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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

D2

DATE: OCT 25 2011 OFFICE: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner claimed on the Form I-129 to be a restaurant with ten employees, gross annual income of $650,000, and net annual income of $125,000. It seeks to employ the beneficiary as a restaurant manager pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition on the basis of his determination that the petitioner failed to demonstrate that its proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's responses to the director's request for additional evidence; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review of the entire record, we find that the petitioner has failed to overcome the director's ground for denying this petition. Beyond the decision of the director, we find additionally that the petitioner has failed to demonstrate that the petition is supported by a certified labor condition application (LCA) which corresponds to it.

The first issue before us on appeal is whether the proposed position qualifies for classification as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

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

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

(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

(2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(3) The employer normally requires a degree or its equivalent for the position; or

(4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

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

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

In its March 27, 2009 letter of support, the petitioner stated that the beneficiary's responsibilities would include the following:

- Overseeing the daily operations of the restaurant;
- Handling all advertising and promotion;
- Scheduling of employees;
- Locating and evaluating potential employees;
- Finding creative ways to retain experienced workers;
- Establishing opportunities for promoting the sales and growth of the restaurant;
- Keeping up with changes and developments in economic trends;
- Keeping up with changes and developments in restaurant trends;
- Locating suppliers able to supply the petitioner with quality foods at low prices;
- Checking and maintaining the restaurant's food supply;
- Placing all inventory orders;
- Solving problems regarding employee needs and customer satisfaction;
- Checking on customers;
- Ensuring the restaurant's cleanliness and readiness;
- Ensuring the restaurant's compliance with Department of Health requirements;
- Preparing payroll reports;
- Preparing daily and monthly sales reports;
- Preparing sales reports and reconciling sales;
- Settling credit card batch reports and reconciling them with daily sales reports;
- Preparing petty cash expenses and necessary reimbursements to employees; and
- Selecting and pricing menu items.

The petitioner expanded upon these duties in its response to the director's request for additional evidence.

The petitioner stated that it requires an individual with a minimum of a bachelor's degree to perform the duties of its position. It did not, however, indicate that the degree needed to from any particular field of study.

In making our determination as to whether the proposed position qualifies for classification as a specialty occupation, we turn first to the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(*1*) and (*2*): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, a resource upon which we routinely rely for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from

firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The duties of the petitioner's proposed position are similar to those of a food service manager, as that occupation is discussed in the *Handbook*. In pertinent part, the *Handbook* states the following regarding food service managers:

> Food service managers are responsible for the daily operations of restaurants and other establishments that prepare and serve meals and beverages to customers. Besides coordinating activities among various departments, such as kitchen, dining room, and banquet operations, food service managers ensure that customers are satisfied with their dining experience. In addition, they oversee the inventory and ordering of food, equipment, and supplies and arrange for the routine maintenance and upkeep of the restaurant's equipment and facilities. Managers are generally responsible for all administrative and human-resource functions of the business, including recruiting new employees and monitoring employee performance and training.
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> Managers interview, hire, train, and when necessary, fire employees. Retaining good employees is a major challenge facing food service managers. Managers recruit employees at career fairs and at schools that offer academic programs in hospitality management or culinary arts, and arrange for newspaper advertising to attract additional applicants. Managers oversee the training of new employees and explain the establishment's policies and practices. They schedule work hours, making sure that enough workers are present to cover each shift. If employees are unable to work, managers may have to call in alternates to cover for them or fill in themselves. Some managers may help with cooking, clearing tables, or other tasks when the restaurant becomes extremely busy.
>
> Food service managers ensure that diners are served properly and in a timely manner. They investigate and resolve customers' complaints about food quality and service. They monitor orders in the kitchen to determine where backups may occur, and they work with the chef to remedy any delays in service. Managers direct the cleaning of the dining areas and the washing of tableware, kitchen utensils, and equipment to comply with company and government sanitation standards. Managers also monitor the actions of their employees and patrons on a continual basis to ensure the personal safety of everyone. They make sure that health and safety standards and local liquor regulations are obeyed.
>
> In addition to their regular duties, food service managers perform a variety of administrative assignments, such as keeping employee work records, preparing the payroll, and completing paperwork to comply with licensing, tax, wage and hour, unemployment compensation, and Social Security laws. Some of this work may be delegated to an assistant manager or bookkeeper, or it may be contracted out, but

most general managers retain responsibility for the accuracy of business records. Managers also maintain records of supply and equipment purchases and ensure that accounts with suppliers are paid.

Managers tally the cash and charge receipts received and balance them against the record of sales, securing them in a safe place. Finally, managers are responsible for locking up the establishment, checking that ovens, grills, and lights are off, and switching on alarm systems.

Technology influences the jobs of food service managers in many ways, enhancing efficiency and productivity. Many restaurants use computers and business software to place orders and track inventory and sales. They also allow food service managers to monitor expenses, employee schedules, and payroll matters more efficiently.

In most full-service restaurants and institutional food service facilities, the management team consists of a *general manager*, one or more *assistant managers*, and an *executive chef*. The executive chef is responsible for all food preparation activities, including running kitchen operations, planning menus, and maintaining quality standards for food service. In some cases, the executive chef is also the general manager or owner of the restaurant. General managers may employ several assistant managers that oversee certain areas, such as the dining or banquet rooms, or supervise different shifts of workers. . . .

In restaurants, mainly full-service independent ones where there are both food service managers and executive chefs, the managers often help the chefs select menu items. Managers or executive chefs at independent restaurants select menu items, taking into account the past popularity of dishes, the ability to reuse any food not served the previous day, the need for variety, and the seasonal availability of foods. Managers or executive chefs analyze the recipes of the dishes to determine food, labor, and overhead costs, work out the portion size and nutritional content of each plate, and assign prices to various menu items. Menus must be developed far enough in advance that supplies can be ordered and received in time.

Managers or executive chefs estimate food needs, place orders with distributors, and schedule the delivery of fresh food and supplies. They plan for routine services or deliveries, such as linen services or the heavy cleaning of dining rooms or kitchen equipment, to occur during slow times or when the dining room is closed. Managers also arrange for equipment maintenance and repairs, and coordinate a variety of services such as waste removal and pest control. Managers or executive chefs receive deliveries and check the contents against order records. They inspect the quality of fresh meats, poultry, fish, fruits, vegetables, and baked goods to ensure that expectations are met. They meet with representatives from restaurant supply companies and place orders to replenish stocks of tableware, linens, paper products, cleaning supplies, cooking utensils, and furniture and fixtures.

Handbook, 2010-11 ed., available at http://www.bls.gov/oco/ocos024.htm (last accessed October 11, 2011). The duties and responsibilities proposed for the beneficiary are largely encompassed within those described by the *Handbook* as normally performed by food service managers. Having made that determination, we turn next to the *Handbook's* findings regarding the educational requirements for food service managers:

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

Id. Thus, the *Handbook* explains unequivocally that a bachelor's degree in a specific specialty is not the normal minimum requirement for entry as a food service manager, as it specifically states that most food service managers do not possess a bachelor's degree. Furthermore, the fact that "some postsecondary education, including a college degree," is "increasingly preferred" or that some employers recruit management trainees from two- and four-year college hospitality or food service programs is not equivalent to requiring a bachelor's degree in a specific specialty as a normal minimum entry requirement.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not rely simply upon a proposed position's title. The specific duties of the 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 beneficiary, 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.

As discussed, we have determined that the duties of the proposed largely mirror those listed in the *Handbook* among those normally performed by food service managers. However, our review has found that this occupation does not normally impose a normal minimum entry requirement of a bachelor's degree in a specific field of study as required by section 214(i)(1)(B) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

Nor do we find convincing the citations by counsel and the petitioner to the Department of Labor's *Occupational Information Network (O*NET™ Online)*. *O*NET™ Online* is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a requirement for a given position, as *O*NET™ Online's* JobZone assignments make no mention of the specific field of study from which a degree must come. As was noted previously, USCIS 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 proposed position. With regard to the Specialized Vocational Preparation (SVP) rating, we note that an SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. Again, USCIS 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 proposed position. For all of these reasons, the *O*NET™ Online* excerpt is of little evidentiary value to the issue presented on appeal.

Counsel's statements in his July 1, 2009 letter made in response to the director's request for additional evidence serve as further evidence that a bachelor's degree in a specific specialty is not required in order to perform the duties of the proposed position. In his May 19, 2009 request for additional evidence, the director had asked for clarification regarding how the beneficiary's degree in economics related to his proposed duties. However, in his response counsel declined to elaborate, and claimed that it is the beneficiary's degree itself, and not the particular field from which it was earned, that relates to the proposed position.

For all of these reasons, we find that the petitioner has failed to demonstrate that its proposed position qualifies for classification as a specialty occupation under the requirements of the first criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

We turn next to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

The petitioner has not satisfied the first of the two alternative prongs at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). This prong alternatively requires a petitioner to establish that a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proposed position; and (2) located in organizations that are similar to the petitioner.

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

As already discussed, the petitioner has not established that its proposed position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree *in a specific specialty*.

Nor has the petitioner submitted evidence that the industry's professional associations have made a degree in a specific specialty a minimum requirement for entry.

In order to determine whether the petitioner's degree requirement is common to the industry in parallel positions among similar organizations, we have reviewed the job vacancy announcements contained in the record, and we find them unpersuasive. The petitioner has not submitted any evidence to demonstrate that either[1] of these job postings is from a company "similar" to the petitioner. There is no evidence that the advertisers are similar to the petitioner in size, scope, and scale of operations, business efforts, and expenditures. Neither of the announcements states the size of the employer. Also, there is no evidence in the record as to how representative these advertisements are of the advertisers' 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)).

Moreover, we note that these job postings fail to indicate that a baccalaureate degree in a specific field, or its equivalent, is a normal minimum entry requirement. Although Pappas Restaurants requires a degree, it does not require that it be from a specific specialty. To the contrary, its posting specifically states "all majors accepted." Although the posting from T.G.I. Friday's states that a degree is "preferred," it does not indicate that it is mandatory. Accordingly, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The petitioner has also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." The duties of the proposed position are similar to those of food service managers as outlined in the *Handbook*, and the *Handbook* does not indicate that a baccalaureate degree in a specific field, or its equivalent, is a normal minimum entry requirement for such positions. The duties proposed by the petitioner are no more complex or unique than those outlined by the *Handbook;* to the contrary, the duties proposed by the petitioner largely mirror those outlined in the *Handbook*. The duties discussed by the petitioner appear no more unique, complex, or specialized than those discussed in the *Handbook*. The evidence of record does not refute the *Handbook's* information indicating that a bachelor's degree from a specific field of study is not the normal minimum entry requirement for positions such as the one proposed here.

We turn next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*), which requires that the petitioner demonstrate it normally requires a degree or its equivalent for the position. To determine a petitioner's ability to satisfy the third criterion, we normally review its past employment practices, as well as the histories, including the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas.[2] In his July 1,

[1] Although the petitioner discussed several job postings in its June 30, 2009 letter, it only submitted two of them into the record. We will therefore only consider those two job postings.

[2] Even if a petitioner believes or otherwise assert that a proposed position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS

2009 submission, counsel provided the names of six individuals whom he asserts have either bachelor's degrees or the equivalents of bachelor's degrees. However, as will be discussed below, the petitioner's employment of these individuals does not establish the proposed position as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*).

- [redacted] submitted a November 22, 1999 evaluation from Global Credential Evaluators, Inc. (Global) equating P-P-'s education to three years of coursework in business administration and secretarial practice. However, counsel submitted no evidence establishing that P-P-'s credentials are equivalent to the actual attainment of a bachelor's degree. We also note that the record lacks a copy of the transcript upon which the Global evaluator relied in reaching her conclusion. Moreover, even if P-P- had earned a degree in business administration and secretarial practice, the fact that the petitioner would find acceptable an individual with such an educational background further supports our determination that a bachelor's degree *in a specific specialty* is not required in order to perform the duties of the proposed position.

- [redacted] submitted a July 8, 2002 evaluation from Global equating S-J-'s foreign degree to a bachelor's degree in business administration, with no further specialization, awarded by a regionally accredited university in the United States. However, the fact that the petitioner would find acceptable an individual with a degree in business administration, with no further specialization, further supports our determination that the proposed position does not qualify for classification as a specialty occupation, as a petitioner must demonstrate that its proposed position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *See Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). To prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. Again, USCIS interprets 8 C.F.R. § 214.2(h)(4)(iii)(A) as requiring a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a

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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 job so long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proposed position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation"). Here, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*) based on its normal hiring practices.

[3] Name withheld to protect individual's identity.

[4] Name withheld to protect individual's identity.

degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007). We also note that S-J-'s transcript does not indicate any coursework in the field of restaurant management, which further supports our conclusion that the petitioner would find acceptable a degree from a range of fields.

- N-S-.[5] Counsel submitted a December 3, 2001 evaluation from Global equating N-S-'s foreign degree to a bachelor's degree in general management, awarded by an unaccredited university. We note that pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C)(2), in order to qualify to perform services in a specialty occupation on the basis of his or her foreign degree, an alien must establish that the foreign degree has been deemed equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an *accredited* college or university. We also note that N-S-'s transcript does not indicate any coursework in the field of restaurant management, which further supports our conclusion that the petitioner would find acceptable a degree from a range of fields.

- S-N-.[6] S-N- earned a master's degree in economics from Western Michigan University and is a certified public accountant in the State of Illinois. S-N-'s credentials add further weight to our determination that a bachelor's degree in a specific specialty is not required in order to perform the duties of the proposed position.

- P-P-.[7] Counsel stated that P-P- completed three of coursework in business administration and secretarial practice in Thailand,[8] and asserted that P-P-'s combination of education and work experience are equivalent to a bachelor's degree in restaurant management. However, counsel submitted no evidence, such as a credentials evaluation, to support his assertion. 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. at 165. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

- S-T-.[9] Counsel submitted an August 15, 2007 evaluation from Global equating S-T-'s foreign degree to a bachelor's degree in business administration, with no further specialization, awarded by a regionally accredited university in the United States. Again, the fact that the petitioner would find acceptable an individual with a degree in business administration, with no further specialization, further supports our determination that the proposed position does not qualify for classification as a specialty occupation. *See Matter of*

[5] Name withheld to protect individual's identity.
[6] Name withheld to protect individual's identity.
[7] Name withheld to protect individual's identity.
[8] Although their initials are identical and their qualifications are similar, this is not the same individual referenced above.
[9] Name withheld to protect individual's identity.

> *Michael Hertz Associates*, 19 I&N Dec. at 558; *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. Moreover, we note that the Global evaluator stated that only "[t]hree years of course work were submitted for a four-year program of study," and that although "[i]t appears that the applicant may have taken courses previous to this program of study," it "was not indicated in her application . . . and no additional course work was submitted for evaluation." That the evaluator was unable to confirm whether S-T- actually completed four years of coursework, yet still found her coursework equivalent to a four-year degree, diminishes the probative value of the evaluation.

Furthermore, the record lacks evidence that any of these individuals, other than S-N-, were ever actually employed by the petitioner. Again, 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. at 165.

In order to classify its proposed position as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*), the petitioner must demonstrate that it requires an individual with a bachelor's degree *in a specific specialty* as a normal minimum requirement for entry into the position. In accordance with the previous discussion, the petitioner has failed to make that demonstration and has not satisfied 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*).

The fourth criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*), requires the petitioner to establish that the nature of its proposed 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. As previously discussed, the *Handbook* indicates that a baccalaureate degree in a specific specialty is not a normal minimum entry requirement. The petitioner has failed to differentiate the duties of the proposed position from those described in the *Handbook* and, as such, has failed to indicate the specialization and complexity required by this criterion. The evidence of record does not distinguish the duties of the proposed position as more specialized and complex than those normally performed by food service managers, which do not normally require, nor are they usually associated with, the attainment of at least a bachelor's degree in a specific field. As a result, the record fails to establish that the proposed position meets the specialized and complex threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

The June 19, 2009 evaluation by [redacted] does not establish that the proposed position qualifies for classification as a specialty occupation under any of the criteria discussed above. In his evaluation, [redacted] briefly summarized the petitioner's business operations, listed the job duties proposed for the beneficiary, stated that performance of those duties requires the attainment of a bachelor's degree, or its equivalent, in restaurant management, business administration, or a related area, and listed several college courses he believes would confer the necessary education. However, we are not persuaded by [redacted]'s evaluation, as he did not establish his qualifications to opine on whether the proposed position requires the attainment of a bachelor's degree in a specific specialty as a minimum entry requirement. He did not address or demonstrate knowledge of the petitioner's particular business operations, beyond a three-sentence generalization. He did not note the size or scale of operations of the petitioner and did not indicate whether he visited the petitioner's premises or spoke with any of its employees or anyone affiliated with it. Accordingly,

[redacted] did not establish an adequate factual foundation to support his opinions, and his letter does not establish that the proposed position qualifies for classification as a specialty occupation under any of the criteria discussed above. 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. 1988).

On appeal, counsel argues that "[o]n at least two prior occasions, USCIS has reviewed and approved H-1B petitions filed by [the petitioner] on behalf of potential restaurant managers," and that "[i]n doing so, the USCIS acknowledged that [the petitioner's] position of 'restaurant manager' was in fact a 'specialty occupation.'" We disagree, as each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although we may attempt to hypothesize as to whether the prior petitions referenced by counsel were similar to the position proposed here or were approved in error, no such determination may be made without review of the original records, in their entirety. However, if the prior petitions were approved based upon evidence substantially similar to the evidence contained in this record of proceeding, those approvals would constitute material and gross error on the part of the director. USCIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither USCIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied,* 485 U.S. 1008 (1988).

For all of these reasons, we agree with the director's determination that the petitioner failed to demonstrate that the proposed position qualifies for classification as a specialty occupation.

Finally, it is noted that the certified LCA provided in support of the instant petition lists a Level I prevailing wage level for food service managers in the Mobile, Alabama metropolitan statistical area.[10] This indicates that the LCA, which is certified for an entry-level position, is at odds with the statements by counsel and the petitioner regarding the complexity of the duties to be performed by the beneficiary.

Given that the LCA submitted in support of the petition is for a Level I wage,[11] it must therefore be concluded that either (1) the position is a low-level, entry position relative to other food service managers; or that (2) the LCA does not correspond to the proposed petition.

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[10] The Level I prevailing wage for a food service manager in Mobile, Alabama was $29,058 at the time the LCA was certified. The Level II prevailing wage was $39,562; the Level III prevailing wage was $50,066; and the Level IV prevailing wage was $60,570. *See* Foreign Labor Certification Data Center, Online Wage Library, *available at* http:///www.flcdatacenter.com (accessed October 11, 2011).

[11] According to guidance regarding wage level determination issued by the DOL in 2009 entitled *Prevailing Wage Determination Policy Guidance,* at page 7, Level I wage rates, which are labeled as "entry" rates, "are assigned to job offers for beginning level employees who have only a basic understanding of the occupation.

While the DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part, the following:

> For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

(Italics added). The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has not demonstrated that the petition is supported by an LCA which corresponds to the petition, and the petition must be denied for this additional reason.

The petitioner has failed to demonstrate that the proposed position qualifies for classification as a specialty occupation. Beyond the decision of the director, the petitioner has also failed to demonstrate that the petition is supported by an LCA which corresponds to the petition.[12] Accordingly, the beneficiary is ineligible for nonimmigrant classification under section 101(a)(15)(H)(i)(b) of the Act and this petition must remain denied.

The petition will remain denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met and the appeal will be dismissed.

ORDER: The appeal is dismissed.

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."

[12] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).