



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **AUG 12 2014**

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a restaurant with eight employees established in 2011.<sup>1</sup> In order to employ the beneficiary in what it designates as a full-time training and development specialist at a minimum salary of \$42,000 per year,<sup>2</sup> the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, concluding that the evidence of record failed to demonstrate that the offered position is a specialty occupation. On appeal, counsel for the petitioner asserts that the director erred, and that the training and development specialist it describes is a specialty occupation.

The record of proceeding before us contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B and brief.

Upon review of the entire record of proceeding,<sup>3</sup> for the reasons discussed below, we find that the evidence of record does not overcome the director's grounds for denying this petition.

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.

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<sup>1</sup> The petitioner provided a North American Industry Classification System (NAICS) Code of 7221, "Full Service Restaurant." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2007 NAICS Definition, "7221 Full Service Restaurants" <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited August 7, 2014).

<sup>2</sup> The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the occupational classification of "Training and Development Specialists" SOC (O\*NET/OES) Code 13-1151, and for which the appropriate prevailing wage level is Level I (the lowest of the four assignable wage rates).

<sup>3</sup> We conduct appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)).

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

*Specialty occupation* means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this 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 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.

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 alien, 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.

In its June 2, 2012 letter of support, which was signed by the petitioner's representative,<sup>4</sup> the petitioner claimed that it purchased the former [REDACTED] area in February 2012, and closed the facility for complete renovations.<sup>5</sup> At the time of the letter, the petitioner stated that it is in its first year of operating the new [REDACTED]. The petitioner stated:

We expect to employ over 20 people at this present location, more when we decide to expand our operations to other locations. The overall plan is to expand the number of restaurant offerings under the control of [REDACTED] LLC in the coming years and to have a successful 'template' of a high end restaurant that is both novel and innovative.

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The minimum educational level for this professional position in our company is a Bachelor's degree in Psychology, Human Resources, Management or Hotel and

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<sup>4</sup> The petitioner's representative identifies his relationship with the petitioner as "partner."

<sup>5</sup> The record does not indicate whether the date of the letter is a typographical error, or why the petitioner wrote the letter close to a year before it submitted the petition.



Restaurant Management.<sup>6</sup> The necessity for a relevant Bachelor's degree arises because our Training and Development Specialist is directly involved in training and program development of more than 230 employees, including Management Consultants, Food Service Managers, Managers, Assistant Managers, Swing Managers and Crew. Hence, the complexity of our organization itself demands a specialist with a relevant degree.

Upon review of the petition and supporting documents, the director found that the duties described in the petition and supporting documents were not so complex or unique that their performance requires a bachelor's degree in a specific specialty, and issued an RFE. The director noted that the petitioner indicated in its letter in support of the petition that it had 230 employees, and requested that the petitioner provide wage reports for the 3<sup>rd</sup> and 4<sup>th</sup> quarters of 2012 and the 1<sup>st</sup> quarter of 2013. The director requested that the petitioner provide an organizational chart listing the petitioner's staffing levels, hierarchy, and divisions in the company, and specifying, by employee name and title, those who the beneficiary will supervise and who will supervise the beneficiary. The director requested that the petitioner provide documentary examples of the unique nature of its operations to substantiate specialized or complex duties, such as press releases, business plans, promotional material, advertisements, patents, critical reviews, articles, photographs of prototypes, etc.

The petitioner described the beneficiary's proposed duties in its support letter of June 2012 and in response to the director's RFE in August 2013 as follows:

25% 8 hours 45 mins	Develop, conduct and implement new employee training programs in accordance with Company standards. Formulate a system and procedure to accurately assess and quantify the job skills level of all employees (Food Service Managers, Managers, Assistant Managers, Swing Managers and Crew). Coordinate development of employee training programs. Organize, schedule and hold instruction seminars for employees on Corporate policies and procedures, such as business operations, customer service, food safety, employee safety, equipment care, all levels of store management classes, franchising. During seminars use variety of instructional techniques and formats as rehearsing, simulating typical employee/customer situations, role playing, team exercises, group discussions, videos and lectures. Organize and develop training procedures into manuals, guidelines, periodical handouts and video materials mandatory for all staff. Staff, train and develop restaurant managers, management staff and hourly employees through orientation, ongoing feedback, establishment of performance expectations and by conducting performance reviews.
25% 8 hours	Oversee the development of management through weekly management meetings, weekly one-to-one, bi-annual performance reviews, delegation of various responsibilities and

<sup>6</sup> The record contains copies of the beneficiary's Bachelor of Science in Hotel Administration (Food Service Management) issued December 17, 2011 from the [REDACTED] an accredited United States university, and accompanying transcripts. The beneficiary's qualifications are not at issue.

45 mins	projects within the restaurants. Develop employee skills to enhance productivity thus, increase sales. At all times provide a favorable image of Company and to promote its goals and objectives, foster and enhance public recognition and acceptance of all of its areas of endeavor.
25% 8 hours 45 mins	Direct hiring and assignment of personnel schedule and supervise work, evaluate performance of employees. Make recommendations to management regarding promotion of employees. Ensure development of managers and employees through meetings, quality circles, all stores meetings and sales meetings. Create a positive working environment. Maintain a favorable working relationship with all company employees to foster and promote a cooperative and harmonious working climate that will be conducive to maximum employee morale, productivity and efficiency/effectiveness. Diagnose employees' problems, recommend solutions, and determine if company's objectives have been met. Ensure that all employees and management candidates are interviewed and hired through the company's selection process. Oversee orientations and training of all management and hourly employees. Ensure responsibilities, goals and plans of managers in training are adhered to the Company's standards. Determine applicability of experience and qualifications for management position of job applicants.
20% 7 hours	Ensure compliance with the state labor laws and regulations regarding overtime, vacation, and fringe benefits. In accord with the goals of the company, divide the staff training solutions into individual steps and separate procedures. Provide an in-depth analysis and determine whether the specific training program is advisable and best suited within the existing system. Devise ways to apply existing resources to additional operations, establish methods to improved work performance. Create and revise procedures as needed. Review diagrams/workflow charts analyzing in more detail operations to be performed by managers and other employees.
5% 1 hour 45 mins	Devote time in implementing a staff coordination system that will be available to other Training and Development Specialists now or in the future.

In response to the director's RFE, the petitioner submitted quarterly wage reports for the 1<sup>st</sup> and 2<sup>nd</sup> quarters of 2013, indicating 9 or 10 employees during those quarters, to whom it paid a combined total of \$100,510 in wages through June, 2013.<sup>7</sup> The petitioner asserted, through counsel, that it plans to expand beyond the current location, and requested that it not be penalized for its current size.<sup>8</sup> The petitioner emphasized that the training program developed by the beneficiary would be

<sup>7</sup> The record contains the petitioner's 2012 Internal Revenue Service (IRS) U.S. Return of Partnership Income Form 1065 tax return indicating on page one, line 9, that it paid no salaries and wages in 2012.

<sup>8</sup> It is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. See *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position. In matters where a petitioner's operations are relatively small, we review the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary



crucial to its goal to grow into “a high-end restaurant mini-chain, in the same vein as [REDACTED] with “an emphasis on ambiance, hospitality and service.”

In response to the director’s RFE, counsel for the petitioner stated that the petitioner’s statement that it had 230 employees was in error. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Simply asserting, through counsel, that the reported number of employees was a clerical error does not qualify as independent and objective evidence. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner submitted an organizational chart indicating that the beneficiary would report directly to the CEO, and would supervise both the “front of house” consisting of four servers and the “back of house” consisting of an executive chef, a sous chef, a cook and a prep worker.

We will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition.

We recognize 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 it addresses.<sup>9</sup>

In relevant part, the *Handbook* summarizes the duties typically performed by training and development specialists. The *Handbook* states that training and development specialists typically do the following:

- Assess training needs through surveys, interviews with employees, or consultations with managers or instructors
- Design and create training manuals, online learning modules, and course materials
- Review training materials from a variety of vendors and choose appropriate materials
- Deliver training to employees using a variety of instructional techniques

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in position requiring the theoretical and practical application of a body of highly specialized knowledge that may be obtained only through a baccalaureate degree or higher in a specific specialty, or its equivalent. Additionally, when a petitioner employs relatively few people, it may be necessary for the petitioner to establish how the beneficiary will be relieved from performing non-qualifying duties.

<sup>9</sup> The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. The AAO’s references to the *Handbook* are from the 2014-15 edition available online.



- Monitor and evaluate training programs to ensure they are current and effective
- Select and assign instructors or vendors to conduct training
- Perform administrative tasks such as monitoring costs, scheduling classes, setting up systems and equipment, and coordinating enrollment

Training and development specialists create, administer, and deliver training programs for businesses and organizations. To do this, they must first assess the needs of an organization. Once those needs are determined, specialists develop custom training programs that take place in a classroom, computer laboratory, or training facility.

Training and development specialists organize or offer training sessions using lectures, group discussions, team exercises, hands-on examples, and other training formats. Some training is in the form of a video, Web-based program, or self-guided instructional manual. Training also may be collaborative, which allows employees to connect informally with experts, mentors, and colleagues, often through the use of technology.

Training and development specialists also may monitor instructors, guide employees through media-based programs, or facilitate informal or collaborative learning programs.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Training and Development Specialists," <http://www.bls.gov/ooh/business-and-financial/training-and-development-specialists.htm#tab-2> (accessed August 10, 2014).

The *Handbook* states the following with regard to the educational requirements necessary for entrance into this field:

Training and development specialists need a bachelor's degree. Specialists can come from a variety of education backgrounds, but many have a bachelor's degree in training and development, human resources, education, or instructional design. Others may have a degree in business or the social sciences, such as educational or organizational psychology.

In addition, as technology continues to play a larger role in training and development, a growing number of organizations seek candidates who have a background in information technology or computer science.

*Id.*, <http://www.bls.gov/ooh/business-and-financial/training-and-development-specialists.htm#tab-4>.

The statements made by the DOL in the *Handbook* do not support a finding that a bachelor's degree, or the equivalent, in a specific field of study is required for entry into the occupation. The DOL specifically states that a bachelor's degree in a variety of fields would be appropriate for the position, including a generalized degree in business or the social sciences.

Nor does the record of proceeding contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion in this occupational category is sufficient in and of itself to establish the proffered position as, in the words of this criterion, a "particular position" for which "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

We further note that the petitioner submitted an LCA that was certified for a wage-level that is only appropriate for an entry-level position, which signifies that the beneficiary is expected to possess a basic understanding of the occupation.<sup>10</sup>

As the evidence in the record of proceeding does not establish that a baccalaureate degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, we find that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively 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 to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by

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<sup>10</sup> The *Prevailing Wage Determination Policy Guidance* (available at [http://www.foreignlaborcert.doleta.gov/pdf/Policy\\_Nonag\\_Progs.pdf](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf) (last accessed August 10, 2014)) issued by DOL states the following with regard to Level I wage rates:

**Level 1** (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 [emphasis in original].

The level of the proposed duties is not particularly complex, unique, and specialized, nor do the duties require a specialized level of independent judgment and occupational understanding. The LCA's wage-level indicates that the proffered position is the lowest level position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is required to possess a basic understanding of the occupation; that he will be expected to perform routine tasks requiring limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.



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

The petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. The petitioner has not submitted any documentation from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

Nor has the petitioner satisfied the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), that the degree requirement is common to the industry in parallel positions among similar organizations. The petitioner has not submitted any of its own recruitment materials or job vacancy announcements for the position. The petitioner submits copies of advertisements from dissimilar companies for positions that are not parallel to the petitioner's training and development specialist. These advertisements are discussed separately below.

**HR Training Manager, Bachelor's degree (Master's degree preferred) in Human Resources, Business, Hospitality, Education or a related field.** The duties of the [redacted] position include consulting with divisional training managers and department managers to develop division-specific training, administering company employee philosophy, and partnering with corporate and leadership entities. The petitioner is not a resort and the proposed duties are not parallel to those of the proffered position in this case.

**Development and Training, Bachelor's degree in related field essential.** The advertisement notes that [redacted] employs 23,000 workers in the global food industry. The petitioner is a small restaurant.<sup>11</sup> The duties include partnering with other functional competencies, coaching subject matter experts and other trainers within the organization. Developing a training program for a small restaurant with expansion goals is not a parallel position to the one described in this advertisement.

**Training and Development Specialist, BA/BS in Human Resources Management, Instructional Design, Training & Education, Adult Learning and/or Human Performance.** [redacted] is a staffing company seeking to fill a position for a manufacturer of vitamins and supplements, an industry dissimilar to the restaurant field. The advertisement indicates that the successful candidate will work with other functional components, e.g. manufacturing, engineering, operations, IT, etc. to ensure materials reflect current specifications, and travel to other sites to confirm effectiveness of training programs. This advertisement contemplates duties beyond

<sup>11</sup> As noted above, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position. See *EG Enterprises, Inc.* 467 F. Supp. 2d at 737.



those in the instant position and does not describe a parallel position. The petitioner has no other components, divisions, or locations.

**Coordinator, Training and Development, Bachelor's degree preferred.** The advertisement indicates that [REDACTED] is a part of [REDACTED] company with more than 36,000 restaurants in over 100 countries. The job responsibilities include providing support for the Learning Management System (LMS) in place, and providing administrative support for various programs. The petitioner does not have a LMS; these duties are not parallel to those described by the petitioner for the instant position. A bachelor's degree in a specific specialty is not required.

**Learning and Development Specialist, Bachelor's degree.** In this position, the successful candidate will develop training solutions for multiple business lines, partner with field training managers and regional franchise leaders, manage the Learning Management System, and coordinate logistics for programs and events. These duties imply a broad reach across a large employee base and are not parallel to those described by the petitioner. A bachelor's degree in a specific field is not required.

**Restaurant Operations Specialist, college degree preferred.** The essential duties of the position are to install the [REDACTED] system in three restaurants per week, assure the IT requirements are configured and implemented, and to train the employees on the system. These duties are not parallel to those described by the petitioner. A bachelor's degree in a specific field is not required.

**Bachelor's degree or equivalent work experience (master's degree preferred).** The page is identified as [REDACTED] is handwritten on the advertisement. The job summary indicates that the instructional designer will develop and maintain [REDACTED] learning programs and courseware. The advertisement does not describe [REDACTED] learning programs. The duties arise in an unknown context and are not demonstrated to be similar to those in the proffered position. A bachelor's degree in a specific field is not required.

**Regional Training Consultant, Master's degree in Business or Human Resource Management or comparable work experience.** The responsibilities include liaising with regional teams to coordinate chain-wide product, equipment and process rollout, working closely with business consultants and operations managers. This regional training consultant position is not parallel to the petitioner's position. A bachelor's degree in a specific field is not required.

**Training Supervisor, required education not specified.** The position is advertised by [REDACTED] and describes a training position across departments at an international hotel in [REDACTED]. The position is not parallel to the petitioner's in this case. A bachelor's degree in a specific field is not required.

The petitioner does not submit recruitment materials, job vacancy announcements, studies, reports or any other documentation to show that companies similar to the petitioner in size, scope, and scale of

operations, require a bachelor's degree for positions parallel to the proffered position. Nor has the petitioner submitted any evidence to establish the industry's usual recruiting and hiring practices. Simply 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Therefore, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty as common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

Next, we find that the petitioner did 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 particular position is so complex or unique that it can be performed only by an individual with a degree."

The director found, in part, that the duties of the proffered position include duties that are not typical of a training and development specialist. The director found that 30% of the proposed duties are directly related to training and development specialists. The director found that 70% of the duties are more like those of a general manager or food service manager. We agree that a significant portion of the duties listed comprise duties other than those of a training and development specialist outlined in the *Handbook*.<sup>12</sup>

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<sup>12</sup> Duties listed by the petitioner that appear to be outside the scope of a training and development specialist as described in the *Handbook* include:

Oversee the development of management through weekly management meetings, weekly one-to-one, bi-annual performance reviews, delegation of various responsibilities and projects within the restaurants; at all times provide a favorable image of company and to promote its goals and objectives; foster and enhance public recognition and acceptance of all of its areas of endeavor; ensure compliance with the state labor laws and regulations regarding overtime, vacation, and fringe benefits; devise ways to apply existing resources to additional operations; direct hiring and assignment of personnel schedule and supervise work, evaluate performance of employees; make recommendations to management regarding promotion of employees; ensure development of managers and employees through meetings, quality circles, all stores meetings and sales meetings; create a positive working environment; maintain a favorable working relationship with all company employees to foster and promote a cooperative and harmonious working climate that will be conducive to maximum employee morale, productivity and efficiency/effectiveness; ensure that all employees and management candidates are interviewed and hired through the company's selection process; determine applicability of experience and qualifications for management position of job applicants.



On appeal, the petitioner states that the director is incorrect in classifying the beneficiary's duties as those of a food service manager or a general operations manager, neither of which requires a degree in a specific specialty. The petitioner states that the beneficiary's role is to oversee other food service managers as the restaurant expands, and to create and put into place procedures that would help the petitioner successfully realize its expansion goals. We note first that the petitioner has no food service manager on its organizational chart. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Nor did the petitioner submit a business plan as requested by the director. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. See 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

To qualify as a specialty occupation, the petitioner must establish, *inter alia*, that the duties of the proffered position require a bachelor's or higher degree in a specific specialty or its equivalent. See section 214(i)(1)(B) of the Act and 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation"). Furthermore and as previously stated by the Service, "The H-1B classification is not intended . . . for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts." 63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998); *but cf.* 8 C.F.R. § 214.2(l)(3)(v)(C) (permitting L-1A managers or executives that are coming to the United States to open a "new office" in the United States to perform some non-qualifying duties during the one year period it takes the new office to meet the "doing business" standard).<sup>13</sup> In other words, and in contrast to the L-1A new office regulations, no provision in the law relevant to H-1B nonimmigrants provides an initial grace period during which non-qualifying duties may be performed.

Secondly, while there is no provision in the law for specialty occupations to include non-qualifying duties, we view the performance of duties that are incidental<sup>14</sup> to the primary duties of the proffered

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<sup>13</sup> This regulation recognizes that when a new office is first established and commences operations in the United States, the L-1A manager or executive responsible for setting up operations will be engaged in a variety of non-qualifying, day-to-day duties not normally performed by employees at the executive or managerial level and that often the full range of executive or managerial responsibility cannot be performed in that first year. See 52 Fed. Reg. 5738, 5740 (Feb. 26, 1987).

<sup>14</sup> The two definitions of "incidental" in *Webster's New College Dictionary* 573 (Third Edition, Hough Mifflin Harcourt 2008) are "1. Occurring or apt to occur as an unpredictable or minor concomitant . . . [and] 2. Of a minor, casual, or subordinate nature. . . ."



position as acceptable when they are unpredictable, intermittent, and of a minor nature. Anything beyond such incidental duties, however, e.g., predictable, recurring, and substantive job responsibilities, must be specialty occupation duties or the proffered position as a whole cannot be approved as a specialty occupation. The director noted that the beneficiary will perform duties that are similar to those of a food service manager or a general operations manager, neither of which requires a degree in a specialty. On appeal, the petitioner contested the director's finding that some of the described duties were outside the scope of those performed by a training and development specialist. The petitioner did not, however, address or establish any distinctions between the proposed qualifying and non-qualifying duties. The organizational chart submitted in response to the director's RFE does not identify divisions, as requested by the director, or name any management consultants, food service managers, managers, assistant managers or swing managers, who are essential components for the beneficiary's proposed duties. The petitioner failed to explain how the management duties included in the position description for a training and development specialist are relevant to a restaurant with four servers, four kitchen staff and a manager.

As previously noted, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position. In matters where a petitioner's operations are relatively small, we review the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in position requiring the theoretical and practical application of a body of highly specialized knowledge that may be obtained only through a baccalaureate degree or higher in a specific specialty, or its equivalent. Additionally, when a petitioner employs relatively few people, it may be necessary for the petitioner to establish how the beneficiary will be relieved from performing non-qualifying duties. *See EG Enterprises, Inc.* 467 F. Supp. 2d at 737.

The petitioner asserts that its principal, [REDACTED] has experience in the restaurant business, and holds other interests in the food service industry. The petitioner submitted articles about several successful restaurateurs and a page from the California Secretary of State's website indicating that the petitioner's partner is the agent for service of process for a business by the name of [REDACTED]. Other than the noted page from the California Secretary of State the petitioner does not submit any corroborating evidence that the petitioner's principal is involved in successful restaurant endeavors. Nor does the record contain any evidence to corroborate the petitioner's projected gross revenue of \$1.2 million in 2013.<sup>15</sup> 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).

In this particular case, the petitioner has failed to credibly demonstrate that the duties the beneficiary will perform on a day-to-day basis are so complex or unique that they can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty. Even though the petitioner claims that the beneficiary will be its training and development specialist, and that development of a good training program is critical to its longer term goal of

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<sup>15</sup> The petitioner's 2012 IRS Form 1065 indicates gross receipts in the amount of \$238,337.

having many locations, the petitioner has not submitted a business plan or other indicia that such expansion plans are currently in development.

Nor has the petitioner established that its current operations are so complex or unique that its training and development specialist must have a bachelor's degree in a particular specialty. The record of proceeding does not contain evidence establishing relative complexity or uniqueness as aspects of the proffered position, or that the position is so complex or unique as to require the theoretical and practical application of a body of highly specialized knowledge such that a person with a bachelor's or higher degree in a specific specialty or its equivalent is required to perform the duties of the position. The petitioner has not distinguished either the proposed duties, or the position that they comprise, from generic training and development specialist work, which, the *Handbook* indicates, does not necessarily require a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

The petitioner has therefore failed to establish how the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with a bachelor's degree, or the equivalent, in a specific specialty.

Additionally, we reiterate our earlier discussion that, as indicated on the LCA, the petitioner would be paying a wage-rate that is appropriate for an entry-level position. Based upon the wage rate, the beneficiary is required to have a basic understanding of the occupation. Moreover, that wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment; that the beneficiary's work will be closely supervised and monitored; that he will receive specific instructions on required tasks and expected results; and that his work will be reviewed for accuracy.

Consequently, the petitioner has not shown that the particular position for which it filed this petition is so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

We turn next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position, and that the petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position.<sup>16</sup> In the instant case, the position is new. Thus, the record

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<sup>16</sup> Any such assertion would be undermined in this particular case by the fact that the petitioner indicated in the LCA that its proffered position is a comparatively low, entry-level position relative to others within its occupation.



does not establish that the petitioner has a prior history of recruiting and hiring for the proposed position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. 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 at 387. 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 a 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 proposed 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 failed to submit evidence that the proffered position satisfies this criterion. As the petitioner has failed to demonstrate a history of recruiting and hiring only individuals with a bachelor's degree, or the equivalent, in a specific specialty for the proffered position, it has failed to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next, we find that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered position's 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 the specialty.

Both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, the petitioner's designation of an LCA wage-level I is indicative of duties of relatively low complexity.



As earlier noted, the *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

**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 [emphasis in original].

By virtue of this submission the petitioner effectively attested that the proffered position is the lowest level position relative to others within the occupation. We also find that, separate and apart from the petitioner's submission of an LCA with a wage-level I designation, the petitioner has also failed to provide any documentary evidence to establish that the nature of the specific duties that would be performed 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.

For all of these reasons, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

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. The petition is denied.