

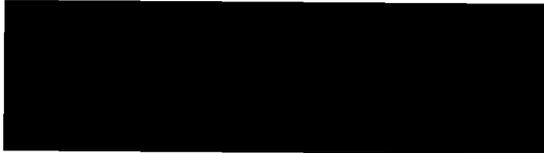
identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

**PUBLIC COPY**

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 06 2012** Office: CALIFORNIA 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:

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 California 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 is a restaurant franchise that seeks to employ the beneficiary as its director of finance and marketing. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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, finding that the position was not a specialty occupation. On appeal, counsel contends that the proffered position is in fact a specialty occupation because of the complexity of the duties.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE; (3) the director's denial letter; and (4) Form I-290B with counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

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 [(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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

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 a particular position 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 (5<sup>th</sup> 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.

The petitioner seeks the beneficiary’s services as its director of finance and marketing. In the petitioner’s June 29, 2009 letter of support, it explained that it intended to “spearhead” the expansion of its restaurant franchises within the United States and the western world, with a goal of opening six restaurants in the State of California within five years. Consequently, it claimed that it required the services of the beneficiary as its director of finance and marketing in order to develop and introduce the petitioner’s restaurant to the United States. Regarding the duties of the proffered position, the petitioner stated as follows:

In the capacity of our Director of Finance & Marketing, [the beneficiary] will execute full-performance level work in our finance and marketing departments for our company. In detail, the following will be her duties and responsibilities:

- Leads the organization and sets overall direction for: new restaurant expansion strategies and market planning; development program performance metrics; new restaurant investment strategies and investment cost budgeting; and vendor relationships essential to the ongoing execution of the development program including suppliers, brokers, contractors, and others.
- Ensures successful, high-quality, execution of the Company's development program and attainment of the Company's budgeted restaurant opening, incremental sales, occupancy penetration and value creation objectives.
- Serves as thought-leader for the company on the application of consumer research, analytics, and information tools to enhance development program processes and performance. Informed on current practices and ideas in the marketplace.
- Coordinates the development and production of appropriate advertising and promotional materials in accordance with established budgetary and quality standards. Ensures quality performance in the areas of copy, media, promotion and other creative work.
- Evaluates the success of marketing and sales programs with management and recommends adjustments and changes to achieve desired results.
- Identifies, analyzes and reports on who our competition is, what they offer and how we differ.
- Develops, implements and monitors plans that improve restaurant earnings. This includes using a wide variety of technology and tools to prepare integrated revenue/expense analyses, projections, reports, and presentations.
- Develops and maintains performance metrics, measurements, methods and targets[;] identifies performance improvement opportunities.
- Provides ongoing management consulting on the use and interpretation of analyses, reports, methodologies, systems and source data, acting as a significant information resource.
- Controls the development of the annual budget.

The petitioner concluded by stating that the proffered position was in fact a specialty position, and pointed out that USCIS typically denied similar petitions on the basis that the petitioning entity was too small to require the services of the proffered position. In support of this contention, the petitioner submitted an expert opinion letter from [REDACTED], Ph.D., Professor of Finance at Seattle Pacific University. [REDACTED] concluded that, based upon the organizational structure of the petition and its proposed expansion, the candidate for the proffered position of director of finance and marketing should possess, at a minimum, a bachelor's degree in finance or a related field. The petitioner concluded by stating that the beneficiary held a Bachelor of Science degree in management from Purdue University and a Master of Business Administration with a focus on management and finance from Claremont Graduate University.

The director found this initial evidence insufficient to establish eligibility, and consequently issued an RFE on July 10, 2009. In his request, the director noted that the proffered position appeared akin to that of an administrative services manager according to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*. Consequently, the director asked the petitioner to submit a more detailed description of the duties of the proffered position, as well as additional evidence establishing that the proffered position satisfied the criteria for a specialty occupation set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A). The director also requested information pertaining to the nature of the petitioner's business.

In a response dated August 6, 2009, the petitioner addressed the director's queries. The petitioner contended that the duties of the proffered position were akin to the positions of financial manager and market research analyst as described by the *Handbook*. With regard to the proffered position, the petitioner provided the following updated description of the position:

**Duties as a Financial Manager**

1. Develops, implements and monitors plans that improve restaurant earnings. Develops and maintains performance metrics, measurements, methods and targets, identifies performance improvement opportunities. This includes using a wide variety of technology and tools to prepare integrated revenue, expense analyses, projections, reports, and presentations. Provides ongoing management consulting on the use and interpretation of analyses, reports, methodologies, systems and source data, acting as a significant information resource.

Percentage of time:	30%
Hours per week:	12
Level of Responsibility:	Leader
Minimum Requirements:	Bachelor's or higher degree in finance, accounting or business administration.
Why a Bachelor's is required:	Must have knowledge of economic and accounting principles and practices, the financial markets, banking and the analysis and reporting of financial data. Must have knowledge of business and management principles involved in strategic planning, resource allocation, human resources

modeling, leadership technique, production methods, and coordination of people and resources. Must have knowledge of arithmetic, algebra, geometry, calculus, statistics, and their applications.

2. Ensures successful, high-quality, execution of the Company's development program and attainment of the Company's budgeted restaurant opening, incremental sales, occupancy costs, restaurant investments, and incremental earnings contribution. Balances market penetration and value creation objectives. Controls the development of the annual budget.

Percentage of time:	20%
Hours per week:	8
Level of Responsibility:	Leader
Minimum Requirements:	Bachelor's or higher degree in finance, accounting or business administration.
Why a Bachelor's is required:	Must have knowledge of economic and accounting principles and practices, the financial markets, banking and the analysis and reporting of financial data. Must have knowledge of business and management principles involved in strategic planning, resource allocation, human resources modeling, leadership technique, production methods, and coordination of people and resources. Must have knowledge of arithmetic, algebra, geometry, calculus, statistics, and their applications.

3. Serves as a thought-leader for the company on the application of consumer research, analytics, and information tools to enhance development processes and performance. Informed on current practices and ideas in the marketplace. Coordinates the development and production of appropriate advertising and promotional materials in accordance with established budgetary and quality standards. Ensures quality performance in the areas of copy, media, promotion and other creative work.

Percentage of time:	30%
Hours per week:	12
Level of Responsibility:	Leader
Minimum Requirements:	Bachelor's or higher degree in business administration, marketing or related field.
Why a Bachelor's is required:	Must have knowledge of principles and methods for showing, promoting, and selling products or services. This includes marketing strategy and tactics, product demonstration, sales techniques, and sales control systems. Must have knowledge of

media production, communication, and dissemination techniques and methods. This includes alternative ways to inform and entertain via written, oral, and visual media. Must have knowledge of principles and processes for providing customer and personal services. This includes customer needs assessment, meeting quality standards for services, and evaluation of customer satisfaction.

4. Evaluates the success of marketing and sales programs with management and recommends adjustments and changes to achieve desired results. Identifies, analyzes and reports on who our competition is, what they offer and how we differ.

Percentage of time:	20%
Hours per week:	8
Level of Responsibility:	Leader
Minimum Requirements:	Bachelor's or higher degree in business administration, marketing or related field.
Why a Bachelor's is required:	Must have knowledge of principles and methods for showing, promoting, and selling products or services. This includes marketing strategy and tactics, product demonstration, sales techniques, and sales control systems. Must have knowledge of media production, communication, and dissemination techniques and methods. This includes alternative ways to inform and entertain via written, oral, and visual media. Must have knowledge of principles and processes for providing customer and personal services. This includes customer needs assessment, meeting quality standards for services, and evaluation of customer satisfaction.

In addition, the petitioner submitted two new letters opining in support of the contention that the proffered position was a specialty occupation. The petitioner also submitted its organizational chart and copies of job postings for positions in companies the petitioner claimed were similar to its organization.

On August 18, 2009, the director denied the petition. The director found that the duties of the proffered position as described were akin to that of a market research analyst. However, based on the nature and scope of the petitioner's business the director concluded that the proffered position was more akin to that of a marketing manager. The director noted that, according to the *Handbook*, the profession of marketing manager is not a specialty occupation, and further found that the petitioner had not established eligibility under any of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). On appeal, however, counsel contends that the director discounted the other duties of the proffered position, including the financial tasks, and further

claims that the director failed to consider the petitioner's five-year business expansion plan when considering the proffered position in relation to the scope of the petitioner's enterprise.

To make its determination whether the employment described above qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. Factors considered by the AAO when determining these criteria include: whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Although the petitioner divides the duties of the proffered position into the two distinct areas of finance and marketing, the AAO, like the director, is not persuaded that the proffered position will require the performance of financial duties akin to those of a financial manager as claimed by the petitioner. Though not addressed by the director in the denial, the AAO will review the pertinent sections of the *Handbook* with regard to financial occupations.

Regarding financial managers, the *Handbook* states, in relevant part:

Almost every firm, government agency, and other type of organization employs one or more financial managers. *Financial managers* oversee the preparation of financial reports, direct investment activities, and implement cash management strategies. Managers also develop strategies and implement the long-term goals of their organization.

The duties of financial managers vary with their specific titles, which include controller, treasurer or finance officer, credit manager, cash manager, risk and insurance manager, and manager of international banking. *Controllers* direct the preparation of financial reports, such as income statements, balance sheets, and analyses of future earnings or expenses, that summarize and forecast the organization's financial position. Controllers also are in charge of preparing special reports required by regulatory authorities. Often, controllers oversee the accounting, audit, and budget departments. *Treasurers* and *finance officers* direct their organization's budgets to meet its financial goals. They oversee the investment of funds, manage associated risks, supervise cash management activities, execute capital-raising strategies to support the firm's expansion, and deal with mergers and acquisitions. *Credit managers* oversee the firm's issuance of credit, establishing credit-rating criteria, determining credit ceilings, and monitoring the collections of past-due accounts.

*Cash managers* monitor and control the flow of cash receipts and disbursements to meet the business and investment needs of their firm. For example, cash flow projections are needed to determine whether loans must be obtained to meet cash requirements or whether surplus cash can be invested. *Risk* and *insurance managers* oversee programs to minimize risks and losses that might arise from financial transactions and business operations. Insurance managers

decide how best to limit a company's losses by obtaining insurance against risks such as the need to make disability payments for an employee who gets hurt on the job or costs imposed by a lawsuit against the company. Risk managers control financial risk by using hedging and other techniques to limit a company's exposure to currency or commodity price changes. Managers specializing in international finance develop financial and accounting systems for the banking transactions of multinational organizations. Risk managers are also responsible for calculating and limiting potential operations risk. Operations risk includes a wide range of risks, such as a rogue employee damaging the company's finances or a hurricane damaging an important factory. (Chief financial officers and other executives are included with top executives elsewhere in the *Handbook*.)

\* \* \*

In addition to the preceding duties, financial managers perform tasks unique to their organization or industry. For example, government financial managers must be experts on the government appropriations and budgeting processes, whereas healthcare financial managers must be knowledgeable about issues surrounding healthcare financing. Moreover, financial managers must be aware of special tax laws and regulations that affect their industry.

Financial managers play an important role in mergers and consolidations and in global expansion and related financing. These areas require extensive, specialized knowledge to reduce risks and maximize profit. Financial managers increasingly are hired on a temporary basis to advise senior managers on these and other matters. In fact, some small firms contract out all their accounting and financial functions to companies that provide such services.

The role of the financial manager, particularly in business, is changing in response to technological advances that have significantly reduced the amount of time it takes to produce financial reports. Technological improvements have made it easier to produce financial reports, and, as a consequence, financial managers now perform more data analysis that allows them to offer senior managers profit-maximizing ideas. They often work on teams, acting as business advisors to top management.

The stated duties in this matter are not akin to those of financial managers. For example, while the beneficiary may be responsible for tasks such as controlling the petitioner's annual budget and developing plans that improve restaurant earnings, these duties are not akin to the duties performed by financial managers as described above. For example, financial managers, according to the *Handbook*, require extensive specialized knowledge, and are often "are hired on a temporary basis to advise senior managers." In addition, small firms contract out all their accounting and financial functions to companies that provide such services. Moreover, the petitioner has failed to demonstrate that the beneficiary will assume any of the duties attributed to financial managers such as comptrollers, treasurers, finance officers or cash managers.

The AAO has also reviewed the occupational category of financial analyst. According to the *Handbook*:

*Financial analysts* provide guidance to businesses and individuals making investment decisions. Financial analysts assess the performance of stocks, bonds, commodities, and other

types of investments. Also called *securities analysts* and *investment analysts*, they work for banks, insurance companies, mutual and pension funds, securities firms, the business media, and other businesses, making investment decisions or recommendations. Financial analysts study company financial statements and analyze commodity prices, sales, costs, expenses, and tax rates to determine a company's value by projecting its future earnings. They often meet with company officials to gain a better insight into the firms' prospects and management.

\* \* \*

Financial analysts generally focus on trends impacting a specific industry, region, or type of product. For example, an analyst will focus on a subject area such as the utilities industry, an area such as Latin America, or the options market. Firms with larger research departments assign analysts even narrower subject areas. They must understand how new regulations, policies, and political and economic trends may impact the investments they are watching. *Risk analysts* evaluate the risk in portfolio decisions, project potential losses, and determine how to limit potential losses and volatility using diversification, currency futures, derivatives, short selling, and other investment decisions.

The description above also does not coincide with the description provided by the petitioner of the beneficiary's proffered position. While the beneficiary may be reviewing restaurant trends in a certain market, the beneficiary will not be advising the petitioner with regard to asset investment in the area of securities, commodities, or other types of investment.

The AAO, therefore, concurs with the director's findings that the duties of the proffered position are primarily marketing related.

According to the *Handbook*, market research analysts, found under the heading of "Market and Survey Researchers," are described as follows:

*Market and survey researchers* gather information about what people think. Market research analysts help companies understand what types of products people want, determine who will buy them and at what price. Gathering statistical data on competitors and examining prices, sales, and methods of marketing and distribution, they analyze data on past sales to predict future sales.

Market research analysts devise methods and procedures for obtaining the data they need by designing surveys to assess consumer preferences. While a majority of surveys are conducted through the Internet and telephone, other methods may include focus group discussions, mail responses, or setting up booths in public places, such as shopping malls, for example. Trained interviewers usually conduct the surveys under a market research analyst's direction.

Market opinion research has contributed greatly to a higher standard of living as most products and services consumers purchase are available with the aid of market research. By making recommendations to their client or employer, market research analysts provide

companies with vital information to help them make decisions on the promotion, distribution, and design of products or services. For example, child proof closures on medicine bottles exist because research helped define the most workable design; and the growing variety of ready to cook meals, such as microwaveable soups and prepackaged meat products, exist because of increasing public demand for fast and convenient meals. The information also may be used to determine whether the company should add new lines of merchandise, open new branches, or otherwise diversify the company's operations. Market research analysts also help develop advertising brochures and commercials, sales plans, and product promotions such as rebates and giveaways based on their knowledge of the consumer being targeted.

The AAO finds the above discussion to be generally reflected in the petitioner's description of the duties of the proffered position and agrees that the petitioner's employment would more likely than not require the beneficiary to have an understanding of marketing principles. However, the general duties of a market research analyst, as discussed above, do not coincide with the duties of the proffered position when analyzed in relation to the nature and scope of the petitioner's business.

In its June 29, 2009 letter of support, the petitioner indicated that it has plans for further expansion and that it is the rapid and continuing growth of the company that necessitates a full-time director of finance and marketing. Specifically, the petitioner claims that it intends to open six restaurants within the State of California in the next five years. The AAO acknowledges that the process of expanding a petitioner's business operations could potentially establish financial and operational complexities that would require the duties of a financial manager and market research analyst as described by the *Handbook*. Accordingly, the AAO has reviewed the record for evidence of the petitioner's growing business, as well as its financial structure and operations, to determine whether the employment described by the petitioner would impose a specific degree requirement on the beneficiary. However, the AAO notes two problems. First, the petitioner has submitted no documentary evidence, such as its most recent income tax return or payroll records, to corroborate its claimed gross income or staffing levels. 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)). Second, a petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The petitioner provides no documentation related to its financial operations or organization that would shed light on the complexity and other substantive aspects of the financial and accounting work to be performed by the beneficiary, e.g., tax returns or other financial documents. It has not provided any evidence that would indicate how the petitioner's plans for expansion have affected its financial position. Moreover, while the petitioner has provided a copy of its business plan, it provides no documentation establishing the current marketing needs of its business. Specifically, in addition to failing to submit evidence of the marketing research it has undertaken to date with regard to potential expansion of its franchise, it further has failed to submit any evidence establishing that it is currently doing business as a restaurant in the City of Industry, California. While the Form I-129 indicates that the petitioner will employ 14 persons by the end of the year, it fails to corroborate this claim with independent documentary evidence. Finally, the AAO notes that, according to its business plan, the petitioner will only hire service-based employees, such as wait staff and

kitchen personnel, until year four of its expansion. Therefore, the claims on the petitioner's organizational chart, indicating that the beneficiary will supervise the marketing, accounting, IT, legal, and human resources department, is undermined. Since the beneficiary will be the only employee assigned to financial and marketing duties, and since the occupational categories discussed above generally require the employee to supervise or work on a team of financial and marketing employees, the AAO concurs with the director's finding that the financial and marketing duties to be performed by the beneficiary in relation to the petitioner's claimed operations and/or in relation to the petitioner's business expansion plans lack the complexity to require the services of a financial manager or market research analyst.

On appeal, counsel correctly asserts that the director failed to consider three expert opinion letters submitted in support of the contention that the proffered position is a specialty occupation based on the nature of the petitioner's proposed business expansion and a review of the stated duties. Specifically, the record contains two letters from [REDACTED] Ph.D., Professor of Finance at Seattle Pacific University, dated June 26, 2009 and August 6, 2009, as well as a letter from [REDACTED] Ph.D., Professor [REDACTED] at Portland State University, dated August 6, 2009.

The first letter from [REDACTED] dated June 26, 2009, concludes that, based on a review of the duties of the proffered position, a bachelor's degree in finance or a related field is the minimum educational requirement to perform such duties. [REDACTED] drew this conclusion despite the fact that the petitioner "at this point in time does not have any people on the payroll." The second letter from [REDACTED], dated August 6, 2009, refutes the director's contention in the RFE that the proffered position resembles an administrative services manager, and reiterates that it is very common for a firm such as the petitioner to employ "an individual with a skill set required for the position in question." The letter from [REDACTED] draws the same conclusions, noting that the petitioner's plans for expansion are reasonable and aggressive. Upon review of the stated duties of the proffered position in accordance with the petitioner's business plan, [REDACTED] concludes that the proffered position is a specialty occupation.

Upon review, the AAO does not find the opinion letters of [REDACTED] persuasive. Neither bases their conclusion on a review of similar businesses in the petitioner's industry. Instead, both [REDACTED] base their conclusions on the list of proffered duties coupled with the title of the position and a review of the petitioner's business plan. Neither presents evidence that other companies in the industry, who claim to operate a restaurant with no employees, or at best one employee, routinely hire a director of finance and marketing with a degree in a specific specialty. Moreover, both evaluations are generalized in that, while they consider the position title and general list of duties, they do not discuss the current and proposed organizational structure of the petitioner. As discussed above, the petitioner's staff for its first restaurant was not in place at the time of filing. Moreover, the petitioner indicates that it will not hire any professional employees to work in the areas of marketing human resources, or information technology until its fourth year of operations. [REDACTED] in particular does not discuss this factor when concluding that "the director of finance and marketing position is a common position in this type of service company." Where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The AAO, therefore, concurs with the director's finding that, in this matter, the *Handbook's* discussion of marketing managers, upon which the director relied in rendering the decision, is the occupational category

most akin to the duties of the proffered position in relation to the current status of the petitioner's business. As discussed within the occupation of advertising, marketing, promotions, public relations and sales managers in the *Handbook*:

*Marketing managers.* Marketing managers work with advertising and promotion managers to promote the firm's or organization's products and services. With the help of lower level managers, including *product development managers* and *market research managers*, marketing managers estimate the demand for products and services offered by the firm and its competitors and identify potential markets for the firm's products. Marketing managers also develop pricing strategies to help firms maximize profits and market share while ensuring that the firms' customers are satisfied. In collaboration with sales, product development, and other managers, they monitor trends that indicate the need for new products and services and they oversee product development.

While the occupation of marketing manager generally requires "the help of lower level managers, including product development managers and market research managers," and the petitioner does not employ lower level managers in these categories, the description of marketing managers is still most akin to the proffered position in this matter. The beneficiary is tasked with expanding the petitioner's restaurant franchise by identifying potential markets and finding ways to maximize profits, duties which are specifically claimed in the petitioner's discussion of the financial and marketing duties of the beneficiary submitted in response to the RFE.

Therefore, having found the duties of the proffered position are those of a marketing manager, the AAO now turns to the *Handbook* for its discussion of the educational requirements imposed on individuals who seek employment within this profession:

A wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales manager jobs, but many employers prefer college graduates with experience in related occupations.

*Education and training.* For marketing, sales, and promotions management positions, employers often prefer a bachelor's or master's degree in business administration with an emphasis on marketing. Courses in business law, management, economics, accounting, finance, mathematics, and statistics are advantageous. In addition, the completion of an internship while the candidate is in school is highly recommended. In highly technical industries, such as computer and electronics manufacturing, a bachelor's degree in engineering or science, combined with a master's degree in business administration, is preferred.

\*

\*

\*

Most advertising, marketing, promotions, public relations, and sales management positions are filled through promotions of experienced staff or related professional personnel. For example, many managers are former sales representatives; purchasing agents; buyers; or product, advertising, promotions, or public relations specialists. In small firms, in which the

number of positions is limited, advancement to a management position usually comes slowly. In large firms, promotion may occur more quickly.

As correctly noted by the director, the *Handbook* indicates no specific degree requirement for employment as a marketing manager, and, accordingly, upon consideration of the entire record of proceeding, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a related field. Accordingly, the AAO finds that the petitioner has not established its proffered position as a specialty occupation under the requirements of the first criterion 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. To establish its degree requirement as an industry norm, the petitioner has submitted numerous job postings from [www.monster.com](http://www.monster.com) for employment related to positions in both the financial and marketing sectors. None of this evidence, however, establishes the petitioner's degree requirement as the norm within its industry.

The petitioner submits twelve job postings for financial positions, such as controller, financial manager, and financial analyst. However, for the reasons set for the above, the proffered position has been deemed akin to that of a marketing manager, and thus an analysis of the proffered position to that of a controller or other position in the financial industry is not warranted.

The petitioner also submitted eleven job postings for marketing-based positions. Specifically, the petitioner submits advertisements for a variety of positions, such as senior marketing analyst, vice president of marketing, consumer marketing associate, etc. In addition to the differing titles and job responsibilities of these positions, it is noted that the companies for which these positions are offered differ vastly from the petitioner.

The petitioner is a restaurant, with one branch in the United States that is not yet fully operational. The job postings submitted in support of this criterion are from the following companies:

1. SCI Team, a search firm recruiting for a Dairy Products company;
2. JBS Pork, a pork products company;
3. A "confidential posting" for a position in the Natural Products industry;
4. Lilly; a nationally-known pharmaceutical company;
5. Ralcorp, a leading producer of value and store brand food products
6. The Judge Group, a food and consumer goods company, for the position of senior marketing manager;
7. The Judge Group, a food and consumer goods company, for the position of marketing director;
8. Finagle a Bagel, a 12-store retail quick-service restaurant;
9. An unspecified company in the food and beverage production industry;

10. Wells, Dairy, Inc., for its Blue Bunny brand, a nationally-known ice cream products company; and
11. General Mills, one of the largest food companies in the world.

Most of the postings submitted are from nationally-known companies, none of which are businesses similar to the petitioner. While Finagle a Bagel is a quick-service restaurant and arguably is the closest in nature to the petitioner's enterprise, it is also a local, 12-store operation, which differs from the petitioner's franchise operation in both size and scope. Moreover, the position at Finagle a Bagel is for a marketing assistant, not a marketing manager, and moreover accepts a degree in a variety of fields, such as marketing, business, communications, and English as opposed to a degree in a specific specialty. Additionally, the record does not include any evidence from professional associations regarding an industry standard. Accordingly, these job postings fail to satisfy this particular criterion's condition that a petitioner establish its degree requirement is common in parallel positions among similar organizations.

The AAO also concludes that the record does not establish that the proposed position is a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a demonstration that the position is so complex or unique that it can only be performed by an individual with a degree. The record does not include any documentation to support the complexity or uniqueness of the proffered position.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and 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.

To determine a petitioner's ability to meet the third criterion, USCIS often reviews the position's employment history, including the names and dates of employment of those employees with degrees who previously held the position, as well as the petitioner's hiring practices with regard to similar positions. The petitioner, established in 2009, makes no claim that it has previously hired anyone to fill the position of director of finance and marketing. Therefore, since it does not appear that the position was previously staffed, and no evidence to the contrary has been submitted, the petitioner cannot establish that its normal hiring practice is to require the minimum of a baccalaureate degree for the proffered position.

Although the petitioner argues that it requires the candidate for the proffered position to hold at least a bachelor's degree, 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 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulation any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position – and without consideration of how a beneficiary is to be specifically employed – then any

alien with a bachelor's degree in 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 fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its 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. Upon review of the duties of the proffered position, the AAO has concluded that the position is closely aligned to that of a marketing manager. It does not find these duties, as described by the petitioner, to reflect a higher degree of knowledge and skill than would normally be required of marketing managers whose business responsibilities require them to survey and analyze industry trends and consumer behavior in order to identify potential markets for expansion. Nor, despite the claimed financial duties of the position, do they represent an amalgam of jobs that would require the beneficiary to possess skills and qualifications beyond those of a marketing manager. There is no evidence that the performance of such duties requires a bachelor's degree in a specific specialty. The AAO, therefore, is not persuaded that the beneficiary's duties are more complex and specialized than a marketing manager assigned to other restaurant franchises with one location. Further, while noting the petitioner's assertions regarding the duties and the types of knowledge required to perform them, the AAO finds that, to the extent that they are described in the record of proceeding, the duties specific to this particular proffered position do not establish themselves as so specialized and complex as to require the application of any body of highly specialized knowledge in a specific specialty that is usually associated with attainment of at least a bachelor's degree in that specialty.

Consequently, the AAO concludes that the proffered position cannot be established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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