restaurant manager and to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the grounds that the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation.

The director's decision also included a denial of the of the request to change status from F-1 to H-1B, finding that the beneficiary failed to maintain his F-1 status. At the outset, the AAO notes that it will not address the change-of-status issue or discuss any evidence in relation to it, as that issue is outside the scope of the AAO's jurisdiction. *See* 8 C.F.R. §§ 248.3(a) and 248.3(g), which indicate that there is no appeal from a denial of an application for a change status to H-1B. Accordingly, the AAO will address only the specialty occupation issue.

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

Again, the primary issue for consideration is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and [(2)] which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the

occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed 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) (hereinafter *Defensor*). 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), USCIS consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

The petitioner states that it is seeking the beneficiary's services as a chief restaurant manager. The record contains a document titled "Job Description and Duties," which states the following:

Business Activities:

- Taking responsibility for the business performance of the restaurant;
- Analyzing and planning restaurant sales levels and profitability;
- Organiz[ing] marketing activities, such as promotional events and discount schemes;
- Preparing reports at the end of the shift/week, including staff control, food control and sales;
- Creating and executing plans for department sales, profit and staff development;
- Setting budgets and/or agreeing them with senior management;
- Planning and coordinating menus.

Front of house:

- Coordinating the entire operation of the restaurant during scheduled shifts;
- Managing staff throughout their shift and providing them with feedback;
- Responding to customer complaints;
- Ensuring that all employees adhere to the company's uniform standards;
- Meeting and greeting u\customers and organi[z]ing table reservations;
- Advising customers on menu and wine choices;
- Recruiting, training and motivating staff;
- Organi[z]ing and supervising the shifts of kitchen, waiting and cleaning staff.

Housekeeping:

- Maintaining high standards of quality control, hygiene, and health and safety
- Checking stock levels and ordering supplies;
- Preparing cash drawers and proving petty cash as required;
- Helping in any area of the restaurant when circumstances dictate.

Tasks and Duties:

1. Work with chefs and other personnel to plan menus that are flavorful and popular with customers. Work with chefs for efficient provisioning and purchasing of supplies. Estimate food and beverage costs. Supervise portion control and quantities of preparation to minimize waste. Perform frequent checks to ensure consistent high quality of preparation and service.
2. Supervise operation of bar to maximize profitability, minimize legal liability, and conform to alcoholic beverage regulations.
3. Work with other management personnel to plan marketing, advertising, and any special restaurant functions.
4. Direct hiring, training, and scheduling of food service personnel.
5. Investigate and resolve complaints concerning food quality and service.

6. Enforce sanitary practices for food handling, general cleanliness, and maintenance of kitchen and dining areas.
7. Comply with all health and safety regulations.
8. Review and monitor, with bookkeeper or other financial personnel, expenditures to ensure that they conform to budget limitations. Work to improve performance.
9. Perform other duties as assigned by management.

Counsel submitted a copy of the beneficiary's foreign degree and transcript along with English translation, as well as a credential evaluation indicating that the beneficiary possesses the equivalent of a U.S. Master of Science in Food Science.

On May 19, 2010 the director issued an RFE, the pertinent parts of which requested that the petitioner submit documentation highlighting the nature, scope, and activity of the petitioner's business enterprise. The RFE noted that such evidence could include (1) a detailed description of the proffered position, including approximate percentage of time spent for each duty; (2) a list of current and past employees in a position similar to the one here proffered, supported by documentary evidence of their qualifications for the position; (3) job descriptions for the majority of the petitioner's positions, including job titles, duties and education requirement; and (4) evidence that a bachelor's degree in specific specialty is the minimum requirement for the proffered position.

In response to the director's RFE, counsel claimed that the proffered position of a chief restaurant manager is a specialty occupation, which warrants approval of the Form I-129. Counsel cited an unpublished decision, "Matter of _____," _____ 2002 _____ (AAU Dec. 13, 2002). Counsel claimed that the case indicates that an executive pastry chef whose job required a degree of Bachelor of Arts and level of complexity and supervisory responsibility was found to be a specialty occupation position.

The AAO will now discuss why the AAO accords no weight to counsel's citation and contention regarding its value to the present proceeding.

First and foremost, and regardless of counsel's contrary statement, he has cited an unpublished decision that has no precedential value: while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not.

Further, counsel asserted, in conclusory fashion without a presenting a supporting factual foundation, that the proffered Chief Restaurant Manager position also requires a Bachelor of Arts degree, and is similar in level of complexity and responsibility to the Executive Chef position that is the subject of the unpublished decision cited by counsel. Further, counsel did not provide a copy of the case nor any documentary evidence to demonstrate that the facts of the instant petition are analogous to the cited case. Accordingly, counsel has not established that the two cases are apposite.

Furthermore, as will be reflected in the rest of this decision, the AAO also finds that the evidence in the record of proceeding here before the AAO clearly does not support a determination that

the proffered position is a specialty occupation. Accordingly, if an unpublished decision found a specialty occupation based upon substantially the same evidence as in the present record of proceeding – and there is no indication of this in this record of proceeding - such finding would be erroneous. In this regard, it should be noted that the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous, even if the AAO itself was the source of the approval. If the cited AAO approval were based on the same unsupported assertions that are contained in the current record, the AAO would have materially erred in rendering that decision. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

In summary, for the reasons discussed above, in its consideration of this appeal the AAO accords no weight to the cited non-precedent decision for any purpose.

The director denied the petition on July 13, 2010. The director found that the evidence of the record does not establish that the job offered qualifies as a specialty occupation.

On appeal, counsel for the petitioner cites the same unpublished decision previously submitted and claims that the position is a specialty occupation.

The AAO finds that the director's determination that the petitioner did not establish the proffered position as a specialty occupation was correct. Accordingly, the appeal will be dismissed, and the petition will be denied.

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 turns first to the criteria 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.

First, the AAO recognizes the U.S. Department of Labor's (DOL'S) *Occupational Outlook Handbook* (hereinafter referred to as the *Handbook*) as an authoritative source on the duties and

educational requirements of the wide variety of occupations that it addresses.¹ The AAO finds that the duties described by the petitioner comport with the the duties of Food Service Managers as that occupational classification is discussed in the *Handbook*, which is also the occupational classification identified in the Labor Condition Application (LCA) that the petitioner filed in support of this petition. .

The “Food Service Managers” chapter at the 2012-2013 edition of the *Handbook* describes the duties of a food service manager, in part, as follows:

- Interview, hire, train, oversee, and sometimes fire employees
- Oversee the inventory and ordering of food and beverage, equipment, and supplies
- Monitor food preparation methods, portion sizes, and the overall presentation of food
- Comply with health and food safety standards and regulations
- Monitor the actions of employees and patrons to ensure everyone’s personal safety
- Investigate and resolve complaints regarding food quality or service
- Schedule staff hours and assign duties
- Keep budgets and payroll records and review financial transaction
- Establish standards for personnel performance and customer service

See Bureau of Labor Statistics, U.S. Dept. of Labor, *Occupational Outlook Handbook*, 2012-13 Ed., at <http://www.bls.gov/ooh/Management/Food-service-managers.htm>, for this and the AAO’s other references to the 2012-2013 *Handbook*’s information regarding Food Service Managers. (Accessed May 21, 2012).

Under the section on “How to Become a Food Service Manager,” the *Handbook* states that:

Experience in the food services industry-as a cook, waiter or waitress, or counter attendant is the most common training for food service managers. Many jobs, particularly for managers of self-service and fast-food restaurants, are filled by promoting experienced food service workers. However, a growing number of manager positions require postsecondary education in a hospitality or food service management program

Specifically under the section on “Education,” the *Handbook* states the following:

Although most food service managers have less than a bachelor’s degree, some postsecondary education is increasingly preferred for many manager positions. Many food service management companies and national or regional restaurant chains recruit management trainees from college hospitality or food service management programs, which require internships and real-life experience to graduate.

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/home.htm>. The AAO’s references to the *Handbook* are to the 2012 – 2013 edition available online.

Because the *Handbook* indicates that working as a food service manager does not normally require at least a bachelor's degree in a specific specialty or its equivalent, the *Handbook* does not support the proffered position as satisfying the criterion at hand.

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

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

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement of 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.

Next, the petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree."

The AAO finds that the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of chief restaurant manager. In this regard, the AAO finds, in particular, that, though the petitioner's listing of duties comprising the proffered position is extensive, it is not self-evident that, as described, those duties, even in the aggregate, comprise a position that is so complex or unique that it can be performed only by a person with at least a bachelor's degree, or the equivalent, in a specific specialty. By the same token, the petitioner has not distinguished this particular proffered position as more complex or unique than food service manager positions that are performed by persons without such educational credentials.

Additionally, as will now be discussed, the AAO finds that the wage level specified in the LCA submitted in support of this petition is inconsistent with a claim of a level of complexity or

uniqueness that would require the services of a person with at least a bachelor's degree level of education in a specific specialty.

In fact, the LCA was certified for Level I of the prevailing wage. 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.²

The AAO notes that prevailing wage determinations start with a Level 1 (entry) 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.³ 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.

In the "Prevailing Wage Determination Policy Guidance" prepared by DOL, a Level 1 wage rate is describes 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 1 wage should be considered.

The AAO notes that Level I is indicative of a comparatively low, entry-level position relative to others within the occupation. The wage rate specified in the LCA indicates that the proffered position only requires a basic understanding of the occupation and carries expectations that the

² 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.

³ 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.

beneficiary perform routine tasks that require limited, if any, exercise of judgment, that she would be closely supervised, that her work would be closely monitored and reviewed for accuracy, and that she would receive specific instructions on required tasks and expected results.

Further, the petitioner failed to demonstrate how a chief restaurant manager's duties, as described, 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. For instance, 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 and unique. While some courses in food service management may be beneficial in performing certain duties of a chief restaurant manager position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in hospitality management or its equivalent is required to perform the duties of the particular position here proffered.

Therefore, the evidence of record does not establish that this position is significantly different from other food service manager positions so as to refute the *Handbook's* information to the effect that a bachelor's degree, or higher, in a specific specialty is not normally required. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than food service manager positions that can be performed by persons without 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 chief restaurant manager is so complex or unique relative to other food service manager 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).

Next, the AAO will consider the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is satisfied if the petitioner establishes that it normally requires a degree or its equivalent in a specific specialty for the position.

The third criterion entails an employer demonstrating that it normally requires a degree or its equivalent 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. In the instant matter, counsel claims that the petitioner "employs individuals with [a] minimum of [a] baccalaureate or higher degree for the similar positions as the nature, size and scope demands for it."

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.⁴

The record of proceeding 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 counsel claims that the position requires at least a bachelor's degree. However, counsel did not submit evidence of an established history of recruiting and hiring for the proffered position. Moreover, counsel did not even state that the petitioner's asserted degree requirement could be met only by at least a bachelor's degree, or the equivalent, in a specific specialty. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Again, if the evidence in the record of proceeding does not establish that the petitioner's asserted degree requirement is necessitated by the actual performance requirements of the proffered position, this criterion will not be satisfied.

Therefore, the petitioner has failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent.

As reflected in this decision's earlier discussion about the proposed duties, while the petitioner lists many, the petitioner has not developed them with sufficient specificity to establish a usual association between their actual performance in the petitioner's business and the attainment of at least a bachelor's degree, or the equivalent, in a specific specialty.

⁴ 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.

The AAO finds that relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position, and the proposed duties have not been described and documented with sufficient specificity to show that they are more specialized and complex than chief restaurant manager positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent. In this regard it should also be noted that the AAO finds that, though many are enumerated, the proposed duties are presented in terms of generalized function that appear generic to the Food Service Managers occupation in general and without regard to whatever educational credentials may be associated with a any particular position therein.

As the evidence of record does not establish that the duties of the proffered position are sufficiently specialized and complex that their performance would require knowledge at a level usually associated with at least a bachelor's degree, or the equivalent, in specific specialty, the petitioner has failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As the the petitioner has failed to establish that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), the AAO cannot find that the petitioner has established the proffered position as a specialty occupation.

Beyond the decision of the director, the AAO finds that the petitioner has not submitted a certified labor condition application (LCA) which corresponds to the petition. Specifically, the AAO finds that the proffered wage is below the prevailing wage. For this additional reason also, the petition must be denied.⁵

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

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

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

Moreover, while 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

⁵ The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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 (emphasis added):

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.

The regulation at 20 C.F.R. § 655.705(b) therefore requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary.

In this case, the petitioner filed the Form I-129 with USCIS on May 13, 2010. The LCA provided at the time of filing was certified (1) for a chief restaurant manager, (2) pursuant to occupational code, 11-9051.00, (3) within New York-White Plains-Wayne, NY-NJ metropolitan division, and (4) at a prevailing wage of \$37,024 a year.

The petitioner failed to use the correct database for determining the prevailing wage. It is noted that the petitioner used the Online Wage Library (OWL) 2008 as a reference for determining the prevailing wage, which covers July 2008 to June 2009. However, the LCA was certified on April 29, 2010; thus, the petitioner should have used the OWL database for 2009, which covers from July 2009 to June 2010. The LCA should have been certified for (1) a chief restaurant manager, (2) pursuant to occupational code, 11-9051.00, (3) within New York-White Plains-Wayne, NY-NJ metropolitan division, and (4) at a prevailing wage of \$39,770 a year.

Thus, the record establishes that, at the time of filing, the petitioner had not obtained a certified LCA for the prevailing wage that applied at the time the petition was filed. Therefore, the petitioner has failed to comply with the filing requirements at 8 C.F.R. §§214.2(h)(4)(i)(B) and 214.2(h)(i)(2)(B) by providing a certified LCA that corresponds to the instant petition. For this additional reason, the petition may not be approved.

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).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The petition will be denied and the appeal dismissed for the above stated reasons, with each

considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner.

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