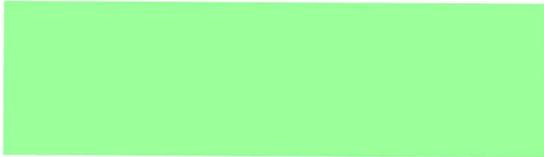




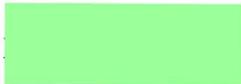
U.S. Citizenship
and Immigration
Services

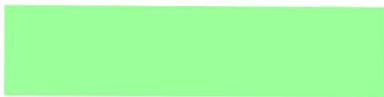
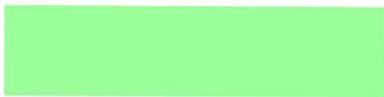
(b)(6)



DATE: FEB 04 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:

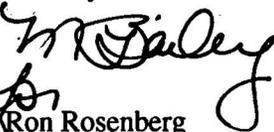


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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,


Ron Rosenberg
Acting 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 with the Vermont Service Center. The service center director affirmed its previous decision. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a restaurant established in 2008. In order to employ the beneficiary in what it designates as a restaurant manager position, the petitioner seeks to classify her 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).¹

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. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the 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; (5) the petitioner's Motion to Reopen and Reconsider; (6) the director's Dismissal of the Motion to Reopen and Reconsider; (7) the Form I-290B and documentation in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed. The petition will be denied.

The primary issue for consideration is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

¹ It must be noted for the record that the Form I-129 petition and the Labor Condition Application (LCA) indicates that the job title of the proffered position is "Restaurant Manager." However, the petitioner's support letter indicates that the job title of the proffered position is "General Manager." In addition, the petitioner's letter dated November 3, 2010, submitted in response to the RFE, and the letter dated July 15, 2011, submitted with the motion, both indicate that the job title of the proffered position is "General Manager." Counsel also indicates in his letter dated November 15, 2010, submitted in response to the RFE, and his motion brief that the proffered position is entitled "General Manager." No explanation for the variance was provided.

- (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 regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

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

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

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

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

F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *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.

In the petition signed on June 20, 2010, the petitioner indicates that it wishes to employ the beneficiary as a restaurant manager on a full-time basis at the rate of pay of \$30,067 per year. In the letter of support, dated June 17, 2010, the petitioner describes the duties of the proffered position as follows:

- Overseeing and managing kitchen staff and waitresses;
- Estimating food and beverage consumption, costs and necessary requisitions;
- Negotiating prices with [the petitioner's] suppliers 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; [and]
- 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.

In addition, the petitioner states that "the General Manager oversees, directs, and manages the overall operations of [the petitioner's] restaurant."² The petitioner also describes the proffered position's duties as follows:

Personnel Management: This includes interviewing and hiring/firing employees, as

² The petitioner mistakenly and repeatedly referenced the beneficiary in its letter of support in the masculine pronoun case. The record provides no explanation for this inconsistency. Thus, the AAO must question the accuracy of the letter of support and whether the information provided is correctly attributed to this particular position and beneficiary.

well as managing the employees. These duties in the Personnel Management category will comprise approximately 30% to 35% of [the beneficiary's] weekly time.

Accounting / Budgeting: This includes estimating food and beverage consumption, costs and necessary requisitions. Thereafter the 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. 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 Norfolk area inhabitants. Market research and evaluation are skills that are learned in college-level business and management program. These duties will account for 25% to 30% 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 General Manager's time on a weekly basis.

Further, the petitioner states that "due to the complexity and nature of the duties of [the] General Manager, the person who will fill the above position must possess [sic] at least a minimum of a college level education and restaurant background/experience."

With the Form I-129 petition, the petitioner submitted a copy of the beneficiary's foreign diploma and transcript, indicating that she received a Bachelor of Business Administration in Business Computer on March 19, 2010. In addition, the petitioner submitted an academic credential evaluation from [redacted] finding that the beneficiary's foreign education is equivalent to a U.S. bachelor's degree in business administration.

In addition, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Food Services Managers" - SOC (ONET/OES Code) 11-9051.00, at a Level I (entry level) wage.

Upon review of the documentation, the director found the evidence insufficient to establish eligibility for the benefit sought and issued an RFE on October 4, 2010. The petitioner was asked to submit documentation to establish that a specialty occupation position exists for the beneficiary.

The director outlined the specific evidence to be submitted.

On November 17, 2010, the petitioner and counsel responded to the director's RFE. In a letter dated November 3, 2010, the petitioner provided a revised job description of the proffered position. Specifically, the petitioner expanded on the previously submitted job description as follows:

Personnel Management (approximately 35% of weekly time): This includes interviewing and hiring/firing employees, as well as managing the employees. [The petitioner's] 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 [the petitioner's] 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 to 35% of [the beneficiary's] weekly time.

Accounting / Budgeting (approximately 40% of weekly time): This includes estimating food and beverage consumption, costs and necessary requisitions. Thereafter the 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 General Manager 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 (approximately 20% of weekly time): This area of responsibility includes overseeing menu changes and decisions and pricing according to market research; and evaluating and responding to customer complaints to maintain a good reputation and relationship with the [redacted] area inhabitants. The manager will be responsible for evaluating which community events to participate in. The manager will determine where the marketing efforts for the restaurant will be focused and will evaluate annually how that focus needs to be changed. Market research and evaluation are skills that are learned in a college-level business and management program. These duties will account for 20 to 25% of [the beneficiary's] weekly time.

Regulatory compliance (approximately 5% of weekly time): 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. The manager will be responsible for handling any inspections or regulation related issues that arise in connection with any aspect of the restaurant. These duties would occupy approximately 5% of the General Manager's time on a weekly basis.

In addition, the petitioner stated that "at the minimum, a Bachelor's degree in Business Administration or a related field" is required for the proffered position.

In response to the RFE, the petitioner and counsel also submitted, in part, (1) job vacancy advertisements; (2) documentation regarding the petitioner's business operations; and (3) a letter from [REDACTED]

The director reviewed the information provided by the petitioner and counsel. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties 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 15, 2011. Counsel for the petitioner submitted a combined motion to reopen and motion to reconsider, and the director affirmed the denial of the petition on January 9, 2012. Counsel submitted an appeal of the denial of the H-1B petition on February 10, 2012.

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. To make this determination, the AAO turns to the record of proceeding. To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

As a preliminary matter, the petitioner's claim that a bachelor's degree in "Business Administration or a related field" is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly 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).

To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as 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 147.³

³ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

Again, the petitioner in this matter claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation. The director's decision must therefore be affirmed and the petition denied on this basis alone.

Nevertheless, the AAO will note that, in any event it reviewed the record of proceeding and, based upon that review, will make some findings that are material to this decision's application of the H-1B statutory and regulatory framework to the proffered position as described in the record of proceeding.

Upon a review of the record of proceeding, the AAO finds that there are discrepancies and inconsistencies with regard to the proffered position.⁴ For instance, there are discrepancies between what the petitioner claims about the occupational classification and level of responsibility inherent in the proffered position set against the contrary occupational classification and level of responsibility conveyed by the wage level indicated on the LCA submitted in support of the petition.

As previously discussed, the petitioner submitted an LCA in support of the petition that designated the proffered position to the corresponding occupational category of "Food Services Managers" - SOC (ONET/OES) code 11-9051.00. The wage level for the proffered position in the LCA corresponds to a Level I (entry) position. The prevailing wage source is listed in the LCA as OWL (Online Wage Library).⁵ The LCA was certified on June 9, 2010. The AAO notes that by

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

Id.

⁴ The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

⁵ The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. *See* Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at <http://www.bls.gov/oes/>. The OES All Industries Database is available at the Office of Foreign Labor Certification (OFLC) Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatacenter.com/>.

completing and submitting the LCA, and by signing the LCA, the petitioner attested that the information contained in the LCA was true and accurate.

Wage levels should be determined only after selecting the most relevant Occupational Information Network (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.⁶

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) position 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.⁷ The U.S. Department of Labor (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.

The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described 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

⁶ For additional information regarding prevailing wage determinations, see U.S. Department of Labor, 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.

⁷ A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

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.

DOL guidance indicates that a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones would be an indication that a wage determination at Level II would be proper classification for a position. The occupational category "Food Services Managers," has been assigned an O*NET Job Zone 3, which groups it among occupations for which medium preparation is needed. More specifically, most occupation in this zone "require training in vocational schools, related on-the-job experience, or an associate's degree." See O*NET OnLine Help Center, at <http://www.onetonline.org/help/online/zones>, for a discussion of Job Zone 3.

In the instant case, the petitioner designated the proffered position as a Level I position. This suggests that the petitioner's academic and/or professional experience requirements for the proffered position would be *less than* the preparation listed for Job Zone 3 occupations (i.e., "training in vocational schools, related on-the-job experience, or an associate's degree"). However, the AAO observes that the petitioner claims that "the General Manager in [the petitioner's] restaurant must have, at the minimum, a Bachelor's degree in Business Administration or a related field."

Furthermore, the petitioner and counsel repeatedly claim that the duties of the proffered position are complex, unique and/or specialized. For instance, in the June 17, 2010 letter of support, the petitioner stated that the beneficiary will oversee, direct and manage the overall operations of the restaurant. The petitioner also reported that the duties of the position include "interviewing and hiring/firing employees, as well as managing the employees." In addition, in the November 3, 2010 letter, submitted in response to the RFE, the petitioner stated that "[t]he General Manager of the restaurant ensures that there is consistency at the restaurant and oversees the performance of the entire staff and restaurant as a whole." Moreover, the petitioner claimed that it required "highly educated and trained managerial staff" to maintain its reputation and that the "General Manager must be educated and knowledgeable in the skills of running a business." According to the petitioner, the beneficiary will manage a staff of 20 employees. The petitioner emphasized that it requires its staff to be "well trained and have experience in restaurant [sic] prior to joining [the petitioner]" and as a result "the General Manager of such a restaurant will clearly require significant training and knowledge in business and management." Furthermore, the petitioner reported that "[d]ue to the complexity and nature of the duties of [the petitioner's] General Manager, this position cannot be filled by one who is not educated in a business related field and has obtained at least a minimum of a bachelor's degree." In a letter dated July 15, 2011, the petitioner's president discussed "the knowledge, expertise and sophistication" necessary for the position.

Additionally, in a November 15, 2010 letter, submitted in response to the RFE, counsel stated that the beneficiary "will be responsible for many detailed tasks which require extensive knowledge and

education to complete accurately." Counsel further claimed that the proffered position "is so specialized and complex that it is not one which can be performed by someone without a collegiate degree." In the motion brief, counsel asserted that the "[b]eneficiary will be responsible for every aspect of management of the company from financial management to personnel management." Counsel also reported that "[the beneficiary] will work closely with the owner of the company in that [the beneficiary] will be reporting to the owner on a weekly basis regarding the finances and the general operations of the restaurant." According to counsel, the "accounting/budgeting aspect alone of the Beneficiary's prospective duties and responsibilities at the company require significant training and knowledge of finance to perform."

The AAO notes that this characterization of the position and the claimed duties, responsibilities and requirements conflict with the wage-rate element of the LCA, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that she would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A).

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. As such, the petitioner has failed to establish that it would pay the beneficiary an adequate salary for her work, as required under the Act, if the petition were granted. Thus, even if it were determined that the petitioner overcame the director's ground for denying the petition (which it has not), for this reason also the H-1B petition cannot be approved. It is considered an independent and alternative basis for denial.

The AAO notes that this aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the demands, level of responsibilities and requirements of the proffered position. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

As noted below, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) specifies that certification of an LCA does not constitute a determination that an occupation is a specialty occupation:

Certification by the Department of Labor of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

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

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

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position, that is, specifically, that corresponds to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance with the pertinent LCA regulations.

The statements regarding the claimed level of complexity, independent judgment and knowledge required for the proffered position, along with the petitioner's claimed academic requirements, are materially inconsistent with the certification of the LCA for a Level I entry-level position. This conflict undermines the overall credibility of the petition. The AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

For the foregoing reasons, a review of the enclosed LCA indicates that the information provided does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and requirements in accordance with the pertinent LCA regulations. As a result, even if it were determined that the petitioner overcame the other independent reason for the director's denial, the petition could still not be approved for this reason.

Furthermore, even if the proffered position were determined to be a Level I position, upon review of the Form I-129 and LCA, the AAO finds that the petitioner failed to establish that it would pay the beneficiary an adequate salary for her work as required under the applicable statutory and regulatory provisions.

More specifically, on the LCA, the petitioner reported that the prevailing wage for "Food Services Managers" at a Level I wage is \$16.52 per hour (\$34,362 per year). The place of employment is listed as Norfolk, Virginia. In addition, on the LCA, the petitioner reported the rate of pay for the proffered position as \$16.55 per hour (\$34,424 per year). However, on the Form I-129 petition, the salary is stated as \$30,067 per year (on pages 3 and 13).

The petitioner stated on the Form I-129 petition and LCA that it intends to employ the beneficiary on a full-time basis. According to the regulation at 20 C.F.R. § 655.731(c)(7) regarding employer wage obligations for H-1B personnel, "[a] full-time week is 40 hours per week, unless the employer can demonstrate that less than 40 hours per week is full-time employment in its regular course of business." The petitioner does not claim, nor has it submitted any documentation to demonstrate that within its regular course of business, less than 40 hours per week is full-time employment.

As previously discussed, under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A). The prevailing wage rate is defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment.

The petitioner has provided inconsistent information as to the salary to be paid to the beneficiary.⁸ However, the petitioner's offered wage to the beneficiary of \$30,067 per year (as stated on pages 3 and 13 of the Form I-129) is below the prevailing wage level for the occupational classification in the area of intended employment for full-time employment. The Level I prevailing wage for the occupation "Food Services Manager" for a full-time position in the area of intended employment was \$34,362 per year at the time the petition was filed in this matter, a difference of almost \$4,300 per year.⁹

As previously mentioned, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. In the instant case, the petitioner failed to provide an explanation or any evidence to resolve the discrepancies in the record regarding the offered salary.

⁸ On the LCA, the petitioner stated that beneficiary would be paid \$16.55 per hour. The beneficiary's salary for a 40 hour week at \$16.55 per hour would be \$34,424 per year (not \$30,067 per year as reported on the Form I-129).

⁹ See the All Industries Database for 7/2009 - 6/2010, for Food Services Managers at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatabase.com/OesQuickResults.aspx?code=11-9051&area=47260&year=10&source=1> (last visited January 23, 2013).

As such, the petitioner has failed to establish that it would pay the beneficiary an adequate salary for her work, as required under the Act, if the petition were granted.

The AAO will now address the director's basis for denial of the petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. 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 position as described constitutes a specialty occupation. For efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the inconsistencies and discrepancies in the record of proceeding regarding the beneficiary's proposed employment.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. 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)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether DOL's *Occupational Outlook Handbook* (hereinafter the *Handbook*), on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹⁰ As previously discussed, the petitioner designated the proffered position in the LCA under the occupational category "Food Services Managers."

The AAO reviewed the chapter of the *Handbook* entitled "Food Services Managers," including the sections regarding the typical duties and requirements for this occupational category.¹¹ However, the *Handbook* does not indicate that normally the minimum requirement for entry into food services manager positions is at least a bachelor's degree in a specific specialty, or its equivalent.

¹⁰ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2012 – 2013 edition available online.

¹¹ For additional information regarding the occupational category "Food Services Managers," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Food Services Managers, on the Internet at <http://www.bls.gov/ooh/management/food-service-managers.htm#tab-1> (last visited January 23, 2013).

The subchapter of the *Handbook* entitled "How to Become a Food Services Manager" states the following about this occupation:

Experience in the food services industry—as a cook, waiter or waitress, or counter attendant—is the most common training for food service managers. Many jobs, particularly for managers of self-service and fast-food restaurants, are filled by promoting experienced food service workers. However, a growing number of manager positions require postsecondary education in a hospitality or food service management program.

Education

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. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Food Services Managers, on the Internet at <http://www.bls.gov/ooh/management/food-service-managers.htm#tab-4> (last visited January 23, 2013).

When reviewing the *Handbook*, the AAO must note again that the petitioner designated the wage level of the proffered position as a Level I position on the LCA. As previously discussed, this designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that she would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results.

The *Handbook* does not indicate that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupation. The *Handbook*

specifically states that most food service managers have less than a bachelor's degree. Moreover, the *Handbook* reports that experience in the food services industry is the most common training for food services managers. The narrative of the *Handbook* also states that some postsecondary education is increasingly preferred for many food services manager positions. Further, the text of the *Handbook* indicates that there are 1,000 colleges and universities that offer bachelor's degree programs in restaurant and hospitality management or institutional food service management, but for those that are not interested in a bachelor's degree, there are opportunities to attend community and junior colleges, technical institutes, and other institutions that offer programs in the field leading to an associate's degree or other formal certification. According to the *Handbook*, an associate's degree or certificate in restaurant and hospitality management or institutional food service management may qualify for jobs as food services managers. Accordingly, as the *Handbook* indicates that working as a food services manager does not normally require at least a bachelor's degree in a specific specialty, or its equivalent, for entry into the occupation, it does not support the proffered position as being a specialty occupation.

In response to the RFE, counsel submitted an opinion letter from [REDACTED] Professor of Management, Entrepreneurship, and General Business at [REDACTED]. The letter is dated November 12, 2010. 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 discussed *supra*, 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 [REDACTED] 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. [REDACTED] claims that she is qualified to comment on the position of general manager because of the position she holds at [REDACTED]. However, without further clarification, it is unclear how her position as a professor of Management, Entrepreneurship, and General Business at [REDACTED] 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 and with the NAICS code) similar to the petitioner for *restaurant manager / general manager* positions (or parallel positions).

[REDACTED] 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 [REDACTED] in the specific area upon which she is opining. In reaching this determination, [REDACTED] 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). [REDACTED] 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 [REDACTED] 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. [REDACTED] 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 [REDACTED] 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. [REDACTED] provides general conclusory statements regarding general manager positions, but she does not provide a substantive, analytical basis for her opinion and ultimate conclusions.

[REDACTED] 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 [REDACTED] that the petitioner characterized the proffered position as a low, entry-level position (as indicated by the wage-level on the LCA). As previously discussed, the wage-rate indicates that the beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she 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 and appropriately determine similar positions based upon job duties and responsibilities.

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). For efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the opinion letters into each of the bases in this decision for dismissing the appeal.

It is incumbent upon the petitioner to provide persuasive evidence that the proffered position qualifies as a specialty occupation under this criterion, notwithstanding the absence of the *Handbook's* support on the issue. As previously mentioned, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish 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.

As stated earlier, 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 response to the director's RFE, the petitioner submitted copies of several advertisements in support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations. However, upon review of the documents, the AAO finds that the petitioner's reliance on the job announcements is misplaced.

In the Form I-129, the petitioner described itself as a restaurant established in 2008. The petitioner stated that it has 20 employees. On the Form I-129, the petitioner designated its operations under the North American Industry Classification System (NAICS) code 722110 – Full-Service Restaurants.¹² The NAICS website describes this industry as follows:

This industry comprises establishments primarily engaged in providing food services to patrons who order and are served while seated (i.e., waiter/waitress services) and pay after eating. These establishments may provide this type of food services to patrons in combination with selling alcoholic beverages, providing carry out services, or presenting live nontheatrical entertainment.

See U.S. Dep't of Commerce, U.S. Census Bureau, 2007 NAICS Definition, 722110 – Full-Service Restaurants, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>. (last visited January 23, 2013).

For the petitioner to establish that an advertising organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, postings submitted by a petitioner are generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the advertising 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). It is not sufficient for the petitioner and counsel to claim that the organizations are similar and in the same industry without providing a legitimate basis for such an assertion. As previously discussed, 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. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Notably, the petitioner and counsel did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the

¹² According to the Department of Commerce, U.S. Census Bureau, the North American Industry Classification System is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy, and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last viewed January 23, 2013).

employers' actual hiring practices.

Upon review of the documentation, the petitioner fails to establish 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 instance, the advertisements include positions with Soboba Band of Luiseno Indians (for which the industry is listed as "Government and Military" and the location is listed as Soboba Springs Country Club) and Eat'n Park Hospitality Group, Inc. ("food service operations in a continuing care retirement community"). Without further information, the advertisements appear to be for organizations that are not similar to the petitioner and the petitioner has not provided any probative evidence to suggest otherwise. Furthermore, the petitioner submitted job postings for which little or no information regarding the employers is provided. For example, the petitioner submitted three postings in which the employers are not identified ("Confidential Posting"). The record is devoid of sufficient information regarding the advertising employers to conduct a legitimate comparison of the organizations to the petitioner. The petitioner failed to supplement the record of proceeding to establish that the advertising organizations are similar to it. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations.

Moreover, some of the advertisements do not appear to be for parallel positions. That is, the positions do not appear to have similar duties and requirements to the proffered position. For example, the petitioner submitted a job posting for Soboba Band of Luiseno Indians for the position of food and beverage manager, which reports to the general manager. (The petitioner identifies its proffered position as a restaurant manager / general manager.) Notably, for the position with Eat'n Park Hospitality Group, Inc., the general manager will be responsible for assuring the nutritional needs of residents are met. There is no indication that the beneficiary will have a similar role in her work with the petitioner. Thus, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

In addition, the petitioner provided several job postings for positions, which require a degree and 2 to 5 years of experience. This includes most of the confidential postings and the job announcements with Fazoli's (Fazwest Group, Inc.) and Barnades Restaurant. Notably, the job announcement with Soboba Band of Luiseno Indians and one of the confidential postings state that the advertised positions require a bachelor's degree and 5 to 7 years of experience. (As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as an entry-level position.)

Additionally, contrary to the purpose for which the advertisements were submitted, none of the postings establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. For example, most of the postings state that a bachelor's degree is required, but they do not provide any further specification. That 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 Soboba Band of Luiseno Indians, Fazoli's (Fazwest Group, Inc.), Barnades Restaurant 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 Eat'n Park Hospitality Group, 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.

The AAO reviewed all of the advertisements submitted by the petitioner. However, as the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed.

It must be noted that even if all of the job postings indicated that a requirement of a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.

Moreover, 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 these 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 proffered position for organizations similar to the petitioner 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 require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

Upon review of the record of proceeding, the AAO notes that the petitioner's president provided documentation regarding the academic credentials of three individuals and claimed that the evidence is relevant to this matter. Specifically, in a letter dated July 15, 2011, submitted with the motion, the petitioner's president stated that he owns and operates other restaurants under different corporate entities. He reported that he currently employs an assistant manager, [REDACTED] who possesses a bachelor's degree in business administration. According to the president, he previously employed an assistant manager, [REDACTED] who possesses a

master's degree in business administration. The petitioner's president further stated that he employed another individual, [REDACTED] at two of his other restaurants on a part-time basis "whenever she was needed." He stated that [REDACTED] also possessed a degree.

In support of these statements, the petitioner submitted copies of these individuals' educational credentials, as well as pay records and wage statements for two of the individuals. The AAO reviewed the documentation but notes that [REDACTED] transcript is partially illegible (as mentioned in the director's decision). Furthermore, the diploma for [REDACTED] indicates that she was granted a master of science degree, but the document does not indicate any particular field of study or discipline. 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 the petitioner's president specifies that these restaurants are separate entities from the petitioning company. Notably, the petitioner's president failed to provide sufficient information regarding his other companies and 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's president failed to provide the job duties and day-to-day responsibilities of the positions. He did not state the knowledge and skills required for the position, or provide any information regarding the complexity of the job duties, independent judgment required or the amount of supervision received. In short, the petitioner has 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 petitioner's president did not indicate the total number of people who currently or in the past have served in these positions at his various restaurants. He also did not state when the restaurants were established. Therefore, it cannot be determined how representative the president's claim regarding these few individuals is of the recruiting and hiring practices of these restaurants.

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).

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 its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

The petitioner and counsel claim that the duties of the proffered position are complex, unique and/or specialized because the beneficiary will be responsible for the overall operations of the petitioner's restaurant. Counsel also claims that "a restaurant that employs 30 individuals, by itself, shows the size and the need for a General Manager to oversee that size of a restaurant requires at least a bachelor's degree in business or a related field." In support of the assertion, the petitioner submitted documentation regarding its business operations, including copies of its tax returns, quarterly wage reports, printouts from its website, and web reviews (from Trip Advisor.com, Yelp.com and Helium.com). Upon review of the record of proceeding, the AAO finds the petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. Moreover, the petitioner has not established that its business operations involve any particular level of complexity or other attributes that substantiate or show that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

The petitioner failed to demonstrate how the duties of the proffered position, as described, require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position.

The petitioner fails to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed. This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the LCA indicates a wage level based upon the occupational classification "Food Services Managers" at a Level I (entry level) wage. The wage level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, a Level IV

(fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."¹³

Therefore, the evidence of record does not establish that this position is significantly different from other food services manager positions such that it refutes the *Handbook's* information to the effect that a bachelor's degree in a specific specialty, or its equivalent, is not required for entry into the occupation in the United States. The record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than food services manager positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The petitioner fails to demonstrate how the proffered position is so complex or unique relative to other positions that do not require at least a baccalaureate degree in a specific specialty, or its equivalent, for entry into the occupation in the United States. Consequently, 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. To this end, the AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. 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.

While a petitioner may believe or otherwise assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty, or its equivalent. See *Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent, to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. See § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

¹³ For additional information on wage levels, 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.

To satisfy this criterion, the evidence of record must show 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 the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations 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 a 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 acknowledges that the record of proceeding contains copies of academic credentials for three individuals who currently or in the past worked for the petitioner's president. 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.

The petitioner stated in the Form I-129 petition that it has 20 employees and that it was established in 2008 (approximately two years prior to the H-1B submission). The petitioner's president stated in a letter dated November 3, 2010 that he "had always managed the restaurant [himself] along with other aspects of the restaurant." He did not state or provide any documentation regarding his academic credentials. Moreover, the petitioner did not submit any evidence regarding its recruiting practices. The AAO observes that the record is devoid of information to satisfy this criterion of the regulations.

The AAO reviewed the record of proceeding but finds that the petitioner has not provided probative evidence to establish 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).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) 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 in a specific specialty, or its equivalent.

The AAO acknowledges that the petitioner and counsel claim that the proffered position involves specialized and complex duties. In addition, the AAO notes that it reviewed the documentation provided by the petitioner regarding its business operations and related materials. However, upon review of the record of the proceeding, the AAO notes that relative specialization and complexity

have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent. 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."

Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a substantially higher prevailing wage. As previously discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

Again, the AAO acknowledges that the record of proceeding contain 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.

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

A 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 has failed to establish that the proffered position requires a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the AAO need not and will not address the beneficiary's qualifications further.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143 (noting that the AAO conducts appellate review on a *de novo* basis).

(b)(6)

Page 27

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

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

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