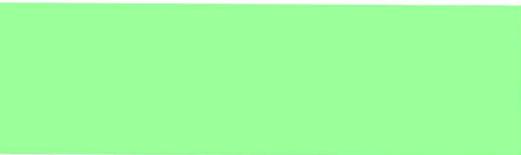


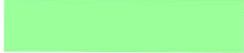
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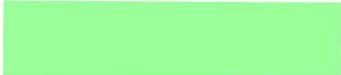
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

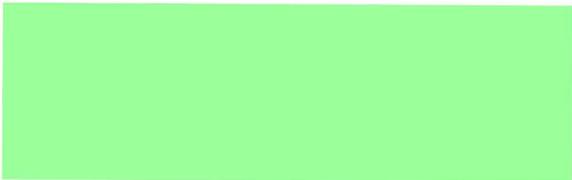


DATE: **DEC 23 2013** OFFICE: VERMONT SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:

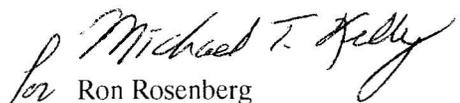


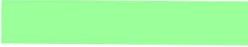
INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

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

Thank you,

  
for Ron Rosenberg  
Chief, Administrative Appeals Office



**DISCUSSION:** The service center director denied the nonimmigrant visa petition, and the petitioner filed a combined motion to reopen and motion to reconsider the decision with the director. The director granted the motion and again denied the petition. The petitioner filed an appeal of that decision with the Administrative Appeals Office (AAO), which dismissed the appeal on June 27, 2013. The petitioner then filed this combined motion to reopen and motion to reconsider the AAO's decision. The motion will be dismissed.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a retail hotel operation established in 1990. In order to employ the beneficiary in what it designates as a "general manager" position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The position is located at a [redacted] and pays \$30,000 per year. The record reflects that the hotel is not a full-service hotel, but offers a breakfast.

The director denied the petition, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

The AAO will now discuss the combined motion to reopen and motion to reconsider submitted by the petitioner. As will be discussed below, the submissions constituting this combined motion do not satisfy the requirements of either a motion to reopen or a motion to reconsider. A motion that does not meet applicable requirements shall be dismissed. See 8 C.F.R. § 103.5(a)(4). Accordingly, this combined motion to reopen and motion to reconsider will be dismissed.

**Documents Comprising the Motion**

This combined motion to reopen and motion to reconsider consists of the following documents: (1) a Form I-290B, in which the petitioner does not specify any grounds for relief; (2) counsel's cover-letter introducing the motion; (3) counsel's 27-page brief in support of the motion; and (4) eight documentary Exhibits (lettered A through H), with an index page which identifies them by Exhibit letter and by a general description of their content.

The index page lists the exhibits as follows (verbatim):

Exhibit	Description
A	Copy of AAO denial dated June 27, 2013 claiming that the Beneficiary was not offered a "Specialty Occupation."
B	Copy of Expert Opinion Evaluation for [the Beneficiary] written by Doctor [redacted] along with Dr. [redacted] Curriculum Vitae demonstrating that the Beneficiary is capable of filling the Position and that the Position required greater Specialization that [sic] AAO has anticipated. <sup>1</sup>

<sup>1</sup> As will be discussed, while the petitioner may have submitted Dr. [redacted] evaluation for consideration as

C	<p>Copy of Job Search conducted on July 26, 2013 and job postings demonstrating the capabilities necessary for General Manager Positions across the United States, including:</p> <ul style="list-style-type: none"> <li>a. 120 Results from a Job Search on [REDACTED]<sup>2</sup></li> <li>b. General Manager Position with [REDACTED] in [REDACTED] California</li> <li>c. General Manager Position located in [REDACTED] Pennsylvania</li> <li>d. General Manager Position with [REDACTED] California</li> <li>e. General Manager Position with [REDACTED] Arizona</li> <li>f. General Manager Position with [REDACTED] in [REDACTED] Texas</li> <li>g. General Manager Position with [REDACTED] Mississippi</li> <li>h. General Manager Position with [REDACTED] in [REDACTED] Georgia</li> <li>i. General Manager Position with [REDACTED] Nevada</li> </ul>
D	Letter from [REDACTED] Clarifying the Qualifications for a General Manager Position dated November 8, 2011
E	Letter from [REDACTED] indicating that a Baccalaureate Degree is required for a General Manager Position July 28, 2013
F	Letter of Clarification from [REDACTED] CEO dated December 28, 2011
G	Letter of Clarification from [REDACTED] CEO dated July 29, 2013
H	Beneficiary's Proof of Foreign Degrees and Prior Experience

The record reflects that the appeal whose dismissal is the subject of this motion was filed in August 2012 and that the AAO issued its dismissal on June 27, 2013.

an expert opinion, the AAO does not recognize it as such.

<sup>2</sup> Actually, only a small portion of the 120 "Job Search Results" pertain to advertisements for General Managers.

### Dismissal of the Motion to Reopen

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.<sup>3</sup> The new facts submitted on motion must be material and previously unavailable, and could not have been discovered earlier in the proceeding. *Cf.* 8 C.F.R. § 1003.23(b)(3).

The AAO notes that with the exception of (1) the job postings for hotel positions retrieved by the petitioner on July 26, 2013 (Exhibit C in the motion's index), (2) the letter from [REDACTED] dated July 28, 2013 (Exhibit E in the motion's index), and (3) the petitioner's own letter of July 29, 2013 (Exhibit G in the index: "Letter of Clarification from [REDACTED] CEO dated July 29, 2013") all of the evidence provided on the motion predates the previous AAO decision and, as such, is not new in any sense.

The job postings provided by the petitioner may be new in the technical sense they were published after the AAO's decision to dismiss the appeal. However, they do not represent any new development or discovery that could not have been presented to the AAO for its consideration in resolving the appeal and that would have been material to the AAO's adjudication of that appeal. Also, the content of the advertisements do not include any type of information that had not been discoverable and reasonably available to the petitioner for presentation on appeal. The AAO will nonetheless address the negligible weight of those submissions.

The job postings do not support the petitioner's claim. The record does not establish that the job postings provided in the record are for positions similar to the one proffered in the instant position. In this regard, it should be noted that the petitioner is not a full-service hotel, and that the position pays \$30,000.

The first advertisement is for the [REDACTED] California. This property is a full-service 230 suite luxury ski resort hotel. The advertisement states the starting pay is \$130,000.

The next position is a full-service [REDACTED] Pennsylvania. The advertisement specifies a bachelor's degree, but not one in any specific field.

The general manager at the [REDACTED] California, would manage a 161-room property. The posting does not state that it requires the general manager to possess a

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<sup>3</sup> The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . . ." WEBSTER'S NEW COLLEGE DICTIONARY 753 (2008) (emphasis in original).

bachelor's degree or any formal education. The posting does not mention what services the hotel provides.

The advertisement for the general manager positions at the [REDACTED] Arizona, and [REDACTED] Texas, states a bachelor's degree as a "plus," but not as a requirement for the positions. Also, the posting does not mention the range of services that the hotels provide.

As the [REDACTED] advertisement specifies either three years of experience managing a hotel or a four-year degree plus two years of experience in the hotel industry, it is not probative evidence towards establishing a requirement for at least a bachelor's degree, or the equivalent, in a specific specialty. Also, the posting does not mention what services the hotel provides, and so does not provide a reasonable basis for comparison with either the petitioner's organization or with the position here proffered.

The advertisement by [REDACTED] in [REDACTED] Georgia, does not list a minimum educational requirement for the position; and this posting does not mention what services the hotel provides.

On its face, the advertisement for the general manager position at the [REDACTED] Nevada, is not probative of a requirement of at least a bachelor's degree level of knowledge in any specific specialty. This employer seeks someone with a four-year college degree in an unspecified field or with an unquantified amount of experience in the hotel field. Also, the posting's information about its organization and the advertised position is not sufficiently specific for an adequate comparison with the petitioner and its proffered position.

Thus, the evidence provided by the petitioner does not establish that the job postings relate to positions that are similar to the one proffered in the present petition, or that the organizations placing those advertisements are similar to the petitioner in size, organizational complexity, or scope of services. Additionally, few of these positions specify a requirement for a bachelor's degree. Thus, there is little value to the above evidence.

Next, we observe that the July 28, 2013 letter from [REDACTED] (Exhibit E) states that it seeks to hire general managers with bachelor's degrees. The petitioner has not established that this is a type of evidence that was previously unavailable. In any event, there is the question of materiality: the content of this letter does not have such substantive weight as to show that its consideration in a reopened proceeding might possibly merit a more favorable result for this petition.

Finally, the petitioner's letter at exhibit G is just an attempt to further its arguments in favor of the petition and to present additional statements about its business, based upon its own information that was obviously known by the petitioner throughout the petition process. So, this letter is clearly not based upon any evidence that was not available to the petitioner for submission as part of the appeal.

Thus, the submissions on motion fail to meet the requirements for a motion to reopen at 8 C.F.R. § 103.5(a)(2). Accordingly, the motion-to-reopen component of this joint motion will be dismissed.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden" of proof. *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden.

### **Dismissal of the Motion to Reconsider**

As will now be discussed, the submissions on motion also fail to satisfy the requirements for a motion to reconsider a decision.

In its "Summary of the Argument" section, counsel's brief frames the bases for the combined motion as follows:

The Brief avers that the AAO made the following errors in denying the Petition: (1) the AAO inaccurately categorized the position at issue as a Lodging Manager, an occupation that does not encompass the duties and responsibilities nor require the level of education and specialized knowledge that the position at issue requires; (2) the AAO's inaccurate labeling of the position led to the erroneous conclusion that a degree requirement for the position was not an industry standard; and (3) the AAO failed to consider or respond to Petitioner's evidence that, in addition to requiring the attainment of a bachelor's degree, the position satisfies every other standard of a specialty occupation as set forth in the Code of Federal Regulations, thereby demonstrating that the position does in fact require the theoretical and practical application of a body of highly specialized knowledge. In denying the brief the AAO was overly narrow and overlooked evidence that clearly meets the specialty occupation standard.

Before addressing the motion's particular documentary exhibits, the AAO will now enter and address its findings that counsel's assignments of error (1) are not based upon an accurate assessment of the evidence of record and (2) appear to overlook the fact that, to establish a proffered position as an H-1B specialty occupation position, the governing regulatory and statutory framework requires the petitioner to establish that the position is one requiring a bachelor's or higher degree *in a specific specialty*.

We will first review the governing statutory and regulatory framework.

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

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

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

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

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

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

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

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

supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing “a degree requirement in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular position”). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

Thus, to the extent that it asserts that the AAO erred by applying a requirement for a degree in a specific specialty, the motion has no basis in statute, regulation, or precedent decision.

Next, we must note that to determine whether a particular job qualifies as a specialty occupation, USCIS does not rely simply upon a proffered position’s title. The specific duties of the position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. USCIS must examine the ultimate employment of the beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d at 384. The critical element is not the title of the position nor an employer’s self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act. In this regard, the AAO finds that nothing presented on motion establishes that the AAO’s decision to dismiss the appeal was based upon an erroneous assessment of the evidence of record before the AAO when it rendered its decision.

Further, to the extent that the motion argues that the AAO erred by assessing the proffered position as belonging to the Lodging Managers occupational classification, the motion misapprehends the evidence of record, the relevant information in the *Occupational Outlook Handbook’s* chapter on Lodging Managers, and the very Labor Condition Application (LCA) that the petitioner submitted to support the petition.

The record reveals that the petitioner itself submitted an LCA that had been certified for a position belonging to the Lodging Managers occupational classification, that is, a position with the SOC (ONET/OES) code 11-9081 and the SOC (ONET/OES) occupational title of Lodging Managers. Thus, by operation of the Department of Labor LCA regulations and the LCA (ETA Form 9035/9035E) instructions, if the proffered position is not within the Lodging Managers occupational

classification – the classification found by the AAO in its decision on appeal – then approval of the petition would be precluded for the petitioner’s failure to file with the petition an LCA certified for the SOC occupational classification for the position in which the beneficiary would serve. See 20 C.F.R §§ 655.700 – 655.760.

Additionally, the motion appears to misconstrue the Lodging Managers occupational category as not encompassing persons working in the hotel/hospitality industry as general managers. This is obvious in the following segment from the *Occupational Outlook Handbook’s* chapter entitled “Lodging Managers”:

Lodging establishments vary in size from independently owned bed and breakfast inns and motels with just a few rooms to hotels that can have more than 1,000 guests. Services can vary from offering a room to having a swimming pool; from free breakfast to having a full-service restaurant; from having a lobby to also operating a casino and hosting conventions.

The following are types of lodging managers:

*General managers* oversee all lodging operations at a property. At larger hotels with several departments and multiple layers of management, the general manager and several assistant managers coordinate the activities of separate departments. These departments may include housekeeping, personnel, office administration, marketing and sales, purchasing, security, maintenance, recreational facilities, and other activities. For more information, see the profiles on human resources managers; public relations managers and specialists; financial managers; advertising, promotions, and marketing managers; and food service managers.

*Revenue managers* work in financial management, monitoring room sales and reservations, overseeing accounting and cash-flow matters at the hotel, projecting occupancy levels, and deciding which rooms to discount and when to offer special rates.

*Front-office managers* coordinate reservations and room assignments and train and direct the hotel’s front-desk staff. They ensure that guests are treated courteously, complaints and problems are resolved, and requests for special services are carried out. Most front-office managers also are responsible for handling adjustment to bills.

*Convention service managers* coordinate the activities of various departments to accommodate meetings, conventions, and special events. They meet with representatives of groups to plan the number of conference rooms to be reserved, design the configuration of the meeting space, and determine what other services the group will need, such as catering or audiovisual requirements. During the meeting or event, they resolve unexpected problems and ensure that hotel operations meet the group’s expectations.

Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2012-13 Edition*, Lodging Managers, on the Internet at <http://www.bls.gov/ooh/Management/Lodging-managers.htm#tab-2> (last visited December 12, 2013).

Additionally, we find that the above-quoted *Handbook* information regarding general managers within the Lodging Managers classification suggests that general managers in the hotels and hospitality industry include all persons who “oversee all lodging operations at a property,” regardless of the property’s size and scope of operations. Thus, in the hospitality industry the General Manager designation does not necessarily denote a position associated with larger hotels that have several departments and multiple layers of management, where, as the *Handbook* notes, the general manager and several assistant managers “coordinate the activities of separate departments,” such as “housekeeping, personnel, office administration, marketing and sales, purchasing, security, maintenance, recreational facilities, and other activities.” In any event, the *Handbook* indicates that even such general managers associated with larger hotels fall within the Lodging Managers occupation. Thus, the petitioner’s argument to the contrary is not supported by the *Handbook*.

Further, a motion to reconsider must state the reasons for reconsideration and be supported by citations to pertinent statutes, regulations, and/or precedent decisions to establish that the preceding decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. The motion before us does not reach that threshold.

The subject of the present motion is the AAO’s June 27, 2013 decision to dismiss the petitioner’s appeal. When filing a motion to reconsider, the petitioner must establish that the preceding AAO decision was incorrect based on the evidence of record at the time of that decision. *See* 8 C.F.R. § 103.5(a)(3) (requirements for a motion to reconsider) and the instructions for motions to reconsider at Part 3 of the Form I-290B.<sup>4</sup>

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<sup>4</sup> The provision at 8 C.F.R. § 103.5(a)(3) states the following:

*Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

This regulation is supplemented by the instructions on the Form I-290B, by operation of the rule at 8 C.F.R. § 103.2(a)(1) that all submissions must comply with the instructions that appear on any form prescribed for those submissions. With regard to motions for reconsideration, Part 3 of the Form I-290B submitted by the petitioner states:

**Motion to Reconsider:** The motion must be supported by citations to appropriate statutes, regulations, or precedent decisions.

As previously mentioned, the petitioner contends that the AAO's decision dismissing the appeal and affirming the director's decision was erroneous. However, using the evidence in the record at the time of the prior decision, the petitioner failed to establish that the AAO's prior decision was based on an incorrect application of law or USCIS policy.

The record indicates June 27, 2013 as the date on which the AAO issued the decision that is the subject of this joint motion.

As Dr. [REDACTED] submission, dated December 11, 2011 (Exhibit B of the motion), was part of the record of proceeding considered by the AAO before it issued its decision, it is within the scope of the motion to reconsider. However, the relevant arguments in the motion's brief do not establish that the AAO abused its discretion in invoking *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r) to accord no significant weight to Dr. [REDACTED] opinion, based upon what the AAO found to be a lack of objective evidence to support it.

The job vacancy advertisements (submitted as Exhibit C of the motion) are beyond the scope of the motion to reconsider. Retrieved from the Internet after the AAO's decision on the appeal, those advertisements were not part of the record of proceeding when the AAO rendered its decision, they do not establish that the decision was incorrect based on the evidence of record at the time of the initial decision. Rather, they are evidence of a type that was present in the record when the AAO rendered its decision, and a motion to reconsider is not a vehicle for expanding the scope of the evidence upon which the decision in question had been based. In any event, we have already addressed the negligible weight of these advertisements.

Next, the AAO finds that the content of the motion's Exhibit D, the November 8, 2011 letter from the [REDACTED] official – which was part of the record when the AAO made its decision below - is not indicative of any error by the AAO in dismissing the appeal for the petition's failure to establish the proffered position as a specialty occupation. The letter only provides a brief summary of this one hotel's "hiring process" for its General Manager. Not only does the author not presume to speak to pertinent recruiting and hiring processes in the hotel industry for general managers, but this short letter does not establish that the undescribed duties of its General Manager position are substantially the same as the duties that comprise the position being proffered here. Additionally, the letter suggests that a person may be hired without a bachelor's degree if that person has "an equivalent of 2 years of experience for each year of education." Further, the letter does not reference any objective standard by which the [REDACTED]

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The regulation at 8 C.F.R. § 103.2(a)(1) states in pertinent part :

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission.

management determines a person's experience to be equivalent to college-level course work. Thus, it is open to speculation whether that hotel even requires the equivalency of a bachelor's degree level of experience when it hires persons without a degree.

Next, the body of Exhibit E – which the motion's index describes as "Letter from indicating that a Baccalaureate Degree is required for a General Manager Position [-] July 28, 2013" – reads as follows (verbatim):

Per our conversation earlier, I am writing to clarify hiring practice for GM position at our hotel.

In all applicants, at minimum, we would look for at least three years of experience in the field. In addition we would also look for an education with degree that would qualify the candidate to perform financial and accounting duties that are unique to the hotel industry.

If I can be of further assistance, please do not hesitate to contact me.

We find that this letter carries no weight towards establishing any misapplication of statute, regulation, or policy in the AAO's decision on the appeal. This letter does no more than state what one particular "would look for" to fill the "GM" position at its particular hotel. Further, while it purports to address this hotel's hiring practice, it does not in fact address the credentials of whatever General Managers it may have actually hired. Further, neither this letter nor any document in this record of proceeding establishes the relevancy of the letter to establishing the educational credentials required for the performance of the particular position that is the subject of the present petition. The record does not establish that all hotel positions bearing the title "General Manager" are fungible in terms of the scope of substantive work involved or in terms of the educational credentials that one must have attained to perform them.

The December 28, 2011 letter from the petitioner (Exhibit F) is a resubmission of a document already in the record of proceeding, and the other submissions on motion do not establish any material error on the part of the AAO in its evaluation of this document. Nor do any submissions into the record persuasively articulate how the AAO misapplied any regulation, policy, or precedent decision in its determination of the evidentiary value of that letter.

Next, the motion's Exhibit G, the July 29, 2013 letter from the petitioner, which postdates the AAO's decision on appeal, obviously was not part of the record of proceeding when the AAO rendered its decision dismissing the appeal. The AAO finds that, while the letter argues for recognition of the proffered position as a specialty occupation, it does not articulate how, based upon the evidence before it at the time of its decision, in light of specifically cited 'statutes, regulations, and/or precedent decisions, the AAO's decision below amounted to an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy that would require reconsideration.

Further, the AAO finds that the purpose of this letter, "to clarify hiring practice for GM position at our hotel" is outside the scope of consideration of a motion to reconsider, as a motion to reconsider is not a vehicle for a petitioner to amend, clarify, or otherwise modify evidence that it had submitted into the record of proceeding prior to the decision that is the subject of the motion: again, as reflected in 8 C.F.R. § 103.5(a)(3) (requirements for a motion to reconsider) and in the instructions for motions to reconsider at Part 3 of the Form I-290B, when filing a motion to reconsider, the petitioner must establish that the preceding AAO decision was incorrect *based on the evidence of record at the time of that decision*.

Further, to merit reconsideration of the AAO's decision to dismiss the appeal, the petitioner must both (1) specifically cite laws, regulations, precedent decisions, and/or binding USCIS policies that the petitioner believes that the AAO misapplied in deciding to dismiss the appeal; and (2) articulate how those standards cited on motion were so misapplied to the evidence before the AAO as to result in a dismissal that should not have been rendered. Here, the submissions on motion fail to articulate how such standards were misapplied to the petitioner's evidence.

Finally, the AAO notes that, on motion, counsel cites to *Tapis Int'l v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000) and asserts that the petitioner's requirement of a bachelor's degree and beneficiary's background, education and experience coupled together meet the criteria of a specialty occupation.

The AAO notes that in *Tapis Int'l v. INS*, the U.S. district court found that while the former Immigration and Naturalization Service (INS) was reasonable in requiring a bachelor's degree in a specific field, it abused its discretion by ignoring the portion of the regulations that allows for the equivalent of a specialized baccalaureate degree. According to the U.S. district court, INS's interpretation was not reasonable because then H-1B visas would only be available in fields where a specific degree was offered, ignoring the statutory definition allowing for "various combinations of academic and experience based training." *Tapis Int'l v. INS*, 94 F. Supp. 2d at 176. The court elaborated that "[i]n fields where no specifically tailored baccalaureate program exists, the only possible way to achieve something equivalent is by studying a related field (or fields) and then obtaining specialized experience." *Id.* at 177.

The AAO agrees with the district court judge in *Tapis Int'l v. INS*, that in satisfying the specialty occupation requirements, both the Act and the regulations require a bachelor's degree in a specific specialty or its equivalent, and that this language indicates that the degree does not have to be a degree in a single specific specialty. In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular

position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) (emphasis added).

Moreover, the AAO also agrees that, if the requirements to perform the duties and job responsibilities of a proffered position are a combination of a general bachelor's degree and experience such that the standards at both section 214(i)(1)(A) and (B) of the Act have been satisfied, then the proffered position may qualify as a specialty occupation. The AAO does not find, however, that the U.S. district court is stating that any position can qualify as a specialty occupation based solely on the claimed requirements of a petitioner.

Instead, 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 as the minimum for entry into the occupation as required by the Act.

In addition, the district court judge does not state in *Tapis Int'l v. INS* that, simply because there is no specialty degree requirement for entry into a particular position in a given occupational category, USCIS must recognize such a position as a specialty occupation if the beneficiary has the equivalent of a bachelor's degree in that field. In other words, the AAO does not find that *Tapis Int'l v. INS* stands for either (1) that a specialty occupation is determined by the qualifications of the beneficiary being petitioned to perform it; or (2) that a position may qualify as a specialty occupation even when there is no specialty degree requirement, or its equivalent, for entry into a particular position in a given occupational category.

First, USCIS cannot determine if a particular job is a specialty occupation based on the qualifications of the beneficiary. A beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. USCIS is required instead to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

Second, in promulgating the H-1B regulations, the former INS made clear that the definition of the term "specialty occupation" could not be expanded "to include those occupations which did not require a bachelor's degree in the specific specialty." 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991). More specifically, in responding to comments that "the definition of specialty occupation was too severe and would exclude certain occupations from classification as specialty occupations," the former INS stated that "[t]he definition of specialty occupation contained in the statute contains this

requirement [for a bachelor's degree in the specific specialty or its equivalent]" and, therefore, "may not be amended in the final rule." *Id.*

In any event, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Tapis Int'l v. INS*. The AAO also notes that, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising even within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

In sum, the AAO finds that the net effect of this motion to reconsider is to disagree with and promote evidentiary analyses that differs from that employed by the AAO in its deliberations on the appeal. Such is not a basis for satisfying the requirements of a motion to reconsider.

A motion that does not meet applicable requirements shall be dismissed. See 8 C.F.R. § 103.5(a)(4). Accordingly, the motion-to-reconsider component of the joint motion will also be dismissed.

#### **Additional Basis for Dismissal**

In addition, the combined motion shall be dismissed for failing to meet another applicable filing requirement. The regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the submissions constituting the combined motion do not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). Again, the regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant combined motion does not meet the applicable filing requirement listed at 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason also.

Finally, it should be noted for the record that, unless USCIS directs otherwise, the filing of a motion does not stay the execution of any decision in a case or extend a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met. Accordingly, the motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decision of the AAO will not be disturbed.

**ORDER:** The combined motion is dismissed.