

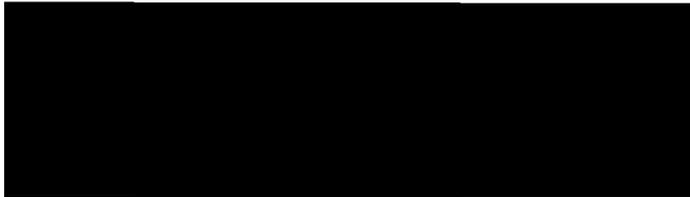
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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: **MAR 08 2012** Office: CALIFORNIA 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.

The petitioner states that it is a restaurant with 10 employees and a gross annual income of \$156,022.00. It seeks to employ the beneficiary as a supervising manager (for operations and marketing) 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) 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 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 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). 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.

In the petition signed on December 15, 2009, the petitioner indicated that it wished to employ the beneficiary as a supervising manager (for operations and marketing). In the December 9, 2009, letter of support, the petitioner states that the beneficiary will be compensated at the rate of

\$16.66 per hour for 30 hours per week.¹ In addition, the petitioner submitted a Labor Condition Application (LCA) certified for the Standard Occupational Classification (SOC) occupation title of food service managers, SOC code 11-9051.

The petitioner also submitted a position description for the proffered position indicating that the beneficiary will be responsible for:

- Overseeing all aspects of the restaurant including supervision of the shift managers[;]
- Management of accounting practices[;]
- Directing local marketing efforts[;] and
- Development of a franchising system for the [petitioner's] brand in Japan and other Asian markets[.]

In addition, the petitioner's position description broke down the day-to-day responsibilities of the proffered position as follows:

1.	Operations (4.0 hrs) - supervise shift leaders, management - oversee accounting	50%
2.	Marketing/Franchise Development (3.0 hrs) - develop plans for expansion into foreign countries - PR with investors	37.5%
3.	Other duties as required (1.0 hr) - PR with customers, vendors	12.5%
	Total:	100%

The petitioner also stated that the minimum requirement for the proffered position is a bachelor's degree in international, Japanese, or management studies, including a minimum of five years of retail and/or food service experience, fluency in Japanese and English, and previous exposure to U.S. business practices and policies.

¹ It must be noted for the record that the petitioner's support letter and Labor Condition Application indicate that the beneficiary will be compensated at the rate of \$16.66 per hour for 30 hours per week, which equates to \$25,989.60. However, the Form I-129 H-1B Data Collection Supplement indicates that the beneficiary's rate of pay is \$24,000 per year, which is the rate of pay for 30 hours per week of work at approximately \$15.39 per hour. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner submitted copies of the beneficiary's foreign degree and college transcripts, but did not submit a credential evaluation.

On December 31, 2009, the director issued an RFE requesting the petitioner submit, *inter alia*, (1) a more detailed description of the work to be performed by the beneficiary; (2) a line-and-block organizational chart showing the petitioner's hierarchy and staffing levels; (3) evidence that the proffered position is a common position required by similarly sized organizations with similar annual incomes; (4) job listings or advertisements evidencing a degree requirement is common to the industry in parallel positions among similar organizations; (5) letters or affidavits from firms or individuals in the industry that attest that such firms routinely employ and recruit only degreed individuals; (6) copies of the petitioner's present and past job vacancy announcements; (7) evidence to establish that the petitioner has a past practice of hiring persons with a baccalaureate or higher degree in a specific specialty to perform the duties of the proffered position; and (8) copies of the beneficiary's college/university transcripts for any degrees earned by the beneficiary relating to the proffered position.

On February 11, 2010, in response to the director's RFE, the petitioner submitted, in part, (1) an updated position description, which indicates the hours per week that the beneficiary will spend on each duty in the proffered position; (2) a line-and-block organizational chart; and (3) a credential evaluation finding that the beneficiary's foreign education is equivalent to a U.S. bachelor's degree in humanities.

The director denied the petition on February 24, 2010.

On appeal, the petitioner claims that the proffered position is a specialty occupation. The petitioner also claims that the proffered position's duties are more akin to a market research analyst position and provides more detail with regard to the proffered position's duties. For instance, counsel states that the beneficiary will:

oversee all aspects of the marketing and development of the franchises both in Hawaii and Japan. This would include research, planning and implementation of PR and marketing plans to investors, vendors and customers for various locations. Implementation of these plans would include the training and supervising of shift leaders and management, a duty that might normally be considered a food service manager duty, [sic] FORM [sic] however the plans are of such specialized knowledge that such training should be considered to [be] more specialized than that of a [sic] simply supervising shift employees. Futhermore, the proffered position would also require the evaluation of such plans after implementation for their effectiveness to assess customer satisfaction for further PR and marketing strategies.

In addition, the petitioner provides the following duties for the proffered position:

1. Assist the employer to create and implement the plans and strategies in order to expand to Japan[;]
2. Examine the trends of Japanese tourists and the Japan casual food market

- to advise company on how to increase the local and international market shares[;]
3. Advice [sic] and expertise in Japanese culture and its marketplace[;]
 4. Help direct and manage our culturally diverse employees[;]
 5. Advice [sic] and direction [sic] on expansion and growth in the Japanese domestic market[;]
 6. Maintain communications with our Japanese business partners[;]
 7. Direct the rest of the employees to learn and maintain communication and customer service skills[;]
 8. Travel to Japan as needed to help negotiate advertising contracts, investigate possible locations and investors for expansion[;] [and]
 9. Advice [sic] on the forecasting of sales and inventory of the Waikiki Restaurant[.]

The petitioner further states "due to the international aspect of the position, the expertise, knowledge and skills necessary to work with the Japanese market makes the position more complex and unique than that of a market research analyst who deals mainly with the U.S. market." Counsel provides another list of duties for the proffered position, which appear to be directly from the U.S. Department of Labor's (DOL's) Occupational Information Network (O*NET) Summary Report for 13-1161.00 – Market Research Analysts and Marketing Specialists. Counsel includes the following additional duties for the proffered position:

- Seek and provide information to help determine [the] Company's position in the marketplace.
- Gather data on competitors and analyze their prices, sales, and method of marketing and distribution.
- Collect and analyze data on Japanese customer demographics, preferences, needs, and buying habits to identify potential markets and factors affecting product demand.
- Devise and evaluate methods and procedures for collecting data on the Japanese customer.
- Monitor industry statistics and trends.
- Measure and assess customer and employee satisfaction.
- Measure the effectiveness of marketing, advertising, and communications programs and strategies to the Japanese customer.

As a preliminary matter, it must be noted that the petitioner's claimed entry requirement of at least a bachelor's degree in "International, Japanese, or Management Studies" 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 alleged requirement of a degree in three disparate fields, i.e., International Studies, Japanese Studies, and Management Studies, does not establish the position as a specialty occupation. See § 214(i)(1) of the Act (requiring in pertinent part the "application of a body of highly specialized knowledge" and "attainment of a bachelor's or higher degree in *the* specific specialty" (emphasis added)); *cf.*

Matter of Michael Hertz Associates, 19 I&N Dec. 558 (Comm'r 1988).

To prove 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 one 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 the specific specialty or its equivalent that is directly related to the proposed position.

Again, the petitioner claims that the duties of the proffered position can be performed by an individual with a bachelor's degree in International Studies, Japanese Studies, or Management studies. As these three dissimilar fields of study fail to delineate a specific specialty or its equivalent, this assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

In addition, the AAO notes that the petitioner provides additional duties from *O*NET* for the proffered position on appeal. On appeal, a petitioner cannot file a new petition, offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a specialty occupation. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Thus, the AAO will not consider the job duties in the appeal brief.

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

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.²

² The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available

The AAO finds that the duties described by the petitioner reflect the duties of both a food service manager and a market research analyst.³

The “Food Service Managers” chapter at the 2010-2011 edition of the *Handbook* describes the duties of a food service manager, in part, as follows:

Food service managers are responsible for the daily operations of restaurants and other establishments that prepare and serve meals and beverages to customers. Besides coordinating activities among various departments, such as kitchen, dining room, and banquet operations, food service managers ensure that customers are satisfied with their dining experience. In addition, they oversee the inventory and ordering of food, equipment, and supplies and arrange for the routine maintenance and upkeep of the restaurant's equipment and facilities. Managers are generally responsible for all administrative and human-resource functions of the business, including recruiting new employees and monitoring employee performance and training.

* * *

In addition to their regular duties, food service managers perform a variety of administrative assignments, such as keeping employee work records, preparing the payroll, and completing paperwork to comply with licensing, tax, wage and hour, unemployment compensation, and Social Security laws. Some of this work may be delegated to an assistant manager or bookkeeper, or it may be contracted out, but most general managers retain responsibility for the accuracy of business records. Managers also maintain records of supply and equipment purchases and ensure that accounts with suppliers are paid.

U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., at <http://www.bls.gov/oco/ocos024.htm> (accessed Feb. 29, 2012).

online.

³ It is noted that, where a petitioner seeks to employ a beneficiary in two distinct occupations, the petitioner should file two separate petitions, requesting concurrent, part-time employment for each occupation. While it is not the case here, if a petitioner does not file two separate petitions and if only one aspect of a combined position qualifies as a specialty occupation, USCIS would be required to deny the entire petition as the pertinent regulations do not permit the partial approval of only a portion of a proffered position and/or the limiting of the approval of a petition to perform only certain duties. *See generally* 8 C.F.R. § 214.2(h). Furthermore and as is the case here, the petitioner would need to ensure that it separately meets all requirements relevant to each occupation, such as the provision of certified LCAs for each occupation and the payment of wages commensurate with the hours worked in each occupation. Thus, filing separate petitions would help ensure that the petitioner submits the requisite evidence pertinent to each occupation and would help eliminate confusion with regard to the proper classification of the position being offered.

Under the section on “Training, Other Qualifications, and Advancement,” the *Handbook* states that:

Most food service managers have less than a bachelor’s degree; however, some postsecondary education, including a college degree, is increasingly preferred for many food service manager positions. Many food service management companies and national or regional restaurant chains recruit management trainees from 2- and 4-year college hospitality or food service management programs, which require internships and real-life experience to graduate. While these specialized degrees are often preferred, graduates with degrees in other fields who have demonstrated experience, interest, and aptitude are also recruited.

Id. The *Handbook’s* description of market research analyst is as follows:

Market and survey researchers gather information about what people think. Market research analysts help companies understand what types of products people want, determine who will buy them and at what price. Gathering statistical data on competitors and examining prices, sales, and methods of marketing and distribution, they analyze data on past sales to predict future sales.

Market research analysts devise methods and procedures for obtaining the data they need by designing surveys to assess consumer preferences. While a majority of surveys are conducted through the Internet and telephone, other methods may include focus group discussions, mail responses, or setting up booths in public places, such as shopping malls, for example. Trained interviewers usually conduct the surveys under a market research analyst’s direction.

Market opinion research has contributed greatly to a higher standard of living as most products and services consumers purchase are available with the aid of market research. By making recommendations to their client or employer, market research analysts provide companies with vital information to help them make decisions on the promotion, distribution, and design of products or services.

U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., at <http://www.bls.gov/oco/ocos013.htm> (accessed Feb. 29, 2012).

The “Training, Other Qualifications, and Advancement” section of the *Handbook* states that:

A bachelor’s degree is the minimum educational requirement for many market and survey research jobs. However, a master’s degree is usually required for more technical positions.

In addition to completing courses in business, marketing, and consumer behavior, prospective market and survey researchers should take social science courses, including economics, psychology, and sociology. Because of the importance of quantitative skills to market and survey researchers, courses in mathematics, statistics, sampling theory and survey design, and computer science are extremely helpful. Market and survey researchers often earn advanced degrees in business administration, marketing, statistics, communications, or other closely related disciplines.

Id. While the *Handbook* reports that a baccalaureate degree is the minimum educational requirement for *many* market and survey research jobs, 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 that is directly related to market research, as would be required for the occupational category to qualify as a specialty occupation as that term is defined by section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). This is also evident in the range of qualifying degrees indicated in the Significant Points section that introduces the *Handbook's* chapter "Market and Survey Researchers," which states: "Market and survey researchers can enter the occupation with a bachelor's degree, but those with a master's or Ph.D. in marketing or a social science should enjoy the best opportunities." *Id.*

Because the *Handbook* indicates that working as a food service manager or a market research analyst does not normally require at least a bachelor's degree in a specific specialty or its equivalent for entry in those occupations, the *Handbook* does not support the proffered position as being a specialty occupation. Further, there is nothing in the evidence of record that otherwise establishes that the duties described for the proffered position would require the application of at least a bachelor's degree level of highly specialized knowledge in any specialty.

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.

Furthermore, the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of supervising manager (for operations and marketing). As such, 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."

Specifically, even though the petitioner and counsel claim that the proffered position's duties are so complex and unique that a bachelor's degree is required, the petitioner failed to demonstrate how the duties of the supervising manager (for operations and marketing), 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 one or two courses in international or management studies may be beneficial in performing certain duties of a supervising manager (for operations and marketing) position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty are 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 or market research analyst positions such that it refutes the *Handbook's* information to the effect that a bachelor's degree is not required in a specific specialty for entry into those occupations. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than food service manager or market research analyst 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 supervising manager (for operations and marketing) is so complex or unique relative to other food service manager or market research analyst 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).⁴

⁴ 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.

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 food service manager or market research analyst positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent.⁵

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 AAO notes that the Labor Condition Application (LCA) provided in support of the instant petition indicates that the beneficiary will work at [REDACTED] [REDACTED] instead of [REDACTED] [REDACTED] as indicated on the Form I-129. 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,

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

⁵ The petitioner claims on appeal that the proffered position qualifies as a specialty occupation on the basis that its duties are so specialized and complex. However, the duties as described lack sufficient specificity to distinguish the proffered position from other food service manager positions for which a bachelor's or higher degree in a specific specialty, or its equivalent, is not required to perform their duties.

Moreover, the petitioner has designated the proffered position as a Level I food service manager position on the submitted Labor Condition Application (LCA), indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. *See* Employment and Training Administration (ETA), *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009). Therefore, it is simply not credible that the position is one with specialized and complex duties, as such a higher-level position would be classified as a Level IV position, requiring a significantly higher prevailing wage. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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 the place of employment on the Form I-129.

Furthermore and as noted above, only one LCA has been submitted in this matter and it has been certified for a food service manager position. As the petitioner has chosen to combine two occupations together in one petition, however, it was also required to submit a separate, certified LCA for a market research analyst position. Failing to do so, it cannot be found that the petitioner has provided an LCA or LCAs that fully correspond to the proffered position as presented in this matter.

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):

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 (or LCAs) that corresponds to the place of employment on the Form I-129 and to both occupations that the beneficiary will allegedly fill, and the petition must be denied for this additional reason.

Also beyond the decision of the director, the AAO finds that even if the petitioner were to demonstrate that the proffered position is a specialty occupation as claimed, the petitioner has not established that the beneficiary meets the petitioner's own requirement that the person who fills this position have at least a bachelor's degree in International, Japanese, or Management Studies. As indicated previously, the petitioner initially submitted a credential evaluation, which states that the beneficiary's education is equivalent to a bachelor's degree in humanities. The beneficiary's educational credentials have not been evaluated as equivalent to a bachelor's degree in *International, Japanese, or Management Studies*. Therefore, the petition could not be approved even if the petitioner had demonstrated, which it did not do, that the proffered position is a specialty occupation.

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

Page 14

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.