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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

Date: **JUN 12 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 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 on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner described itself as a “Chinese Restaurant” with 12 employees. It seeks to employ the beneficiary in a full-time capacity as an “Operations 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 record of proceeding before the AAO contains: (1) the 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.

The issue before the AAO 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 job 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 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 which [(2)] 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). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

The petitioner submitted the following documents with the Form I-129: (1) the petitioner’s support letter, dated September 28, 2009; (2) an evaluation of the beneficiary’s experience in the culinary arts field b [REDACTED] (3) a copy of a letter dated August 25, 2003, from [REDACTED] [REDACTED] stating that the beneficiary worked in the “Chinese Food Department” of the hotel from August 1990 to June 2003; (4) a copy of a certified Labor Condition Application; and (5)

copies of pages from the beneficiary's foreign passport.

In the petitioner's support letter, the petitioner states that the beneficiary will be "responsible for planning, directing, and coordinating operations" including the following job duties:

- (1) Accomplishing human resources objectives by recruiting, selecting, orienting, training, assigning, scheduling, coaching, counseling, and disciplining food production employees; communicating job expectations; planning, monitoring, appraising, and reviewing job contributions; planning and reviewing compensation actions; enforcing policies and procedures, (15% of time);
- (2) Achieving operational objectives by contributing information and analysis to strategic plans and reviews; preparing and completing action plans; implementing production, productivity, quality, and customer service standards; identifying and resolving problems; completing audits; determining systems improvements; implementing change, (15% of time);
- (3) Meeting culinary financial objectives by estimating requirements; preparing an annual budget; designing menus; anticipating and evaluating response to menu preparation; scheduling expenditures, analyzing variances; initiating corrective actions; evaluating time-saving production techniques; training others in specialty techniques; (15 % of time);
- (4) Developing recipes and portion specifications by understanding consumer tastes and nutritional needs; anticipating emerging food and dining trends; reviewing product specifications; evaluating ease of menu preparation; applying established procedures and budgetary constraints, (10% of time);
- (5) Overseeing food preparation by consulting with Chefs and kitchen personnel, overseeing portion size; controlling productivity; providing culinary leadership in areas of personal expertise, (15% of time);
- (6) Improving menu quality and consistency by analyzing food production records and menu expenses; standardizing production recipes; promoting kitchen staff interest in quality improvement; studying, evaluating, and re-designing processes; implementing changes, (10% of time);
- (7) Maintaining safe, secure, and healthy work environment by establishing, following, and enforcing standards and procedures; complying with sanitation and federal, state, and local legal regulations; overseeing food preparation, safety, and security; reviewing and implementing accident and disaster plans, (5% of time);
- (8) Coordinating equipment maintenance by following operating instructions; instructing staff in equipment use; troubleshooting breakdowns; maintaining equipment supplies; performing preventive maintenance; evaluating new equipment; preparing administrative proposals to justify purchases, (5% of time);
- (9) Preparing menu and food presentation reports by collecting, analyzing, and summarizing food, dining, and customer data and trends, (5% of time); [and]
- (10) Maintaining professional and technical knowledge by attending

educational workshops; reviewing professional publications; establishing personal networks; benchmarking state-of-the-art practices; being sought for opinions as a culinary expert; participating in professional societies, (5% of time).

On January 6, 2010, the director issued an RFE requesting the petitioner to submit the following: (1) documentation highlighting the nature, scope, and activity of the petitioner's business enterprise in order to establish that the beneficiary will be employed in accordance with the duties set forth in the Form I-129 support letter; (2) evidence showing that in the petitioner's business or industry, a bachelor's degree in a specific field of study is a standard minimum requirement for the proffered position; (3) evidence establishing that the beneficiary is qualified to perform services in a specialty occupation; (4) evidence pertaining to employees previously employed in the proffered position; (5) a description and job titles of all 12 of the petitioner's employees; (6) an organizational chart; (7) a list of individuals that the petitioner currently employs; and (8) evidence demonstrating that the beneficiary is continuing to maintain valid nonimmigrant status.

On February 18, 2010, in response to the director's RFE, the petitioner submitted a letter along with the following documents: (1) the terms of the oral agreement under which the beneficiary will be employed; (2) a copy of the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*) chapter on Top Executives; (3) a copy of a letter dated May 3, 2006, from [REDACTED] stating that the beneficiary was responsible for "food service operations" at the hotel and restaurant "November 2003 until presently"; (4) a second letter from the [REDACTED] dated April 28, 2006, stating that the beneficiary was Executive Chef in charge of 11 cooks and assistants; (5) an evaluation of the beneficiary's training and work experience by [REDACTED] Ph.D; (6) the petitioner's organizational chart; and (7) a copy of the beneficiary's I-94 card.

The director denied the petition on March 12, 2010, finding that the proffered position of operations manager reflecting the duties of a Restaurant Manager in the *Handbook* is not a specialty occupation. Citing to the *Handbook*, the director noted that the proffered position did not require a bachelor's degree in a specific specialty.

On appeal, counsel for the petitioner contends that the "regulations only require that one of the four criteria must be met to establish that the position is a specialty occupation" and that the petitioner has met three out of the four. Counsel also states that the proffered position "requires the services of a person who has attained a minimum [of a] baccalaureate degree and/or its equivalent in the hospitality management field."

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the

*Handbook*,<sup>1</sup> on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO will now look at the *Handbook*, an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. As an initial matter, the AAO finds that the duties of the proffered position most closely relate to the *Handbook's* description of "Food Service Managers." With regard to "Food Service Managers," the *Handbook* states:

Food service managers are responsible for the daily operations of restaurants and other establishments that prepare and serve food and beverages to customers. Managers ensure that customers are satisfied with their dining experience.

#### Duties

Food service managers typically do the following:

- 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 transactions
- Establish standards for personnel performance and customer service

Besides coordinating activities among the kitchen and dining room staff, managers must ensure that customers are served properly and in a timely manner. They monitor orders in the kitchen and, if needed, they work with the chef to remedy any delays in service.

Food service managers are generally responsible for all functions of the business related to people. For example, most managers interview, hire, train, and, when necessary, fire employees. Finding and keeping good employees is a challenge for food service managers. Managers schedule work hours, making sure that enough

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

workers are present to cover each shift—or managers may have to fill in themselves.

Food service managers plan and arrange for clean tablecloths and napkins, for heavy cleaning when the dining room and kitchen are not in use, for trash removal, and for pest control when needed.

In addition, managers do many administrative tasks, such as keeping employee records, preparing the payroll, and completing paperwork to comply with licensing, tax and wage, unemployment compensation, and Social Security laws. While they may give some of these tasks to an assistant manager or bookkeeper, most general managers are responsible for the accuracy of business records. Managers also keep records of supply and equipment purchases and ensure that suppliers are paid.

Many full-service restaurants have a management team that includes a general manager, one or more assistant managers, and an executive chef. Managers add up the cash and charge slips and secure them in a safe place. Many managers also lock up the establishment; check that ovens, grills, and lights are off; and switch on the alarm system.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, "Food Service Managers," <http://www.bls.gov/ooh/Management/Food-service-managers.htm#tab-2> (last visited May 10, 2012).

Although the *Handbook* reports that *some* postsecondary education is increasingly preferred for many food service manager positions, it does not indicate that such a degree is a minimum entry requirement or, more importantly, that the degrees held by such workers must be in a specific specialty, as would be required for the occupational category to be recognized as a specialty occupation. *See id.*; section 214(i)(1) of the Act. This is evident in the range of educational or experience requirements in the *Handbook's* discussion in the "How to Become a Food Service Manager" section of its chapter on "Food Service Managers," which does not specify a minimum requirement of a bachelor's degree in a specific specialty for entry into the occupation:

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.

### **Education**

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.

Almost 1,000 colleges and universities offer bachelor's degree programs in restaurant and hospitality management or institutional food service management. For those not interested in a bachelor's degree, community and junior colleges, technical institutes, and other institutions offer programs in the field leading to an associate's degree or other formal certification.

Both degree and certification 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 and thus provide on-the-job training and experience. In addition, many educational institutions offer programs in food preparation.

### **Training**

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 get instruction and work experience in all aspects of how to run a restaurant or institutional food service facility, including food preparation, nutrition, sanitation, security, company policies and procedures, personnel management, recordkeeping, and report preparation. Training on the use of the restaurant's computer system is increasingly important as well.

### **Certification**

The Foodservice Management Professional (FMP) designation is a measure of professional achievement for food service managers. Although not required, voluntary certification shows professional competence, particularly for managers who learned their skills on the job. The National Restaurant Association Educational Foundation awards the FMP designation to managers who meet several criteria, including passing a written exam, completing coursework, and meeting experience requirements.

### **Important Qualities**

***Customer-service skills.*** Food service managers must have good customer service skills when dealing with patrons. Satisfying customers and exceeding their needs is critical for success and ensures customer loyalty.

***Detail oriented.*** Managers must deal with many different types of activities at the same time. They deal with workers, customers, making sure there's enough food, taking care of records, making sure the place is in good condition, and more.

**Leadership skills.** All managers must establish good working relationships to ensure a productive work environment. This may involve motivating workers, resolving conflicts, or actively listening to complaints or criticism from customers.

**Managerial skills.** Food service managers may deal with budget matters; they also coordinate and supervise workers. Choosing the best people for a job is important, as is the need to guide and motivate employees.

**Organizational skills.** Food service managers keep track of many different schedules, budgets, and people at once. This becomes more complex as the size of the restaurant or food service facility increases.

**Problem-solving skills.** The ability to resolve personnel issues and customer-related problems is imperative to the work of managers. As a result, they must be creative and practical when solving problems.

**Speaking skills.** Food service managers must give clear orders to staff and be able to explain information to employees and customers.

**Stamina.** Especially for owners of small establishments, food service managers may spend a lot of time on their feet, often working long hours. They need stamina to handle the physical and other stresses of the job.

*Handbook* at <http://www.bls.gov/ooh/Management/Food-service-managers.htm#tab-4> (last visited May 10, 2012). Because the *Handbook* indicates that entry into the food service manager occupation does not normally require at least a bachelor's degree in a specific specialty, the *Handbook* does not support the proffered position as being a specialty occupation.

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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

As stated earlier, 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. Finally, for the reasons discussed below, the petitioner's reliance upon the job vacancy advertisements is misplaced.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner submitted copies of thirteen advertisements as evidence that its degree requirement is standard amongst its peer organizations for parallel positions. The advertisements provided, however, do not establish that at least a bachelor's degree or the equivalent in a specific specialty is required. In addition, even if all of the job postings indicated that a bachelor's or higher degree in a specific specialty or its equivalent were required, the petitioner fails to establish that the submitted advertisements are relevant in that the posted job announcements are not for parallel positions in similar organizations in the same industry.

For instance, the first five advertisements do not state that a bachelor's degree or its equivalent in a specific specialty is required. The sixth advertisement indicates that a bachelor of science is required; however, it does not state that a bachelor's degree or the equivalent in a specific specialty is required. While the seventh advertisement states that a "BA/BS in Hospitality / Food Services / Business or equivalent experience" is required, it does not state that a bachelor's or higher degree in a specific specialty or its educational equivalent is required. Specifically, and as explained above, USCIS interprets the supplemental degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) as requiring a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business, 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). Finally, the remaining six advertisements do not state that a bachelor's degree or its equivalent in a specific specialty is required.<sup>2</sup>

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<sup>2</sup> Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from just thirteen job advertisements with regard to determining the common educational requirements for entry into parallel positions in similar companies. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position of an operations manager

The petitioner also has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that “an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree.” The petitioner and counsel claim that the duties of the proffered position are complex. However, the record does not demonstrate any complexity or unique nature of the proffered position that distinguishes it from similar but non-degreed or non-specialty degreed employment under the second prong of the criterion. A review of the record indicates that the petitioner has failed to credibly demonstrate that the duties the beneficiary will be responsible for or perform on a day-to-day basis entail such complexity or uniqueness as to constitute a position so complex or unique that it can be performed only by a person with at least a bachelor’s degree in a specific specialty.

Specifically, the petitioner failed to demonstrate how the duties 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 hospitality management and culinary arts courses may be beneficial in performing certain duties of a restaurant operations manager, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate degree in a specific specialty, or its equivalent are required to perform the duties of the particular position here proffered. Consequently, as the petitioner fails to demonstrate how the proffered position of operations manager is so complex or unique relative to other operations 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 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. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).<sup>3</sup>

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for a restaurant with twelve employees required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

<sup>3</sup> 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 at 387. 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

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. Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than restaurant operations manager positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent.<sup>4</sup>

The petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

Beyond the decision of the director, the petition must also be denied due to the petitioner's failure to provide a certified LCA that corresponds to the petition. It is noted that the LCA provided in support of the instant petition is for a General and Operations Manager, OES/SOC code: 11-1021. The restaurant management position described in the petition, however, is indicative of OES/SOC code: 11-9051, Food Service Managers. Moreover, the claimed duties of the proffered position indicate that the beneficiary will in fact work in its Chinese restaurant business coordinating equipment maintenance, developing recipes, and recruiting restaurant staff, among other duties. If this is in fact the actual position to be filled by the beneficiary, the submitted LCA would have to have been certified instead for OES/SOC code: 11-9051, Food Service Managers, in order to correspond to the petition.

Given that the occupational classification selected by the petitioner on the LCA is not in accord with the proffered job duties, it must therefore be concluded that the LCA does not correspond to the petition. In other words, even if it were determined that the proffered position requires at least a bachelor's degree in a specific specialty or its equivalent, such that it would qualify as a specialty occupation, the petition could still not be approved due to the petitioner's failure to submit an LCA that corresponds to that position.

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 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):

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occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

<sup>4</sup> Counsel contends in response to the RFE that the proffered position qualifies as a specialty occupation on the basis that its duties are so complex. However, the duties as described lack sufficient specificity to distinguish the proffered position from other operations manager positions for which a bachelor's or higher degree in a specific specialty, or its equivalent, is not required to perform their duties.

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) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that corresponds to the claimed duties of the position and that has been certified for the proper occupational classification, and the petition must be denied for this additional reason.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined.

However, the AAO notes that in any event, the combined evaluation of the beneficiary's culinary training and work experience submitted by the petitioner is insufficient to establish that the beneficiary possesses the equivalent of a U.S. bachelor's degree in any specific specialty. Specifically, as the claimed equivalency was based in part on experience, there is no evidence that the evaluator has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience and that the beneficiary also has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty. *See* 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) and (D)(1). While the evaluator, a professor at Purdue University, states that he is authorized to "grant college level credit or waive course requirements for experience, training, and/or other courses," there is no evidence demonstrating the truth of his claim. Furthermore, none of the letters from the beneficiary's former employers nor any other evidence of record demonstrates the extent of the theoretical and practical application of specialized knowledge in any specialty that was involved in the beneficiary's prior work in China; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in any particular specialty occupation; or that the alien has recognition of expertise in any specialty, as evidenced by at least one type of documentation such as those listed in 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. § 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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