



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: APR 01 2013 Office: VERMONT SERVICE CENTER

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

fa *Michael T. Kelly*
Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and after consideration of a subsequent joint motion to reopen and to reconsider, issued a decision affirming the initial decision to deny the petition due to the petitioner's failure to establish the proffered position as a specialty occupation. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner describes itself as operating a restaurant specializing in Indian cuisine, with a gross annual income of \$731,916, employing eight employees. It seeks to employ the beneficiary in what it describes as a General Manager position and to classify the alien as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The Labor Condition Application (LCA) submitted by the petitioner to support the petition was certified for the SOC (O*NET/OES) Code 11-9051, the associated occupational classification of Food Service Managers, and a Level I prevailing wage rate.

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 RFE; (4) the notice of decision denying the petition; (5) the Form I-290B and supporting materials comprising a joint motion to reopen and to reconsider; (6) the director's decision affirming the prior decision to deny the petition; and (7) the Form I-290(B) and the allied documents submitted on appeal. The AAO reviewed the record in its entirety before issuing its decision.

At the outset, the AAO would like to address some salient aspects of the expert opinion letter dated January 12, 2011, written by [REDACTED] a professor of Management, Entrepreneurship, and General Business at [REDACTED]. In the letter, [REDACTED] states that the proffered position is a specialty occupation and, therefore, requires a bachelor's degree in business administration or a related field. In addition, [REDACTED] states that a bachelor's degree in business administration, or its equivalent, is considered an industry standard requirement for the proffered position.

First, it must be noted that [REDACTED] conclusion that a degree in "business administration" is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. As will be discussed, a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, but 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 at 147.

[REDACTED] provided a summary of her education and experience and attached a copy of her curriculum vitae. She described her qualifications, including her educational credentials and professional experience, as well as provided a list of the publications she has written. Based upon a complete review of [REDACTED] letter and curriculum vitae, the AAO notes that, while

_____ may, in fact, be a recognized authority on various topics, she has failed to provide sufficient information regarding the basis of her claimed expertise on this particular issue. _____ claims that she is qualified to comment on the position of general manager because of the position she holds at _____. However, without further clarification, it is unclear how her position as a professor of Management, Entrepreneurship, and General Business at _____ would translate to expertise or specialized knowledge regarding the *current recruiting and hiring practices* of restaurants in the full-service restaurant industry (as designated by the petitioner in the Form I-129) similar to the petitioner for *restaurant manager / general manager* positions (or parallel positions).¹

_____ opinion letter and curriculum vitae do not cite specific instances in which her past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication that she has published any work or conducted any research or studies pertinent to the educational requirements for *restaurant managers / general managers* (or parallel positions) in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that she is an authority on those specific requirements. The opinion letter contains no evidence that it was based on scholarly research conducted by _____ in the specific area upon which she is opining. _____ provides no documentary support for her ultimate conclusion regarding the education required for the position (e.g., statistical surveys, authoritative industry or government publications, or professional studies). _____ asserts a general industry educational standard for organizations similar to the petitioner, without referencing any supporting authority or any empirical basis for the pronouncement.

Upon review of the opinion letter, there is no indication that _____ possesses any knowledge of the petitioner's proffered position beyond the job description. The fact that she attributes a degree requirement to such a generalized treatment of the proffered position undermines the credibility of her opinion. _____ does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. Her opinion does not relate her conclusion to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. There is no evidence that _____ has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. _____ provides general conclusory statements regarding general manager positions, but she does not provide a substantive, analytical basis for her opinion and ultimate conclusions.

_____ claims that the duties of the proffered position are complex and/or specialized. However, it must be noted that there is no indication that the petitioner and counsel advised _____ that the petitioner characterized the proffered position as a low, entry-level position (as indicated by the wage-level on the LCA). As will be discussed later in this decision, the wage-rate

¹ The AAO observes that the NAICS code selected by counsel is 722110, a code that does not relate back to a particular industry classification. The petitioner should have selected code 722500, the code for full-service restaurants, to correspond to the nature of the business, as described by the petitioner.

indicates that the beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results. It appears that [REDACTED] would have found this information relevant for her opinion letter. Moreover, without this information, the petitioner has not demonstrated that [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position.

In summary, and for each and all of the reasons discussed above, the AAO concludes that the advisory opinion rendered by [REDACTED] is not probative evidence to establish the proffered position qualifies as a specialty occupation. The conclusions reached by [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which she reached such conclusions. There is an inadequate factual foundation established to support the opinion and the AAO finds that the opinion is not in accord with other information in the record.

The AAO may, in its 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, 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'r 1988). As a reasonable exercise of its discretion the AAO discounts the advisory opinion letter as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Therefore, the AAO finds that the letter from [REDACTED] does not establish that the proffered position is a specialty occupation. It should be noted that, for efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the duties and requirements of the proffered position into each basis discussed below for dismissing the appeal.

Next, the AAO will conduct a full analysis as to whether the petitioner's proffered position qualifies as a specialty occupation. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the proffered position, as described, constitutes a specialty occupation.

To meet its burden of proof in this regard, the petitioner must establish that the employment offered to the beneficiary meets the applicable statutory and regulatory framework below.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and

- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means 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 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 (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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether this general manager position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, so that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program in a specific discipline. The AAO finds that the petitioner has not done so.

In this matter, the petitioner indicated on the Form I-129 and supporting documentation that it seeks the beneficiary's services as a general manager responsible for overseeing, directing, and managing the overall operations of its restaurant. In its letter of support dated July 20, 2010, the petitioner stated that the proffered position entails the following duties, as quoted below:

- Overseeing and managing kitchen staff and waitresses.
- Estimating food and beverage consumption, costs[,] and necessary requisitions.
- Negotiating with our suppliers[?] prices and purchasing all the necessary supplies.
- Overseeing preparation of the menu and its pricing.
- Interviewing and hiring employees.
- Monitoring daily and monthly sales transactions, preparing weekly and monthly financial reports.

- Ensuring compliance with state and local regulations concerning safe food preparation and handling, and obtaining all the necessary permits and licenses needed to operate a large public restaurant.

The major categories of job duties are as follows:

Personnel Management: This includes interviewing and hiring/firing employees, as well as managing the employees. Our manager will have the discretion to fire employees as well as the authority to select employees. The position also requires the person to manage, evaluate and train our workers. Shift administration and management are key in this position as well as risk management as it pertains to selection and hiring practices. These duties in the Personnel Management category will comprise approximately 30% of his weekly time.

Accounting/Budgeting: This includes estimating food and beverage consumption, costs and necessary requisitions. Thereafter the [general] manager must negotiate with suppliers, place orders for equipment, food, beverages, linens, etc. This also includes monitoring daily and monthly sales transactions in relation to the expenditures to make sure that the restaurant stays within budget. Thereafter, the manager would be expected to prepare weekly/monthly financial reports. The [g]eneral [m]anager must evaluate consumption trends and monitor market trends to be able to lower costs and increase profits. These duties will account for approximately 40% of [the beneficiary's] weekly time.

Marketing: This area of responsibility includes overseeing menu changes and decisions and pricing according to market research; making determinations as to effective ways to increase business levels via different media; acting as the restaurant's representative as needed; and evaluating and responding to customer complaints to maintain a good reputation and relationship with the [local] area inhabitants. Market research and evaluation are skills that are learned in a college-level business and management program. These duties will account for 25% of [the beneficiary's] weekly time.

Regulatory Compliance: This includes making sure that the restaurant complies with state and local regulations concerning safe food preparation and handling, and obtaining all the necessary permits and licenses needed to operate a large public restaurant. These duties would occupy approximately 5% of the [g]eneral [m]anager's time on a weekly basis.

The petitioner maintained that the complexity and nature of the proffered position's duties require a minimum of a college-level education and a background in or experience with working in a restaurant. In addition, the petitioner opines that an individual who is less qualified would not be able to undertake the job duties and would have to undergo years of on-the-job training

before the individual could assume the duties associated with the proffered position. The AAO observes that the petitioner had not articulated a degree requirement in a specific specialty that is directly related to the duties and responsibilities of the petitioner's general manager position.

Counsel explained that the petitioner employs highly-educated individuals in general manager positions for its other restaurant locations, and supported the statement with the respective degrees and education evaluations for four individuals. These four individuals are employed as general managers at other corporate entities owned by the petitioner. As a whole, the AAO observes that the individuals earned bachelor's degrees or advanced degrees in business administration, strategic leadership, computer information systems, and accounting. These degrees, however, represent an array of subject matter, and therefore this evidence does not show that the petitioner normally requires at least a bachelor's degree or higher in a specific specialty as required by the statutory and regulatory framework.

Within the initial petition materials, counsel submitted eight job vacancy announcements advertising managerial restaurant positions at restaurants that required, at a minimum, a bachelor's degree-level education. Notably, counsel failed to assert how these job vacancy announcements evidence that a degree requirement, in a specific specialty, is common in the industry for parallel positions among similar organizations.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for evidence (RFE) on December 14, 2010. The director requested the petitioner to submit additional documentation to demonstrate that the proffered position is a specialty occupation.

In response to the director's RFE, counsel submitted a letter dated January 21, 2011, accompanied by documentation previously submitted with the initial petition; printouts from the Internet describing the petitioner's restaurant, menu, and accolades; the previously discussed opinion letter dated January 12, 2011 written by [REDACTED]; and an RFE response letter from the petitioner's president, dated January 12, 2011. Within the petitioner's January 12, 2011 RFE response letter, the petitioner's president asserts that the restaurant serves customers who have high expectations, and that the restaurant is operating at capacity. As such, opined the president, the petitioner must employ an individual who possesses at least a bachelor's degree in business administration or a related field, in order to efficiently perform all tasks and supervise all restaurant personnel who are charged with varied duties. Moreover, the president claims, that the success of the business depends upon efficient, flawless management to meet the customers' expectations, and therefore the petitioner requires a degreed individual to fill the position.

Although the petitioner claimed that the beneficiary will serve in a specialty occupation, the director determined that the petitioner failed to establish how the proffered position would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty.

The director denied the petition on June 30, 2011.

On August 2, 2011, counsel filed a joint motion to reopen and to reconsider, stated that the Service did not adequately address evidence within the record of proceeding, and requested that the Service reopen and reconsider the underlying decision. Upon consideration of the joint motion, the director affirmed the underlying decision on December 29, 2011, and stated that the petitioner had not overcome the grounds for denial.

On appeal, counsel for the petitioner claims that USCIS erred in its determination that the proffered position did not meet the specialty occupation standard, because the petitioner satisfies all of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will now discuss the basis for its determination that the petitioner has not satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position.

As already noted, in the LCA submitted in support of the petitioner, the petitioner attested that the proffered position belongs to the Food Services Managers occupational classification. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, the specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly, specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The AAO will now look at the U.S. Department of Labor's *Occupational Outlook Handbook* (hereinafter referred to as the *Handbook*), which the AAO recognizes as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.² The AAO will analyze the proffered position associated with the occupational classification selected by the petitioner for the LCA, namely the occupational classification for Food Services Managers.

The "Food Services Managers" chapter in the 2012-1013 edition of the *Handbook* describes the associated duties, in part, as follows:

Food Services Managers typically do the following:

² All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO>.

- Interview, hire, train, oversee, and sometimes fire employees
- Oversee the inventory and ordering of food and beverage, equipment, and supplies
- Monitor food preparation methods, portion sizes, and the overall presentation of food
- Comply with health and food safety standards and regulations
- Monitor the actions of employees and patrons to ensure everyone's personal safety
- Investigate and resolve complaints regarding food quality or service
- Schedule staff hours and assign duties
- Keep budgets and payroll records and review financial transactions
- Establish standards for personnel performance and customer service

Besides coordinating activities among the kitchen and dining room staff, managers must ensure that customers are served properly and in a timely manner. They monitor orders in the kitchen and, if needed, they work with the chef to remedy any delays in service.

Food service managers are generally responsible for all functions of the business related to people. For example, most managers interview, hire, train, and, when necessary, fire employees. Finding and keeping good employees is a challenge for food service managers. Managers schedule work hours, making sure that enough workers are present to cover each shift—or managers may have to fill in themselves.

Food service managers plan and arrange for clean tablecloths and napkins, for heavy cleaning when the dining room and kitchen are not in use, for trash removal, and for pest control when needed.

In addition, managers do many administrative tasks, such as keeping employee records, preparing the payroll, and completing paperwork to comply with licensing, tax and wage, unemployment compensation, and Social Security laws. While they may give some of these tasks to an assistant manager or bookkeeper, most general managers are responsible for the accuracy of business records. Managers also keep records of supply and equipment purchases and ensure that suppliers are paid.

Many full-service restaurants have a management team that includes a general manager, one or more assistant managers, and an executive chef. Managers add up the cash and charge slips and secure them in a safe place. Many managers also lock up the establishment; check that ovens, grills, and lights are off; and switch on the alarm system.

U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 Ed., "Food Service Managers," <http://www.bls.gov/ooh/management/food-service-managers.htm#tab-2> (accessed March 11, 2013).

In its discussion of the educational and training requirements for food service managers, the *Handbook* states the following, in pertinent part:

Although most food service managers have less than a bachelor's degree, some postsecondary education is increasingly preferred for many manager positions. Many food service management companies and national or regional restaurant chains recruit management trainees from college hospitality or food service management programs, which require internships and real-life experience to graduate.

Almost 1,000 colleges and universities offer bachelor's degree programs in restaurant and hospitality management or institutional food service management. For those not interested in a bachelor's degree, community and junior colleges, technical institutes, and other institutions offer programs in the field leading to an associate's degree or other formal certification.

Both degree and certification programs provide instruction in subjects such as nutrition, sanitation, and food planning and preparation, as well as accounting, business law and management, and computer science. Some programs combine classroom and laboratory study with internships and thus provide on-the-job training and experience. In addition, many educational institutions offer programs in food preparation.

U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 Ed., "Food Service Managers," <http://www.bls.gov/ooh/management/food-service-managers.htm#tab-4> (accessed March 11, 2013).

As reflected in the passage quoted above, the *Handbook* indicates that entry into the Food Service Managers occupational classification does not normally require a least a bachelor's degree, or the equivalent, in a specific specialty. The *Handbook's* information also indicates that a position's inclusion within the occupational category is not in itself sufficient to establish that a particular Food Services Manager position is one for which the normal minimum entry requirement is a bachelor's or higher degree, or the equivalent, in a specific specialty.

On appeal, counsel argues that the *Handbook* expressly states that it is describing the Food Service Manager occupational classification of self-service and fast food restaurants. Notably, the 2012-2013 edition of the *Handbook* does not focus on self-service and fast food restaurants, and specifically addresses full service restaurants in the duties section, as evident in the excerpt above.

The AAO here incorporates its finding that the expert opinion letter from [REDACTED] claiming that a bachelor's degree in "business administration" is a sufficient minimum requirement for

entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. Even if established by the evidence of record, which it is not, the requirement of a bachelor's degree in business administration is inadequate to establish that a 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. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). In addition to proving 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 also establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As explained above, USCIS interprets the supplemental degree requirement at 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 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).

As a matter of discretion, USCIS may accept expert opinion testimony. However, USCIS will reject what is submitted as an expert opinion or give it less weight if it is not in accord with other information in the record or if it is in any way questionable. *Matter of Caron International, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought; the submission of expert opinion letters is not presumptive evidence of eligibility. *Id.*; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) ("[E]xpert opinion testimony, while undoubtedly a form of evidence, does not purport to be evidence as to 'fact' but rather is admissible only if 'it will assist the trier of fact to understand the evidence or to determine a fact in issue.'"). In addition to its other defects, discussed earlier in this decision, this letter is not in accord with information in the *Handbook*. Because of all of the letter's deficiencies, the AAO accords it no probative weight towards satisfaction of any criterion at 8 C. F.R. § 214.2(h)(4)(iii)(A).

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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.

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 previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Moreover, the AAO acknowledges that the record of proceeding contains an opinion letter from [REDACTED]. However, as previously discussed, the AAO finds that the opinion letter does not merit probative weight towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) or establishing the proffered position as a specialty occupation.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner submitted copies of eight advertisements as evidence that its degree requirement is standard amongst its peer organizations for parallel positions. The AAO finds that not one of the advertisements showed, nor did counsel assert, that they were from similar organizations for parallel positions, as specified in the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), and thus the AAO will not analyze each of the job advertisements herein.

Further, although the advertisements are all within the restaurant industry, counsel has not established an industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.³

Contrary to the purpose for which the advertisements were submitted, in the aggregate they are not indicative of a common requirement among the advertising employers for at least a bachelor's degree in a specific specialty, or its equivalent. For example, most of the postings state that a bachelor's degree is required, but they do not provide any further specification. That

³ Further, although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from just eight job advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position of general manager in a restaurant required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

is, they do not indicate that a bachelor's degree in a *specific specialty* that is directly related to the occupation is required. The advertisements that require a general-purpose degree (without specifying a specific discipline) include the postings by [REDACTED] and the confidential postings. The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the duties and responsibilities of the position. Furthermore, the advertisement for [REDACTED], Inc. states that a culinary or HRIM-related degree or equivalent experience is required; however, the posting does not specify the level of education required (e.g., associate's degree, vocational degree/diploma, baccalaureate, master's degree). The advertisement does not indicate that the employer requires at least a baccalaureate level of education.

Upon review of the record of proceeding, the AAO notes that the petitioner provided documentation regarding the academic credentials of four individuals and claimed that the evidence is relevant to this matter. Specifically, in a letter dated January 21, 2011, submitted with the RFE response, counsel stated that the petitioner owns and operates other restaurant locations under different corporate entities. Counsel reported that the petitioner currently employs four general managers, who possess a bachelor's or higher degrees in business administration, strategic leadership, computer information systems, and accounting. Counsel asserted that the petitioner employs highly educated individuals, and that these individuals fill precisely the same role as the beneficiary would in the proffered position.

In support of these statements, the petitioner submitted copies of these individuals' educational credentials, without transcripts. The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the duties and responsibilities of the position.

Moreover, the AAO notes that counsel specifies that these restaurants are separate entities from the petitioning company. Notably, counsel and the petitioner failed to provide sufficient information regarding these other restaurants to establish that the organizations are similar to the petitioner and share the same general characteristics. Without such evidence, such documentation is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. As previously discussed, when determining whether the petitioner and another organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). In this case, the petitioner's president did not state that the organizations are similar, nor did he provide any probative evidence on the issue.

Moreover, the petitioner and counsel failed to provide the job duties and day-to-day responsibilities of the positions. The record does not reflect the knowledge and skills required for the claimed parallel positions, or provide any information regarding the complexity of the job

duties, independent judgment required or the amount of supervision received. In short, the petitioner and counsel have not submitted sufficient information regarding the positions to make a legitimate comparison between them and the proffered position. Without this pertinent information, the petitioner has not established that the positions are similar or related to the proffered position. Simply going on record without providing adequate supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Additionally, the counsel and petitioner did not indicate the total number of people who currently or in the past have served in these positions at his various restaurants. In addition, the record does not establish when the restaurants were established. Therefore, the petitioner has not established how representative the academic credentials of the four employees are of the recruiting and hiring practices of the restaurants where they work.

Thus, based upon a complete review of the record, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that the particular position proffered in this petition is "so complex or unique" that it can be performed only by an individual with at least a bachelor's degree in a specialty occupation.

Specifically, counsel claimed in the undated document submitted with the initial H-1B visa petition filing entitled "Memorandum in Support of Petition for H-1B Non-Immigrant Visa," that the proffered position is so complex and unique by virtue of the duties themselves, and counsel posits that hiring general managers with bachelor's degrees supports this claim.

To prevail in this regard, the petitioner must demonstrate how the proffered position itself is so complex or unique that it can only be filled by a person with at least a bachelor's degree, or the equivalent, in a specific specialty. For instance, the AAO notes that the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree or its equivalent and did not establish that the proffered position can only be performed by a person with such education or educational equivalency. A background in food service management may be beneficial in performing certain duties of a food service general manager position. In this instance, however, the petitioner has failed to demonstrate how an established curriculum of such courses or a relevant experience, leading to a baccalaureate or higher degree in a specific specialty or its equivalent, are required to perform the duties of the particular position here proffered.

Throughout the record of proceeding, counsel maintains that the position is so complex and unique that it can only be performed by a degreed individual. In support of this statement, counsel asserts that the petitioner is an established, productive and profitable restaurant with a very high reputation. Additionally, counsel states that the future profitability and success of the company depends upon filling the position with a degreed individual. The AAO observes that the petitioner has not shown the profitability and success of the restaurant, or how a degreed individual will ensure the future profitability and success of the restaurant. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

As related above, the evidence of record does not establish that this position is significantly different from other food service manager positions such that it refutes the *Handbook's* information to the effect that most food service manager positions do not require any postsecondary education. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as more unique or more complex than food service manager positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

Further, of particular importance to this criterion, the AAO notes that the LCA indicates a wage level based upon the occupational classification "Food Services Managers" at a Level I (entry-level) wage.

Wage levels should be determined only after selecting the most relevant *O*NET* occupational code classification. Then, a prevailing-wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation. Prevailing wage determinations start with an entry level wage (i.e. Level I) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent worker) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received as indicated by the job description.

The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These

employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher-level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

The AAO observes that the wage-rate element of the LCA is indicative of a low position relative to others within the occupation. According to the DOL information on the four wage levels, the Level I wage rate would be appropriate for a position that only demands a basic understanding of the occupation, and one in which the position holder would be expected to perform duties under close supervision and receive specific instructions on required tasks and results expected. Moreover, Level I positions involve routine tasks that require limited, if any, exercise of judgment.

Thus, based upon the record of proceeding, including the LCA, it does not appear that the proffered position is so complex or unique that it can only be performed by an individual who has completed a baccalaureate program in a specific discipline that directly relates to the proffered position.

Based on the foregoing, as the petitioner fails to demonstrate how the proffered position is more complex or unique than other food service manager positions that can be performed by persons with less than a bachelor's degree, or the equivalent, in a specific specialty, 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 third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position.

The AAO's review of the record of proceeding under this criterion always necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and with regard to employees who previously held the position in question. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

To satisfy this criterion, the record must establish that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements and, on the basis of that

examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 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 a specific specialty or its equivalent as the minimum for entry into the occupation as required by section 214(i)(1) of 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 AAO notes that the petitioner and counsel claim repeatedly that the proffered position requires the services of a degreed individual. To support this contention, counsel submitted the degrees and degree evaluations of four other general managers who have earned bachelor's degrees in business administration, strategic leadership, computer information systems, and accounting. On appeal, counsel opines that the relevant inquiry is not the degree title, and that all of the represented degree fields involve business-related classes as requisites to obtain the respective degrees. However, the documentation relates to separate business entities than the petitioner, and, as previously discussed in detail, the AAO finds that the documentation is not persuasive in establishing the proffered position as a specialty occupation. Of note, counsel acknowledged that the transcripts cannot be obtained and therefore were not submitted into evidence to support the claim. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Along the same vein, the AAO observes that the petitioner's president stated in the January 12, 2011 RFE response letter that he has managed all of his own restaurants, yet did not submit his own educational documentation to demonstrate that the employer normally requires a bachelor's degree, or the equivalent, in a specific specialty for the proffered position. This is important in three respects. First, the president's statement indicates that he has served as a general manager, and suggests that hiring the beneficiary would relieve the president of the general manager role. Second, although the president has stated that he has managed his restaurants, he has not provided his own educational documentation. Third, throughout the record of proceeding, counsel claims that the petitioner's general managers are all degreed individuals, but the record does not contain the educational documentation of the petitioner's president who has managed the restaurant.

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 states a preferred 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 384. In other words, if a petitioner's degree requirement is only a matter of preference in order to hire qualified individuals 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)(H) (defining the term "specialty occupation").

The AAO reviewed the record of proceeding but finds that the petitioner has not provided probative evidence establishing that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Now, the AAO looks to the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), which requires a petitioner to establish that the nature of the specific 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.

The AAO acknowledges that the petitioner and counsel claim that the nature of the proffered position's duties are so specialized and complex. In addition, the AAO notes that it reviewed the documentation provided by the petitioner regarding its business operations and related materials. However, the AAO finds that relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position's duties. In other words, the proposed duties have not been described with sufficient specificity to show that their nature is more specialized and complex than the nature of the duties of restaurant general-manager positions whose performance does not require knowledge usually associated with at least a bachelor's degree in a specific specialty. Furthermore, there is a lack of substantive evidence substantiating the petitioner's assertions. The AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupational category of "Food Services Managers." The petitioner designated the position as a Level I position (the lowest of four assignable wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation."

Consequently, to the extent that they are depicted in the record, the duties have not been demonstrated as being so specialized and complex as to require the highly specialized knowledge usually associated with attainment of a baccalaureate or higher degree, or its equivalent, in a specific specialty.

Again, the AAO acknowledges that the record of proceeding contains an opinion letter from [REDACTED]. However, as previously discussed, the AAO finds that the opinion letter does not merit probative weight towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) or establishing the proffered position as a specialty occupation.

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the additional, supplemental requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). 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 AAO does not need to examine the issue of the beneficiary's qualifications in great detail, because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation. Therefore, the AAO need not and will not address the beneficiary's qualifications further.

As the petitioner has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

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.

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