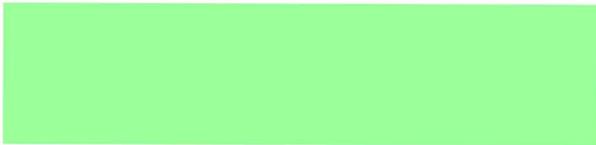




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAR 08 2013** 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 Ron Rosenberg
Acting 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 describes itself as a restaurant specializing in Indian cuisine, with an undisclosed gross annual income, employing three employees. It seeks to employ the beneficiary as a food services manager and to classify the alien 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 Labor Condition Application (LCA) submitted by the petitioner to support the petition was certified for the SOC (O*NET/OES) Code 11-9051, the associated occupational classification of Food Service Managers, and a Level II prevailing wage rate.

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 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 employment offered to the beneficiary meets the applicable statutory and regulatory requirements.

In deciding whether a proffered position qualifies as a specialty occupation, the AAO analyzes the evidence of record according to the statutory and regulatory framework below.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation “which requires [(1)] theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires [(2)] the attainment of a bachelor’s degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.”

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in a particular position 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. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular 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 directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on December 28, 2011. Within the RFE, the director outlined the specialty occupation regulatory criteria and requested specific documentation to establish that the proffered position qualifies for classification as a specialty occupation.

In response to the director's RFE, the petitioner submitted, in part, (1) counsel's letter dated March 21, 2012; (2) promotional material, photos, and other information pertinent to the petitioning organization; (3) copies of Form I-797 approval notices and some documentation for other food services managers; (4) three letters from individuals within the food service industry; and (5) copies of State of Texas Employer's quarterly report filed on March 20, 2012; (6) Form 941, Employer's Quarterly Federal Tax Return for the fourth quarter of 2011; (7) a spreadsheet counsel claims is a list of approved LCAs for H-1B petitions for the position of food service manager filed by various similarly situated employers across the United States.

The response to the RFE does not supplement the initial filing documentation with any substantive information regarding the specific work that the beneficiary would perform and does not show a correlation between such work and the necessity for at least a bachelor's or higher degree in the specific specialty, or the equivalent. As such, the AAO finds a fundamental failure on the petitioner's part to establish the substantive nature of the proposed duties of the proffered position.

The director denied the petition on June 8, 2012.

On appeal, counsel for the petitioner claims that USCIS erred in its determination that the proffered position did not meet the specialty occupation standard, because the petitioner has shown that the degree requirement is common to the industry in parallel positions among similar organizations. Counsel further claims that USCIS abused its discretion in that the beneficiary has been in prior positions in H-1B status as a food services manager.

At the outset, the AAO observes that the petitioner never provided a narrative description of the job duties in the initial filing, in the response to the director's RFE, or on appeal. Rather, counsel succinctly stated on Form I-129 that the proposed duties would be the same as those for the beneficiary's current H-1B employment; and on appeal, counsel claims that the beneficiary has been granted H-1B status to serve in food manager positions "multiple times since 2006." As will now be discussed, these claims carry no evidentiary weight towards satisfaction of any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Claims by counsel and/or a petitioner asserted as substantive support for an H-1B petition carry no evidentiary weight beyond that established by supporting evidence in the record of proceeding. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Not only does the record of proceeding before the AAO not include the records of proceeding related to the petition approvals asserted by counsel, but the record of proceeding also contains no substantive descriptions of the actual work that the beneficiary would actually perform for the petitioner if this petition were approved.

Likewise, the record of proceeding lacks any substantive evidence of a necessary correlation between whatever work the beneficiary might perform and a requirement for any particular level of educational attainment of any body of highly specialized knowledge in a specific specialty.

When any person makes an application for a "visa or any other document required for entry, or makes an application for admission [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such relief. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm'r 1972). Furthermore, any suggestion that USCIS must review approved petitions not part of this record of proceeding and possibly request and review each case file relevant to those decisions, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361. Accordingly, neither the director nor the AAO was required to request and/or obtain a copy of the unpublished decisions cited by counsel.

Also, it must be emphasized that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Each nonimmigrant and immigrant petition is a separate record of proceeding with a separate burden of proof; each petition must stand on its own individual merits. There is no requirement either in the regulations or in USCIS procedural documentation requiring nonimmigrant petitions to be combined in a single record of

proceeding.¹ Accordingly, the director was not required to request and obtain a copy of the prior H-1B petitions.

In the instant case, neither the petitioner nor counsel have submitted copies of the beneficiary's prior visa petition records of proceeding, and yet, they, mistakenly, presume that USCIS is bound to accept their conclusions as to the content of those records and as to the correctness of the claimed approvals. As the record of proceeding does not contain the records upon which the asserted approvals were based, including all forms and supporting documents, there were no underlying factual records to be analyzed by the director and, therefore, no basis for the director to make reasonable determinations as to what facts, if any, in the past proceedings referenced by counsel were analogous to those in this proceeding, and no basis for the director to gauge whether the asserted approvals were correctly granted.

Also, the AAO finds no merit in counsel's suggestion, as in the Form I-290B comments, that USCIS or the AAO is bound to approve the present petition because some H-1B petitions for food services managers may have been approved in the past. As counsel provides no statutory, regulatory, caselaw, or USCIS precedent-decision in support of this proposition, it is without merit. Further, 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, it does not recognize petition approvals or, for that matter, unpublished AAO decisions as similarly binding.

The AAO also observes that counsel and the petitioner fundamentally err to the extent that they rely upon a position's inclusion in the Food Services Managers occupational classification as sufficient in itself to establish that position as a specialty occupation. Rather, even if a proffered position is shown to belong to the Food Services Managers occupational classification, it would be incumbent upon the petitioner to provide detailed, substantively specific descriptions of the actual work that the beneficiary would perform, and to provide sufficient evidence to show how that particular work, as performed in the particular business context of the petitioner's own business, would require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty, or its equivalent, which requirement is essential for a specialty occupation as defined at section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In this regard, the AAO will now reference the U.S. Department of Labor's *Occupational Outlook Handbook* (hereinafter referred to as the *Handbook*), which the AAO recognizes as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.²

¹ USCIS does not engage in the practice of reviewing previous nonimmigrant petitions when adjudicating extension petitions. Given the various and changing jurisdiction over various nonimmigrant petitions and applications, requiring previously adjudicated nonimmigrant petitions to be reviewed before any newly filed application or petition could be adjudicated would result in extreme delays in the processing of petitions and applications. Furthermore, such a suggestion, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361.

The “Food Services Managers” chapter in the 2012-1013 edition of the *Handbook* describes the associated duties, in part, as follows:

Food Services 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 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. Dept. 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> (accessed February 7, 2013).

In its discussion of the educational and training requirements for food service managers, the *Handbook* states the following, in pertinent part:

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.

U.S. Dept. 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-4> (accessed February 7, 2013).

As reflected in the passage quoted above, the *Handbook* indicates that entry into the Food Service Managers occupational classification does not normally require a least a bachelor's degree, or the equivalent, in a specific specialty. The *Handbook's* information also indicates that a position's inclusion within the occupational category is not in itself sufficient to establish that a particular Food Services Manager position is one for which the normal minimum entry requirement is a bachelor's or higher degree, or the equivalent, in a specific specialty.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the

focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. Therefore, further analysis is not necessary for the proper disposition of this appeal. The appeal will be dismissed and the petition denied for the reasons discussed above.

The AAO does not need to examine the issue of the beneficiary's qualifications in great detail, 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. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note (1) that the experience letters submitted within the record of appeal establish that the beneficiary has experience, but experience unsupported by a credible experience evaluation cannot be accorded any weight; and (2) that the beneficiary's diploma evidences only three years of education and has not been evaluated to be equivalent to a U.S. bachelor's degree in a specific specialty. For these reasons, the beneficiary's experience and education cannot be found to meet the regulatory standard at 8 C.F.R. § 214.2(h)(4)(iii)(D), and therefore the petition must also be denied for this reason.

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 143, 145 (3d Cir. 2004) (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. Section 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.