



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

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

In Re: 26401998

Date: JUL. 19, 2023

Appeal of Texas Service Center Decision

Form I-129, Petition for a Nonimmigrant Worker (H-1B)

The Petitioner, an Indian restaurant providing catering services, seeks to temporarily employ the Beneficiary as a “restaurant manager” under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both: (a) the theoretical and practical application of a body of highly specialized knowledge; and (b) the attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the proffered job qualifies as a specialty occupation under section 101(a)(15)(H)(i)(b) of the Act because the Petitioner did not demonstrate any of the four criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A). The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo’s, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

## I. LEGAL FRAMEWORK

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) the 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) is a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) adds a non-exhaustive list of fields endeavor to the statutory definition. And the regulations require that the proffered position must also meet one of the following criteria to qualify as a specialty occupation:

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.

The statute and the regulations must be read together to make sure that the proffered position meets the definition of a specialty occupation. *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. Fed. Sav. And Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). Considering the statute and the regulations separately leads to scenarios where a Petitioner satisfies a regulatory factor but not the definition of specialty occupation contained in the statute. *See Defensor v. Meissner*, 201 F.3d 384, 387 5th Cir. 2000). The regulatory criteria read together with the statute gives effect to the statutory intent. *See Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act*, 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991).

So we construe the term “degree” in 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 supporting the statutory definition of specialty occupation. *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”). USCIS’ application of this standard has resulted in the orderly approval of H-1B petitions for engineers, accountants, information technology professionals and other occupations, commensurate with what Congress intended when it created the H-1B category.

And job title or broad occupational category alone does not determine whether a particular job is a specialty occupation under the regulations and statute. The nature of the Petitioner’s business operations along with the specific duties of the proffered job are also considered. We must evaluate the employment of the individual and determine whether the position qualifies as a specialty occupation. *See Defensor*, 201 F.3d 384. So a Petitioner’s self-imposed requirements are not as critical as whether the nature of the position the Petitioner offers requires the application of a theoretical and practical body of knowledge gained after earning the required baccalaureate or higher degree in the specific specialty required to accomplish the duties of the job.

## II. PROFFERED POSITION

The Petitioner seeks to employ the Beneficiary in H-1B classification to serve as its “restaurant manager,” and it submitted a labor condition application (LCA) certified for a position located with the “Food Service Managers” occupational category as contained in the Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)*. *See Bureau of Labor Statistics, U.S. Dep’t of Labor, Occupational Outlook Handbook, Food Service Managers* (Sept. 8, 2022),

<https://www.bls.gov/ooh/management/food-service-managers.htm>. At each state of this proceeding, the Petitioner has provided descriptions of the job duties along with the percentages of time to be spent performing the various tasks. In response to the Director's request for evidence (RFE), the Petitioner submitted an advisory opinion letter from a professor at [redacted] College in [redacted] New York, a comparison of the proffered job's duties with the applicable DOL Occupational Information Network (O\*NET) category, a letter describing its hiring practices, copies of diplomas and paystubs for a "sampling" of individuals who were previous employees, prospective employees, or employees at unidentified affiliated or related entities, and copies of the Beneficiary's educational and professional qualifications. According to the Petitioner, the proffered job requires a minimum of a bachelor's degree in business administration with a concentration in hospitality management, hotel and restaurant management, or a related field.

### III. ANALYSIS

For the reasons below, we have determined that the Petitioner's restaurant manager position does not qualify as a specialty occupation. The evidence the Petitioner has submitted into the record does not demonstrate that performance of the proffered job's duties requires an individual with a bachelor's degree in a specific related specialty, or the equivalent.

#### A. First Criterion

The Petitioner's proffered job does not qualify as a specialty occupation under the first criterion of the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I). To satisfy this criterion, the position must require a bachelor or higher degree in a specific specialty as a threshold for entry. In support, the Petitioner submitted an advisory opinion by [redacted] a professor of marketing at [redacted] College, and a chart comparing its restaurant manager's duties to those of food service managers as contained in the *Handbook*.

Whilst the *Handbook* is not an exclusive source of information, it can be persuasive in that it contains the duties and educational requirements of a wide variety of occupations. So the occupational category chosen by the Petitioner is instructive in that it provides a framework within which to evaluate the general nature of the Petitioner's proffered job. The Petitioner contends that a comparison of its proffered job duties to those contained in the *Handbook* supports its claim that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I). We do not agree.

A position located within the "Food Service Managers" occupational category selected by the Petitioner generally does not qualify as a specialty occupation under the first criterion. The *Handbook* states that "[f]ood service managers typically need a high school diploma..." as the minimum education to enter the position. Aside from a high school diploma, there is no other "typical" or "normal" education requirement for these types of positions. The *Handbook* therefore does not support the requirement of least a bachelor's degree in a specific specialty, or its equivalent, as the normal minimum requirement for entry. See *Handbook, supra*, at <https://www.bls.gov/ooh/management/food-service-managers.htm>.

The *Handbook* states that education requirements for positions located within this occupational category positions range from those requiring a college degree to those requiring no formal educational

credential whatsoever. So although the *Handbook* does reflect that some employers may “prefer” to hire candidates who have some type of postsecondary education, it does not specify whether that postsecondary education must be the equivalent of a bachelor’s degree in a specific specialty, or the equivalent, to perform the duties of the position. This wide range of acceptable education requirements for these positions underscores our determination that a bachelor’s degree or higher in a specific specialty, or the equivalent, related to the job duties is not “normally” or “typically” required as a threshold for entry. So the *Handbook* does not support the assertion at least a bachelor’s degree in a specific specialty, or its equivalent, is normally the minimum requirement for these positions and does not support the particular position proffered here as being a specialty occupation.

Whilst we agree with the Petitioner’s implicit argument that the *Handbook* is not dispositive, the inapplicable or distinguishable cases it cites to encourage a departure from the *Handbook* in this case do not satisfy its burden. The Petitioner suggests that *India House v. McAleenan*, 449 F. Supp. 3d 4 (D.R.I. 2020) supports its restaurant manager position’s classification as a specialty occupation under the first criterion because its self-imposed requirement for a bachelor’s degree in business administration with a concentration in hospitality management, hotel and restaurant management, or a related field carries the same requirement as the *India House* petitioner’s general operations manager position. But the standard of whether an individual petitioner’s proffered position is a specialty occupation because it normally require a degree or its equivalent as a threshold requirement for entry to the position is in the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). If we were to interpret the first criterion to relate to a specific petitioner’s proffered position and its minimum requirements, it would render the third criterion of the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) redundant. And *India House* involved a position categorized by that employer in the general and operations manager sub entry in the “Top Executive” category of the *Handbook*. See Bureau of Labor Statistics, U.S. Dep’t of Labor, *Occupational Outlook Handbook*, Top Executives (Sept. 8, 2022), <https://www.bls.gov/ooh/management/top-executives.htm>. In any event, *India House* did not extend a blanket eligibility for specialty occupation classification under the first criterion to any position that requires a bachelor’s degree in business administration with a concentration in hospitality management.

Moreover, the courts in *Innova Solutions, Inc. v. Baran*, 983 F.3d 428 (9th Cir. 2020), *Residential Finance Corp. v USCIS*, 839 F. Supp. 2d 985 (S.D. Ohio 2012), *Relx v. Baran*, 397 F. Supp 3d 41 (D.D.C. 2019), and *Tapis International v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000), which the Petitioner also cites, considered occupational categories for which the *Handbook* stated “normal,” “typical,” or “usual” requirements for a bachelor’s degree in a specific specialty related to the job duties, or the equivalent, as a minimum for entry to the proffered job. That is not the case here. Those courts considered whether the terms “typically” or “usually” were the same as “normally” as that term is contained in the regulations and whether many different degree fields could comprise a singular specialty to qualify to perform the duties of a proffered job. The courts were not considering whether positions that “normally,” “typically,” or “usually” require less than a bachelor’s degree, such as a high school degree, could be considered a specialty occupation under the first criterion. And in any event, and in contrast to the broad precedential authority of the case law of a United States circuit court, we are not bound to follow the published decision of a United States district court in matters arising even with the same district. See *Matter of K-S-*, I&N Dec. 715, 719-720 (BIA 1993).

The Petitioner also prompts us to consider expanding of the holding in *Matter of Sun*, 12 I&N Dec. 535 (Dist. Dir. 1966) to authoritatively render any hotel, restaurant, or hospitality adjacent occupation a specialty occupation under the first criterion. We do not follow the Petitioner's generous reading of *Matter of Sun*. First and foremost, *Sun* did not involve an H-1B petition. It was an immigrant visa proceeding, and the question to be resolved was whether its beneficiary was a member of the professions as the term is defined in section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), and as interpreted in 1966. The issue before us today is whether the proffered position qualifies as a specialty occupation, not whether it is a profession.<sup>1</sup> Moreover, *Sun* concerned a hotel management position, not a restaurant manager position such as the one proffered by the Petitioner. The minimum entry requirements for restaurant management positions do not necessarily mirror those of hotel management positions, and the Petitioner has provided no basis for why an analogous position would categorically be a specialty occupation under the first criterion. And another distinguishing fact is that the petitioner in *Matter of Sun* was a "large hotel" as opposed to the Petitioner's "Indian-style café" format. Restaurant operations are oftentimes one of several functions in a large hotel. Here, that slice of overall hotel business is the entirety of the Petitioner's business operations.

Nor does O\*NET's summary report for "Food Service Managers" provide support for the proposition that positions in the "Food Service Manager" category qualify as specialty occupations. Aside from not containing a requirement for a bachelor's degree in a specific specialty or equivalent, it assigns "Food Service Managers" a "Job Zone Two" rating. The O\*NET specifically states that "Job Zone Two" occupations "usually require a high school diploma." Further, the O\*NET summary report for "Food Service Managers" reflects that 88% of survey respondents had earned less than a bachelor's degree. See O\*NET Summary Report for "Food Service Managers," <https://www.onetonline.org/link/summary/11-9051.00>.<sup>2</sup>

The Petitioner also provided an advisory opinion to establish eligibility under the first criterion. As a matter of discretion, we may use opinion statements submitted by the Petitioner as advisory. *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). But opinion statements are not presumptive evidence of eligibility. See also *Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA, 2008). And less weight is given to an advisory opinion where there is cause to question or doubt the opinion or if it is not in accord with other information in the record. *Caron Int'l*, 19 I&N Dec. at 795. Here, the advisory opinion the Petitioner submits is considerably doubtful. Its writer bases their opinion on

---

<sup>1</sup> The primary and fundamental difference between qualifying as a profession and qualifying as a specialty occupation is that specialty occupations require the U.S. bachelor's or higher degree to be in a specific specialty, or its equivalent. Thus, although an occupation may be specifically identified as qualifying as a profession as that term is defined in section 101(a)(32) of the Act, that occupation would not necessarily qualify as a specialty occupation unless it met the definition of that term at section 214(i)(1) of the Act.

<sup>2</sup> Since most "Job Zone Two" occupations do not require attainment of a bachelor's degree, and the Petitioner claims the proffered position does, it properly categorized the position at a Level II wage on the LCA. See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [https://www.flcdatcenter.com/download/npwhc\\_guidance\\_revised\\_11\\_2009.pdf](https://www.flcdatcenter.com/download/npwhc_guidance_revised_11_2009.pdf). However, the Petitioner's assertions made on appeal raise questions as to whether the wage level should have been elevated further. For example, the Petitioner states on appeal that the proffered position is "substantially more complex than an entry-level" position, and that it is for a candidate "who has already embarked on his career" and has "gained multiple years of experience." *Id.* We therefore question whether the submitted LCA corresponds to and supports this H-1B petition, and whether this apparent deficiency constitutes yet another reason why the petition cannot be approved. Since the proffered position is not a specialty occupation—thereby rendering the petition unapprovable—we will not explore this issue further, but the Petitioner should be prepared to address it in any future H-1B filings.

the Petitioner's letter containing the job description, the writer's research into the issues presented, their own independent research, their asserted familiarity with the Petitioner and its competitors, and their self-expressed vast experience in business administration, branding, sales, marketing, and related areas. But it appears to have been written by the writer in isolation from other applicable information or authority. It does not provide an individualized analysis of why the Petitioner's position is a specialty occupation when sources such as the *Handbook* advise that such positions typically only require a high school diploma as a minimum requirement. The advisory opinion contains only unsupported conclusory statements. There is no direct citation to specific research, authority, or credible source to support the writer's assertions other than an invocation of the writer's resume as justification.<sup>3</sup> This advisory opinion is therefore not sufficient to satisfy the first criterion, either.

The Petitioner has not provided sufficient documentation from a probative and authoritative source to conclude that a baccalaureate or higher degree or its equivalent in a specific specialty related to the duties of the job are required as a minimum qualification for entry to this particular position. So, the Petitioner has not satisfied the first criterion contained at 8 C.F.R. § 214.2(h)(4)(iii)(A).

## B. Second and Fourth Criteria

The Petitioner's proffered job does not qualify as a specialty occupation under the second alternate prong of the second criterion or the fourth criterion of the regulations at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(2) and (A)(4). The second criterion presents two, alternative prongs: (A) the degree requirement is common to the industry in parallel positions among similar organizations; or (B) the employer's particular position is so complex or unique that it can be performed only by an individual with a degree. The first prong, concerned with common industry practice is satisfied when the Petitioner establishes that their degree requirement is common to the industry in parallel positions among similar organizations. The Petitioner here does not assert that it satisfies the first prong of the second criterion and we will not address it further.

The Petitioner does claim that its proffered job is a specialty occupation under the second alternate prong of the second criterion. That alternative prong of the second criterion 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 a bachelor's degree in a specific specialty related to the duties of the proffered position or its equivalent. The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) requires a petitioner to establish that the nature of the specific job duties 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.

The Petitioner states that its restaurant manager must possess a bachelor's or higher degree in business administration with a concentration in hospitality management, hotel and restaurant management, or a related field as a minimum qualification for entry because its particular restaurant manager position is complex or unique and also requires the performance of specialized duties due to their reputation in their industry. We stated earlier that the Petitioner submitted a chart into the record comparing its

---

<sup>3</sup> We will evaluate the advisory opinion the Petitioner has submitted in the applicable sections of this decision to the extent that it asserts the Petitioner's proffered position qualifies as a specialty occupation under other criteria contained at 8 C.F.R. § 214.2(h)(4)(iii)(A).

restaurant manager's duties to those of food service managers as contained in the *Handbook*. Via this chart, the Petitioner aims to propose that its restaurant manager position is complex or unique because it includes "specialized" tasks beyond those typically performed by food service managers as listed in the *Handbook*. But the Petitioner's attempt to demonstrate complexity or uniqueness through the duties its restaurant manager will perform in comparison to the food service manager duties in the *Handbook* is not convincing. The Petitioner's comparison chart actually demonstrates that the restaurant manager will perform substantially the same duties as those contained in the *Handbook* for typical positions located in the food service manager occupational category. The expanded duties, or "detail," that the Petitioner provides breaks the main duties into component parts. The component parts collectively constitute the sum of the specific duty in the job description which corresponds with the job description in the *Handbook*. The component parts do not demonstrate any additional complexity or uniqueness in the duties that constitute this particular position.

And the expanded duties are not so specialized and complex that they would require the application of a theoretical and practical body of highly specialized knowledge gained after earning a bachelor's degree in a specific specialty to perform them so as to demonstrate eligibility under the fourth prong. The Petitioner discusses their restaurant manager's duties at length and summarily identifies the duties as specialized and complex. The Petitioner states that its restaurant manager's duties are specialized and complex because they are an "Indian-style café" and "specialty restaurant and caterer" based in the Indian ethnic community that it serves for large functions such as weddings. But a talismanic repetition of the terms "complex" or "unique" or "specialized" does not convincingly establish that the performance of those duties requires the theoretical and practical application of a body of specialized knowledge attained after earning a bachelor's or higher degree in a specific specialty related to the job duties. And the Petitioner does not explain why the duties of a food service manager are specialized and complex when they are performed at an "Indian-style café" in contrast with another ethnic or themed restaurant.

Even when the Petitioner strays away from its function as an ethnic restaurant for its justifications, it does not articulate specialized and complex job duties. In one attempt to describe the proffered position's specialized and complex duties, the Petitioner specifically points out that its restaurant manager is required to budget and account. According to the Petitioner, this duty is more specialized and complex than ordinary food service managers and sets the Petitioner's position apart because it requires the theoretical and practical application of a body of specialized knowledge to perform. But the food service manager entry in the *Handbook* does state that such individuals work with "budget and payroll records" and have "financial responsibilities that include budgeting, ensuring cash flow, and monitoring operational costs." It is not clear from the Petitioner's description how the "budgeting and accounting" duties the restaurant manager performs are more specialized and complex from the ones described in the *Handbook*.

And the Petitioner's self-identification as an "Indian-style café" and "specialty restaurant and caterer" of a certain "nature [of] business and reputation" is not sufficient to elevate their offered position to that of a specialty occupation. The Petitioner provides documentation in the record to show that it has attended to prominent individuals in contemporary American and Indian popular culture and has contracts for services with well-known hotel franchises. But it has not provided evidence demonstrating how this establishes the specialized and complex nature of its restaurant manager's duties such that they can only be performed by a person with a bachelor's degree in a specific related

specialty. Nor has it shown how it renders this particular restaurant manager position complex or unique.

On appeal, the Petitioner relies heavily upon the advisory opinion it submitted as presumptive evidence of the specialty occupation nature of the restaurant manager position. Again, submission of an advisory opinion is not presumptive evidence of eligibility; we are ultimately responsible for making the final determination regarding an individual's eligibility for the benefit sought. *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988); *see also Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA, 2008). The advisory opinion submitted by the Petitioner, insufficient to establish eligibility under the first criterion, similarly demonstrates eligibility under neither the second alternate prong of the second criterion nor the fourth criterion. The writer concludes that the restaurant manager position is a specialty occupation because its requirements "exist at the intersection of the highly quantitative and technical areas of operations management, logistics, business analysis and development, quality control, regulatory compliance, and customer relationship management." The writer does not articulate why requirements at this "intersection" are required to perform the duties of the proffered position. They do not cite, refer to, or provide in the record any of the writer's research into the issues they are considering or other research into the issues. They do not compare and contrast the Petitioner's restaurant manager position to the other food service managers positions to distinguish and justify its educational requirements. This is especially problematic given the *Handbook's* finding that food service manager positions generally require no more than a high school degree. The writer of the advisory opinion does not identify the duties falling within the Petitioner's responsibility groups (such as logistics, business development, quality control etc.) and how those duties require the theoretical and practical application of a body of knowledge that can only be attained from earning a baccalaureate or higher degree in a specific specialty related to the job duties or its equivalent. The advisory opinion simply repeats the duties the Beneficiary would perform as restaurant manager in an expanded narrative format. These duties do not appear so specialized and complex such that a bachelor's degrees in business administration with a specialization in hospitality management, or hotel and restaurant management is the minimum requirement for entry. And the writer does not establish what makes the proffered position complex or unique. Whilst the writer concludes the duties in the context within which they will be performed require a bachelor's degree in a specific specialty related to those duties, it does not explain why the context renders the duties more specialized and complex or the particular position complex or unique.

The record lacks sufficient unambiguous information to set the Petitioner's restaurant manager position as more "complex or unique" or its duties "specialized and complex" from positions that do not require at least a bachelor's degree in a specific specialty or its equivalent to perform the duties of the Petitioner's officer job. So the Petitioner has not satisfied the second alternative prong of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) or the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

### C. Third Criterion

The Petitioner's proffered job does not qualify as a specialty occupation under the third specialty-occupation criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). The third criterion requires an employer to demonstrate that it normally requires a bachelor's degree in a specific specialty, or its equivalent, related to the performance of the position's job duties.



The record must establish that a petitioner's stated degree requirement is not a matter of preference for high-caliber candidates but is necessitated instead by performance requirements of the position. *See Defensor*, 201 F.3d at 387-88. Were we limited solely to reviewing a petitioner's claimed self-imposed requirements, an organization could bring any individual with a bachelor's degree to the United States to perform any occupation so long as the petitioning entity created a token degree requirement. *Id.*

The Petitioner's RFE response expressed its preference for its restaurant manager to require a bachelor's degree in business administration with a concentration in hospitality management, hotel and restaurant management or a related field. The Petitioner asserts that its preference is in fact its normal requirement for its restaurant manager position. It provided a hiring practice letter as well as credentials evaluations, educational and vocational certificates, experience letters, resumes, and paystubs from unrelated entities for a "sampling" of seven individuals in support of its preference.

The Petitioner's submission does not establish that its requirements compose anything more than a preference. The Petitioner's "samplings" of individuals it self-identifies are not comprehensive. So the Petitioner cannot provide an accurate picture of its normal recruiting and hiring practices. The Petitioner provides information for individuals currently employed at related or affiliated entities in what they identify as "similar positions." However, the Petitioner did not provide documentation identifying the type of business the other related or affiliated entities conduct or the job duties of their current position.<sup>4</sup>

A portion of the Petitioner's "sampling" is two people it identifies as historically filling the proffered position. But it cannot be determined how representative the Petitioner's claim is of the Petitioner's normal recruiting and hiring practices for the proffered position when the Petitioner only provided a non-comprehensive "sample." Moreover, the Petitioner's "sample" includes an individual who previously filled the food service manager and not the restaurant manager position. Whilst job titles are not determinative, there is no explanation given by the Petitioner for the apparent change in job title. And we are not able to shift our review to the duties the "sample" performed versus those of the proffered position because the Petitioner did not provide them. So we cannot evaluate and analyze the relative complexity of the job duties, independent judgment required, or the amount of supervision received. Accordingly, it is unclear whether the duties and responsibilities of these individuals were same or similar to the proffered position.

Likewise, the "sample" of individuals the Petitioner did not ultimately employ because they did not commence employment with them is not illuminative. The jobs offered to these individuals had a different title and there is no description of their duties in the record.

---

<sup>4</sup> In any event, the hiring practices at related or affiliated entities are not relevant under this criterion. As noted, the Petitioner has specifically stated that it did not submit evidence to demonstrate that its proffered position qualified under the first prong of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). But the documentation submitted by the Petitioner in the RFE response and hiring practice letter are insufficient to demonstrate eligibility under the first prong of the second criterion because it provides no evidence or documentation to support whether the positions of the sample of individuals are parallel to its proffered position or that the entities employing the sample of individuals are similar organizations to the Petitioner.

The Petitioner also references the Beneficiary's educational and professional qualifications as support for its normal and historical hiring requirements for the restaurant manager position. But the Beneficiary's qualifications are not material for this portion of our analysis. Long-standing legal standards require an initial determination that a proffered position qualifies for classification as a specialty occupation determining whether the Beneficiary is qualified for the position. *Cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation])." The educational and professional background of the intended beneficiary of the H-1B petition is not relevant unless the position has first been identified as a specialty occupation.

The Petitioner has not persuasively established that it normally requires at least a bachelor's degree in a specific specialty required to perform the duties, or its equivalent, for the position. So the Petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Since the Petitioner has not satisfied any of the available criteria described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1)-(4), it has not established that the proffered position is a specialty occupation.

### III. CONCLUSION

It is the Petitioner's burden to provide competent and credible evidence of the nature of its proffered specialty occupation and the Beneficiary's qualification for the proffered position. The Petitioner has not met its burden for the reasons set forth above.

**ORDER:** The appeal is dismissed.