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**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF U-T-&C-, INC.

DATE: OCT. 7, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a hospitality business, seeks to employ the Beneficiary as a food service manager in the classification of a nonimmigrant worker in a specialty occupation. *See* 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, Vermont Service Center, initially approved the nonimmigrant visa petition. Upon subsequent review of the record of proceeding, the Director issued a notice of intent to revoke (NOIR), and ultimately did revoke the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

I. BACKGROUND

The Petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on September 13, 2011 in order to extend the Beneficiary's employment in what it designated as a food service manager position. The Petitioner described itself as a hospitality business established in [REDACTED] with 12 employees.

The Director approved the petition; subsequently, a site visit was conducted. Thereafter, the Director issued a NOIR, and ultimately did revoke the approval of the petition. The Petitioner submitted an appeal of the decision.

The record of proceeding contains: (1) the Petitioner's Form I-129 and supporting documentation; (2) the Director's NOIR; (3) the response to the NOIR; (4) the Director's revocation notice; and (5) the Notice of Appeal or Motion (Form I-290B) and supporting documents. We reviewed the record in its entirety before issuing our decision.

II. REVOCATION

The regulation at 8 C.F.R. § 214.2(h)(11)(iii), which governs revocations, states:

- (A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

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- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
- (2) The statement of facts contained in the petition . . . was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
- (3) The petitioner violated terms and conditions of the approved petition; or
- (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
- (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

(B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

On appeal, the Petitioner asserts that the NOIR addressed only the Petitioner's compliance with the terms and conditions of the petition: specifically, the wages paid to and the duties performed by the Beneficiary; but did not sufficiently identify and explain the ultimate ground for revocation: that the proffered position is not a specialty occupation.

After review of the NOIR, we note that while the NOIR called into question the proffered position's eligibility as a specialty occupation, the only factual basis for revocation articulated in the NOIR was that the Petitioner is not employing the Beneficiary in a specialty occupation consistent with the terms and conditions of the approved petition. The Petitioner contends that the NOIR was therefore insufficient, and that we should remand the matter to the Director for issuance of a new NOIR.

However, notwithstanding the issue of sufficiency of the NOIR, the Petitioner has, on appeal, had the opportunity to respond to the grounds for revocation discussed in the revocation notice; specifically that the proffered position is not a specialty occupation. On appeal the Petitioner has provided a detailed rebuttal statement regarding the proffered position as a specialty occupation and supplemented the record with additional supporting evidence. It is not apparent that remanding the case to the Director would elicit any additional evidence or information; therefore, we will make a decision based on the record before us.

As will be discussed below, we find that the Director's decision to revoke approval of the petition accords with the evidence or lack of evidence in the record of proceeding, and that neither the response to the NOIR nor the submissions on appeal overcome the grounds for revocation. Accordingly, the appeal will be dismissed, and approval of the petition will remain revoked.

III. SPECIALTY OCCUPATION

A. Legal Framework

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements of 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.

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 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.

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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 result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and 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 foreign nationals 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.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the foreign national, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

B. The Proffered Position

As noted above, the Petitioner indicated on the Form I-129 that it is a hospitality business seeking to extend the Beneficiary's employment as a food service manager, performing the duties described below:

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The duties of the Food Service Manager will continue to be to coordinate food service activities of the restaurant, catering service and establishment of food services at additional locations. To estimate food and beverage costs and purchase supplies. To confer with food preparation and other personnel to plan menus for the various operations and the policies to be followed by food service personnel. To direct hiring and assignment of personnel, and investigate and resolve food quality and service complaints.

The Food Service Manager will be responsible for reviewing financial transactions and monitoring the food service budget to ensure efficient operation, and ensure expenditures stay within budget limitations. In general, the Food Service Manager will be responsible for the establishment of all policies of and the direction of the food service aspect of the company. Currently there are 6 employees who make up the kitchen staff of the company, all of whom report to the executive chef, who report to the Food Service Manager.

The Petitioner states that it "believe[s] that for an individual to perform the functions of the Food Service Manager, given [its] plans, that a minimum of a bachelor's degree in Hospitality Management or related field [is required]."

The Petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B. The Petitioner indicates that the proffered position corresponds to the occupational category "Food Service Managers"-SOC (ONET/OES Code) 11-9051, at a Level I (entry level) wage.

In response to the NOIR, the Petitioner provided a more detailed description of the duties and the time spent on each duty, as seen below:¹

| DUTIES OF FOOD SERVICE MANAGER ² - As set out on H Support Letter - Fully explained duty | % Of Daily Time |
|--|-----------------|
| <i>Coordinate food service activities of the restaurant, catering service and establishment of food services at additional locations. Coordinate and run the daily food service operations of the restaurant to provide high quality service to the customers. Establish the necessary policies related for that service. Be involved in the expansion of the business; "take-out & delivery", "catering" (such as bar & bat mitzvahs, wedding showers, baby showers, graduations birthdays, anniversaries), "establishment of new locations" (one in downtown [redacted] with other two in [redacted] suburbs i.e. [redacted] and [redacted]). Monitor receipts vs. sales records and deposits. Make sure regulations, laws, health and</i> | 40% |

¹ In the NOIR, the Director questioned whether or not the Beneficiary was performing the duties described above. In response, the Petitioner provided evidence, including but not limited to, invoices, hiring documents, letters from coworkers, and affidavits from the Beneficiary and the Petitioner's owner, that establish that the Beneficiary is in fact performing the duties described above in the course of her employment. Therefore, our analysis will be based on the duties as they are described in the original petition and the NOIR response.

² Emphasis removed from original text.

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| | |
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| <p>safety standards are obeyed. Handle variety of administrative assignments such as employee records, payroll, taxes, license and insurance, etc. Utilize internet for research, marketing, hiring, training, and buying. Coordinate with accountant, CPA and food consultants.</p> | |
| <p><i>Estimate food and beverage costs and purchase supplies.</i> Prepare food service budgets (actual and projected). Monitor and review food service budget. Conduct research to find reliable suppliers. Make cost analysis. Estimate food and beverage costs. Oversee the inventory. Be involved in financing terms & arrangements. Meet the representatives of restaurant supply companies. Order food items, supplies and equipment (some gross volumes produce: \$75,000/yr, meat: \$50,000/yr, fish \$25,000/yr, dairy products, soup, beverage: \$75,000/yr, paper products \$30,000/yr, imported ethnic food: \$30,000/yr, supplies: \$40,000/yr, tea-coffee-soda: \$25,000). Monitor deliveries, inspect quality. Maintain purchasing records.</p> | 20% |
| <p><i>Confer with food preparation and other personnel to plan menus for the various operations and the policies to be followed by food service personnel.</i> Be involved in menu planning & development in accordance with the cuisine and high end fine dining standards. Determine food-labor-overhead costs and menu pricing. Monitor food preparation procedures. Coordinate with the executive chef and food consultants</p> | 15% |
| <p><i>Direct hiring and assignment of personnel.</i> Hiring, training, and replacing the employees: establish standards for personnel performance and customer service. Monitor employee performance and training. Assign duties and schedule hours. Coordinate hiring & assignment of kitchen personnel with executive chef. Make recruitment plans to meet employee needs in the near future (such as 4 managers and assistant managers, 4 chefs, 6 cooking personnel, 10 dining room and counter service personnel) in parallel to company's growth plans (2 more locations in 5 years, catering, dinner expansion, Sunday brunches, take-out & delivery business). Confer with top management and coordinate.</p> | 10% |
| <p><i>Investigate and resolve food quality and service complaints.</i> Ensure customers are satisfied. Handle customer relations properly with high standards. Investigate and resolve customer complaints regarding food quality or service. Be a good communicator. Be flexible, respectful and show self-confidence.</p> | 15% |

(Verbatim.)

C. Analysis

A baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position

We will now discuss the proffered position in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

USCIS recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.³ The Petitioner asserted in the LCA that the proffered position falls under the occupational category "Food Service Manager." We reviewed the section of the *Handbook* regarding this occupational category, including the section entitled "How to Become a Food Service Manager," which states the following:

Most applicants qualify with a high school diploma and long-term work experience in the food service industry as a cook, waiter or waitress, or counter attendant. However, some receive training at a community college, technical or vocational school, culinary school, or at a 4-year college.

Education

Although a bachelor's degree is not required, some postsecondary education is increasingly preferred for many manager positions, especially at upscale restaurants and hotels. Some food service 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.

Many colleges and universities offer bachelor's degree programs in restaurant and hospitality management or institutional food service management. In addition, numerous community and junior colleges, technical institutes, and other institutions offer programs in the field leading to an associate's degree. Some culinary schools offer programs in restaurant management with courses designed for those who want to start and run their own restaurant.

Regardless of length, nearly all programs provide instruction in nutrition, sanitation, and food planning and preparation, as well as courses in accounting, business law, and management. Some programs combine classroom and practical study with internships.

³ All of the references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. The excerpts of the *Handbook* regarding the duties and requirements of the referenced occupational category are hereby incorporated into the record of proceeding.

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Work Experience in a Related Occupation

Most food service managers start working in industry-related jobs, such as cooks, waiters and waitresses, or dining room attendants. They often spend years working under the direction of an experienced worker, learning the necessary skills before they are promoted to manager positions.

Training

Managers who work for restaurant chains and food service management companies may undergo programs that combine classroom instruction and on-the-job training. Topics may include food preparation, nutrition, sanitation, security, company policies, personnel management, and recordkeeping. Some include training on the use of the restaurant's computer system.

Licenses, Certifications, and Registrations

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 Foodservice Management Professional designation to managers who meet several criteria, including passing a written exam, completing coursework, and meeting experience requirements.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 Edition, Food Service Managers, on the Internet at <http://www.bls.gov/ooh/management/food-service-managers.htm> (last visited Sept. 29, 2015).

The *Handbook* does not state that a baccalaureate or higher degree, in a specific specialty, or its equivalent is normally the minimum requirement for entry into the proffered position. In fact, the *Handbook* specifically states that "a bachelor's degree is not required," and that for "most applicants," a high school diploma is sufficient for entry into the occupation.

The Petitioner highlights the *Handbook's* statements regarding "upscale" restaurants and hotels, and claims to be such an organization. However, we do not find the Petitioner's assertions persuasive, as the *Handbook* states only that "some postsecondary education" is "increasingly preferred" by such institutions. The *Handbook* does not specify that the phrase "some postsecondary education" necessarily connotes a bachelor's degree in a specific specialty or the equivalent and, given that the sentence highlighted by the Petitioner begins with the phrase "[a]lthough a bachelor's degree is not required," we decline to reach that conclusion. In any event, an increasing preference for "some [(unspecified)] postsecondary education" does not necessarily to a normal, minimum recruiting and hiring standard. Consequently, the *Handbook's* statements regarding "upscale" restaurants and hotels afford the Petitioner no relief under this criterion.

The record also contains a letter from Mr. [REDACTED], an instructor at [REDACTED] [REDACTED] who states that the proffered position is "complex and requires unique knowledge and skills that can only be obtained through a degree program in hospitality management or culinary arts or through equivalent experience." However, as discussed below we find that Mr. [REDACTED] letter does not satisfy this criterion (or any of the remaining criteria to be discussed later in this decision).

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While Mr. [REDACTED] claim to have performed some type of consulting and/or planning work for the Petitioner in the past is acknowledged, we find that he did not discuss the duties of the proffered position in any meaningful detail so as to provide any additional insight into the duties beyond the generalized duty-descriptions provided by the Petitioner. His letter is not accompanied by, and does not expressly state the full content of, the documentation and/or oral communications upon which his opinion was based. Given his near-verbatim repetition of the duties provided by the Petitioner to USCIS, Mr. [REDACTED] knowledge of the actual position proffered here is not clear.

Nor does Mr. [REDACTED] discuss any studies, surveys, industry publications, authoritative publications, or other sources of empirical information which he may have consulted in the course of whatever evaluative process he followed. As a result, it is not apparent why his opinion should be afforded any deference over the DOL-provided information contained in the *Handbook*, which does not indicate that a bachelor's degree in a specific specialty, or the equivalent, is normally required for positions located within the occupational category selected by the Petitioner on the LCA.

Importantly, there is also no indication that the Petitioner advised Mr. [REDACTED] that it characterized the proffered position as a low, entry-level food service position, for a beginning employee who has only a basic understanding of the occupation (as indicated by the wage-level on the LCA).⁴ We consider this a significant omission; without this information, the Petitioner has not demonstrated that Mr. [REDACTED] possessed the requisite information necessary to adequately assess the nature of the Petitioner's position and appropriately determine parallel positions based upon the job duties and responsibilities.

We may, in our discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

It is incumbent upon the petitioner to provide persuasive evidence that the proffered position qualifies as a specialty occupation under this criterion, notwithstanding the absence of *Handbook*

⁴ The "Prevailing Wage Determination Policy Guidance" issued by the U.S. Department of Labor (DOL) provides a description of the wage levels. A Level I wage rate is described by DOL as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

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support on the issue. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." 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'l Comm'r 1972)).

In the instant case, the Petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

*The requirement of a baccalaureate or higher degree in a specific specialty,
or its equivalent, is common to the industry in parallel
positions among similar organizations*

Next, we will review the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a Petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common for positions that are identifiable as being (1) in the Petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the Petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As previously discussed, the Petitioner has not established that its proffered position is one for which the *Handbook* (or other independent, authoritative source) reports a standard industry-wide requirement for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter. Nor has the Petitioner submitted evidence that the industry's professional associations have made a bachelor's degree in a specific specialty, or the equivalent, a minimum requirement for entry. Nor does the record of proceeding contain any other evidence for our consideration under this prong.

The Petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the Petitioner's industry in positions that are (1) in the Petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the Petitioner. For the reasons discussed above, the Petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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The particular position is so complex or unique that it can be performed only by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent

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

On appeal, the Petitioner asserts that the nature of the Petitioner's business, as a "high-end full service restaurant," makes this proffered position unique. The Petitioner states, "[i]t is therefore imperative for the Petitioner to operate at a level equal to or above [our] competition for [us] to grow. As such, the position of Food Service Manager in this type of 'high-end' restaurant would require a Bachelor's degree which would normally be the minimum requirement for the position."

However, the information provided in the record does not 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 normal is so complex or unique that it can be performed only by an individual with a degree." To begin, the record does not sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of food service manager. Specifically, the Petitioner does not demonstrate how the food service manager 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 of the position it claims is so unique. While a few courses in hospitality management may be beneficial in performing certain duties of a food service manager, the Petitioner has not demonstrated how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the particular position here proffered.

Therefore, the evidence of record does not establish that this position is significantly different from other food service manager positions such that it refutes the *Handbook's* information to the effect that there is a spectrum of education levels acceptable for food service manager positions. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than a food service manager position or other closely related 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 does not demonstrate how the proffered position of food service manager is so complex or unique relative to other food service manager positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the Petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

This is further evidenced by the LCA submitted by the Petitioner in support of the instant petition. The LCA indicates a wage level at a Level I (entry) wage, which is the lowest of four assignable wage levels.⁵ Without further evidence, the record does not demonstrate that the proffered position

⁵ The issue here is that the Petitioner's designation of this position as a Level I, entry-level position undermines its claim

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is complex or unique as such a position falling under this occupational category would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."⁶ The evidence of record does not establish that this position is significantly different from other positions in the occupational category such that it refutes the *Handbook's* information that a bachelor's degree in a specific specialty, or its equivalent is not required for the proffered position.

The Petitioner did not establish that its particular position is so complex or unique that it can only be performed by an individual with at least a bachelor's degree in a specific specialty, or its equivalent. The Petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The employer normally requires a baccalaureate or higher degree in a specific specialty, or its equivalent, for the position

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, we review the Petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position, and any other documentation submitted by a Petitioner in support of this criterion of the regulations.

To merit approval of the petition under this criterion, the record must establish that a Petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. While a Petitioner may assert that a proffered position requires a specific degree, that statement 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 petitioner 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 388. In other words, if a Petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if 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

that the position is particularly complex, specialized, or unique compared to other positions within the same occupation. Nevertheless, it is important to note that a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation. In certain occupations (doctors or lawyers, for example), an entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty or its equivalent. That is, a position's wage level designation may be a consideration but is not a substitute for a determination of whether a proffered position meets the requirements of section 214(i)(1) of the Act.

⁶ For additional information regarding wage levels as defined by DOL, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

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

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

The Petitioner states that two individuals have previously held the position of food service manager. The Petitioner claims that the two individuals had a bachelor's degree in economics and a bachelor's degree in hospitality management, respectively. First, the fact that the Petitioner would find acceptable individuals with degrees in the disparate fields of economics and hospitality management undermines any claim that the proffered position requires an individual with a bachelor's degree in a specific specialty, or the equivalent. Further, the record indicates that one of those two individuals was the Petitioner's owner who, as the owner of the establishment, presumably performed duties requiring her to exercise independent judgement. As noted, by virtue of the wage-level it selected on the LCA, the Petitioner indicated that the Beneficiary is only expected to possess a basic understanding of the occupation and will perform routine tasks that require limited, if any, exercise of judgment. It is therefore unclear whether the position occupied by that individual was the same one proposed here. While the other individual did apparently possess a bachelor's degree in hospitality management, one previous hire for a 12-employee business in existence since 1998 does not constitute the type of recruiting and hiring history necessary for analysis under this criterion.

The record does not establish that the Petitioner normally requires a bachelor's degree in a specific specialty, or its equivalent, for the proffered position and that performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge. Therefore, the Petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a Petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is

(b)(6)

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usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

The Petitioner claims, through the assertions made in the letter from Mr. [REDACTED] that the nature of the specific duties of the position in the context of its business operations is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. We have reviewed and evaluated the Petitioner's statements regarding the proffered position and its business operations in light of this criterion. The relative specialization and complexity have not been sufficiently developed by the Petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.

We further incorporate our earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a Level I position (the lowest of four assignable wage-levels) relative to others within the occupational category. Without more, the position is one not likely distinguishable by relatively specialized and complex duties. That is, without further evidence, the Petitioner's has not demonstrated that its proffered position is one with specialized and complex duties as such a position falling under this occupational category would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a substantially higher prevailing wage.⁷

The Petitioner has submitted insufficient evidence to satisfy this criterion of the regulations. Thus, the Petitioner has not established that the nature of the specific duties of the proffered position is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. We, therefore, conclude that the Petitioner did not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the Petitioner has not established 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.

Based upon a complete review of the record of proceeding, the Petitioner has not overcome the grounds upon which approval of this petition was revoked.⁸ Accordingly, the appeal is dismissed. The approval of the petition remains revoked.

⁷ As previously discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems" and requires a significantly higher wage.

⁸ We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). However, as the appeal is dismissed, and the petition is revoked for the reasons discussed above, we will not further discuss the additional issues and deficiencies that we observe in the record of proceedings.

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IV. CONCLUSION AND ORDER

In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of U-T-&C-, Inc.*, ID# 13671 (AAO Oct. 7, 2015)