

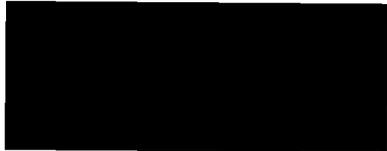
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



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



D2

Date: **APR 05 2012**

Office: VERMONT SERVICE CENTER

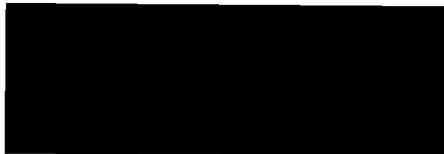
FILE: 

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:

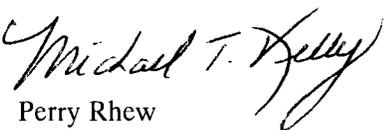


INSTRUCTIONS:

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

If you believe the 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,


for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the Vermont Service Center 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.

The petitioner, which identified itself as a restaurant with 13 employees, seeks to employ the beneficiary in what it designates as “manager” position in the Form I-129 (Petition for a Nonimmigrant Worker) and the accompanying Labor Condition Application (LCA). Accordingly, the petitioner filed this H-1B petition for classification of the beneficiary as a temporary 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 petitioner failed to establish that the proffered position is a specialty occupation.

The record of proceeding before the AAO contains (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 denial decision; and (5) the Form I-290B and brief submitted by counsel. The AAO reviewed the record in its entirety before issuing its decision.

The primary issue before the AAO is whether the position qualifies 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. As will now be discussed, the AAO finds that the director's decision to deny the petition for failure to establish the proffered position as a specialty occupation was correct. Therefore, the appeal will be dismissed, and the petition will be denied.

Section 214(i)(1) of 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 proffered 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 this matter, the petitioner, a restaurant, seeks the beneficiary's services as a manager. In the petitioner's letter of support submitted with the initial filing, the petitioner characterized the position as that of a "business manager" and described it as follows:

The nature of the business dictates the corporation have professionally designed and managed inventory-control and financial systems. The business manager will be responsible for evaluating the current systems, and designing and implementing necessary modifications to those systems.

The business manager must provide a high-level of analyses. The business manager must be able to provide accurate and up-to-date financial, inventory, and sales reports to the owners and officers of the company so that they can rely on such information to make responsible decisions. The business manager must be able to discuss business matters and respond to requests for information from the owner, the corporate accountants, and any creditors of the company.

The business manager will be responsible for overseeing the day-to-day operations of the restaurant. The business manager must evaluate the vendors and ensure that the restaurant has retained the highest quality vendors. The business manager must ensure that he restaurant has the best possible terms on all vendor contracts. The business manager must oversee the shift managers and ensure that they allocate personnel in an effective manner and uphold the restaurant's standards. The business manager must ensure that the shift managers are accountable for guest service, the overall appearance of the restaurant and maintenance of the equipment. The business manager must ensure that personnel policies and practices facilitate the efficient and effective operation of the restaurant and result in a high rate of employee retention.

The business manager will also be responsible for the marketing effort. The business manager will advise on the development and refinement of the marketing strategy and the retention, of any, of marketing firms for the implementation of that strategy. Such advice must take into account the current and projected revenue of the enterprise, past revenue trends, the investment criteria of the owners, and the reputation of the restaurant.

The business manager must assist with the identification and evaluation of business opportunities with the goal of achieving the maximum profit and furthering the reputation of the restaurant.

This support letter also asserts that the business manager position requires the services of a professional with a bachelor's degree in business administration or a related field. Also, the petitioner submitted an evaluation from Silvergate Evaluations Inc. and the beneficiary's transcripts from Dublin Institute of Technology as evidence that the beneficiary has the equivalent of a bachelor's degree in business administration from an accredited institution of higher education in the United States.

As a preliminary matter, it must be noted that the petitioner's acceptance of a bachelor's degree in "business administration or a related field" for the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered 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'r 1988).

To prove that a job requires the theoretical and practical application of a body of highly 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 or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as one in business administration without a specific academic concentration, 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).¹

In this matter, the petitioner indicates its assessment that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone. However, the AAO will continue its analysis of this record of proceeding in order to identify evidentiary deficiencies which also preclude approval of this petition.

At the outset, the AAO makes the following findings that have a material bearing on the outcome of this appeal. The duties of the proffered position, and by extension, the position itself, are described in generalized terms of generic functions (such as, for instance, "evaluating the current systems," "provid[ing] accurate and up-to-date financial, inventory, and sales reports," and ably

¹ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. See, e.g., *Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; cf. *Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.

“discuss[ing] business matters.”) Such information does not convey the substantive nature of the services that the beneficiary would perform on a day-to-day basis, a body of highly specialized knowledge that would have to be theoretically and practically applied to perform such services, or a necessary correlation between such knowledge and the need for at least a bachelor’s degree level of knowledge in a specific specialty.

The AAO further finds that the generalized and generic levels at which the proffered position and its constituent duties are presented in this record of proceeding do not establish relative complexity, uniqueness, and/or specialization as attributes of the proffered position or its constituent duties that distinguish the proffered position as requiring a higher or more specialized level of educational attainment than positions within its occupational classification which do not require the theoretical and practical application of at least a bachelor’s degree level of a body of highly specialized knowledge in a specific specialty.

As an administrative note, the above comments and findings are hereby incorporated into, and adopted as part of, this decision’s later analysis of each criterion of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)

The submitted Labor Condition Application (LCA) was certified for a “Manager” to work full-time at the petitioner’s restaurant in Arlington, Virginia at a wage of \$48,131.00 per year.²

On July 31, 2009, the director requested additional information from the petitioner to establish that the proffered position is a specialty occupation.

In response to the RFE, the petitioner submitted another description of the duties of the proffered position. In addition to reiterating the duty descriptions of the aforementioned letter of support, submitted with the initial filing, the petitioner specifically states that the business manager will have administrative and clerical support staff. The petitioner also estimated the time that the business manager would spend for each duty as follows: 75% of time with inventory-control and financial systems during her first 4-6 weeks; 35% weekly for daily analysis and preparation of weekly and monthly reports; 25% of time for overseeing the day-to-day operations of the restaurant; 25% of her time for overseeing the shift managers and personnel matters; and 15% for marketing effort.

Counsel also submitted a letter from the proprietor of another Irish restaurant, the [REDACTED] and Restaurant, stating his opinion that successful operation of restaurants, particularly in the metropolitan area where [REDACTED] and the petitioner are located, requires managers with a baccalaureate degree or its equivalent in hospitality management or a similar field. Accompanying the letter are a copy of a notice of approval of an H-1B petition for one of the [REDACTED]’s employees and two advertisements for restaurant manager positions.

² This is the prevailing wage at Level I of Administrative Services Managers (SOC code: 11-3011) in Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division for 7/2008 - 6/2009. See <http://www.flcdatcenter.com/OesQuickResults.aspx?code=11-3011&area=47984&year=9&source=1> (last accessed March 6, 2012)

The director denied the petition, finding that the petitioner had satisfied none of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualifies for classification as a specialty occupation.

On appeal, counsel for the petitioner asserts that the director erred in considering the proffered position as a food service manager and argues that the proffered position of business manager is not a food service manager, but what counsel terms “a fiscal/financial/HR compliance/marketing professional” position.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO turns 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 Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies 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 AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. The “Food Services Managers” chapter at the 2010-2011 edition of the *Handbook*, available at <http://www.bls.gov/oco/ocos024.htm> (last accessed March 6, 2012), states the nature of work for food services managers as follows:

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.

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.

The “Administrative Services Managers” chapter at the 2010-2011 edition of the *Handbook*, available at <http://www.bls.gov/oco/ocos002.htm> (last accessed March 6, 2012), states the nature of work for administrative services managers as follows:

Administrative services managers plan, coordinate, and direct a broad range of services that allow organizations to operate efficiently. They might, for example, coordinate space allocation, facilities maintenance and operations, and major property and equipment procurement. They also may oversee centralized operations that meet the needs of multiple departments, such as information and data processing, mail, materials scheduling and distribution, printing and reproduction, records management, telecommunications management, security, recycling, wellness, and transportation services. Administrative services managers also ensure that contracts, insurance requirements, and government regulations and safety standards are followed and up to date. They may examine energy consumption patterns, technology usage, and personal property needs to plan for their long-term maintenance, modernization, and replacement.

Specific duties for these managers vary by size of company or office and degree of responsibility and authority. In small organizations, a *single administrative services manager, sometimes called an office manager, may oversee all support services.* In larger ones, however, there may be several layers of administrative services managers that may specialize in different areas and report to directors of

administration, or vice presidents of administration who oversee all administrative services.

Upon consideration of the entire record of proceeding, the AAO finds that, to the extent to which it and its constituent duties are described in the record of proceeding, the proffered position substantially comports with the Food Services Managers occupational classification as addressed in the in the *Handbook* (except for the portion specifically addressing executive chefs). It is noted that the proffered position also involves some administrative services duties as described under the chapter of Administrative Services Managers in the *Handbook*. However, according to the narrative in the *Handbook*, the main duties of the administrative services managers focus on overseeing all support services, especially in a relatively small organization like the petitioner, while the proffered position's administrative services duties are a very small portion of her entire responsibilities. Therefore, the AAO does not concur with the petitioner's assertion that the proffered position falls under SOC code 11-3011 Administrative Services Managers, the occupational classification designated in the certified LCA. Although the proposed duties of the proffered position include some non-food services management duties, the AAO agrees with the director's finding that the proposed duties of the proffered position most closely resemble that of Food Services Managers as described in the *Handbook*.

On appeal, counsel asserts that based on the proposed duties, the proffered position is not a food services manager, but a fiscal/financial/HR compliance/marketing professional position. The AAO finds, however, that the evidence in the record of proceeding does not establish that the duties that counsel attributes to the counsel-termed "fiscal/financial/HR compliance/marketing professional position" substantially exceeds those of a food service manager as described in the *Handbook*. 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 Obaigbena*, 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).

However, as will now be discussed, the *Handbook* indicates that food services managers do not constitute an occupational group that categorically requires a specialty-occupation level of education, that is, at least a U.S. bachelor's degree, or the equivalent, in a specific specialty. *Handbook*, 2010-11ed., available at <http://www.bls.gov/oco/ocos024.htm>.

More specifically, the introduction to the "Training, Other Qualifications, and Advancement" section of the *Handbook* states that:

Education and training. 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. (emphasis added). Although the *Handbook* indicates that “many” food services manager positions increasingly prefer a college degree, it also states that most food service managers have less than a bachelor’s degree.

As reflected in the above discussions of the *Handbook*’s information regarding the respective occupational classifications, neither Administrative Services Managers nor Food Services Managers constitute an occupational group that categorically requires for entry at least a bachelor’s degree, or the equivalent, in a specific specialty. Accordingly, inclusion in either occupational group is not in itself sufficient to establish a position as one that normally requires at least a bachelor’s degree, or the equivalent, in a specific specialty. The AAO further finds that there is no persuasive evidence in the record of proceeding that overcomes the implication of the relevant chapters of the *Handbook* that the proffered position is not one which would normally require at least a bachelor’s degree, or its equivalent, in a specific specialty.

Thus, for the reasons discussed above, the AAO finds that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1)). As the record’s descriptions of the proposed duties are limited to generic and generalized functions, which are normally performed by food services managers pursuant to descriptions in the *Handbook*, and based on the fact that the *Handbook* does not indicate that at least a bachelor’s degree in a specific specialty or its equivalent is normally a minimum entry requirement for this occupation, it cannot be found that the petitioner has satisfied this first criterion of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO finds 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 requires a petitioner to establish that a bachelor’s degree, in a specific specialty, 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.

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 proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor’s degree in a specific specialty.

In response to the director’s RFE, counsel for the petitioner submitted the letter, dated September 22, 2009, from [REDACTED], the proprietor of the [REDACTED], which states that it is a high-end restaurant with 45 employees in the DC Metro area, and which opines that the successful

operation of restaurants like the petitioner and the [REDACTED] requires managers with a baccalaureate degree or its equivalent in hospitality management or a similar field. The author also states that he only hires managers with such credentials. As an attachment, the author submitted a copy of an H-1B approval for his employee.

The AAO finds that the record of proceeding does not provide evidence substantiating the accuracy of the [REDACTED] proprietor's assertions regarding educational requirements for the proffered position. The record does not contain any evidence showing that [REDACTED] opinion comports with an the industry-wide standard. [REDACTED] does not cite any surveys, studies, or publications of any sort with regard to industry-wide practices, nor does he establish himself as a recognized authority on the recruiting and hiring practices in the industry with regard to positions parallel to the one proffered here and in business organizations substantially similar to the petitioner. The AAO finds that, while relevant to this proceeding, [REDACTED] letter is not probative of the proffered position as being a specialty occupation. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Counsel also submitted two advertisements for restaurant manager positions, in response to the director's RFE, as evidence that the degree requirement asserted by the petitioner is common to the industry in parallel positions among similar organizations. While both advertisements are placed for parallel positions by organizations in the food services industry and the advertisements specify a bachelor's degree as a requirement, they do not require a bachelor's degree in a specific specialty. Therefore, these two advertisements are not indicative of the type of commonly required degree that is necessary to satisfy the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

For all of the reasons noted above, the petitioner has failed to satisfy the first alternative prong at 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."

As noted earlier, the AAO integrates into the following analysis this decision's earlier comments and findings with regard to the proffered position and its duties as described in the record of proceeding.

To begin with, and as discussed previously, the petitioner itself does not require at least a baccalaureate degree, or its equivalent, in a specific specialty. In addition, the petitioner failed to credibly demonstrate exactly what the beneficiary will do on a day-to-day basis such that the requisite level of complexity or uniqueness can even be determined. Thus, the petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position.

Specifically, even though the petitioner and its counsel claim that the proffered position's duties are so complex and unique that a bachelor's degree is required, the petitioner failed to demonstrate how the food services manager duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish a necessary correlation between a need for such a curriculum and unestablished levels of complexity or uniqueness that may, or may not, reside in the proffered position. .

The evidence of record does not establish that the position that is the subject of this petition is significantly different from other food services manager positions such that it refutes the *Handbook's* information to the effect that food services manager positions are performed by persons with degrees across a wide range of disparate disciplines rather than with a degree in a specific specialty. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than food services managers or other closely related positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. Consequently, as the petitioner fails to demonstrate how the proffered position is so complex or unique relative to similar positions that do not require a person with at least a a baccalaureate degree in a specific specialty or its equivalent, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) -- the employer normally requires a degree or its equivalent for the position. The record does not contain documentary evidence showing that the petitioner previously employed any individuals in the proffered position, the petitioner has not presented evidence for consideration under this criterion. ³

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent.

³ While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the 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 proffered 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* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

As earlier indicated, the AAO here incorporates by reference, and integrates into the following analysis, this decision's earlier comments and findings with regard to the descriptions of the proffered position and its duties.

Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than food services manager positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent.⁴

Relative complexity is not sufficiently developed by the petitioner and, in the absence of evidence to the contrary, the duties of the proposed position are not so specialized and complex as to require the highly specialized knowledge usually associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. The AAO, therefore, concludes that the proffered position does not meet the requirements 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, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

The appeal will be dismissed and the petition denied. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. § 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.

⁴ Counsel argues on appeal that the proffered position qualifies as a specialty occupation on the basis that its duties are so specialized and complex. However, the duties as described lack sufficient specificity to distinguish the proffered position from other food service materials manager positions for which a bachelor's or higher degree in a specific specialty, or its equivalent, is not required to perform their duties. Moreover, the petitioner has designated the proffered position as a Level I position on the submitted Labor Condition Application (LCA), indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. See Employment and Training Administration (ETA), *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009). Therefore, it is simply not credible that the position is one with specialized and complex duties, as such a higher-level position should be classified as above Level I and require a significantly higher prevailing wage. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).