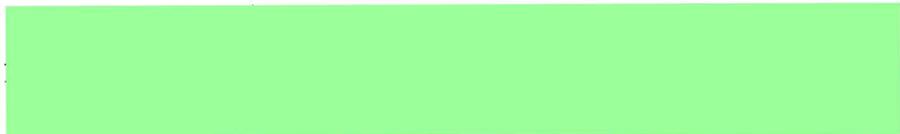
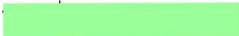


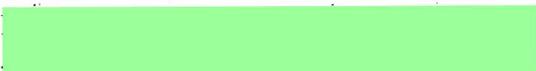


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **FEB 22 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:

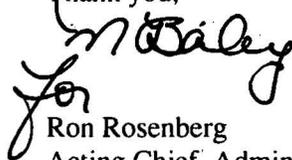


INSTRUCTIONS:

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. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on January 23, 2012. In the Form I-129 visa petition, the petitioner describes itself as a full service restaurant established in 2011. In order to employ the beneficiary in what it designates as a public relations 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 director denied the petition on April 23, 2012, 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 asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements. In support of this assertion, counsel submitted a brief and additional evidence.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. 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, and the petition will be denied.

As a preliminary matter, the AAO notes that even if the petitioner were to overcome the basis for the director's denial of the petition (which it has not), it could not be found eligible for the benefit sought. That is, upon review of the record, the AAO notes that in the instant case, another issue, not addressed by the director, precludes the approval of the H-1B petition. As will be explained below, the Form I-129 petition was not properly signed by the petitioner. More specifically, the petitioner failed to certify that it would be liable for the reasonable costs of return transportation if the beneficiary is dismissed from its employment prior to the period of authorized stay.

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

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, and such instructions are incorporated into the regulations requiring its submission.

The instructions for Form I-129 state that the petition must be properly signed, and further indicate that a petition that is not properly signed will be rejected. Moreover, according to the instructions, a petitioner that fails to completely fill out the form will not establish eligibility for the benefit sought and the petition may be denied.

The regulation at 8 C.F.R. § 103.2(a)(2), which concerns the requirement of a signature on applications and petitions, states the following:

An applicant or petitioner must sign his or her benefit request. . . . By signing the benefit request, the applicant or petitioner . . . certifies under penalty of perjury that the benefit request, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct. Unless otherwise specified in this chapter, an acceptable signature on a benefit request that is being filed with the USCIS [United States Citizenship and Immigration Services] is one that is either handwritten or, for benefit requests filed electronically as permitted by the instructions to the form, in electronic format.

Pursuant to 8 C.F.R. § 103.2(a)(7)(i) and (iii), an application or petition which is not properly signed shall be rejected as improperly filed, and will not retain a filing date.

The regulation at 8 C.F.R. § 103.2(b)(1) provides, in pertinent part, the following:

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions.

The petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. All required petition forms must be properly completed and filed with any initial evidence required by applicable regulations and the form instructions. *See* 8 C.F.R. § 103.2(b)(1).

In the instant case, the petitioner failed to comply with the signature requirement. More specifically, the Form I-129 (page 12) contains a signature block that is devoid of any signature from the petitioning employer. This section of the form reads as follows:

As an authorized official of the employer, I certify that the employer will be liable for the reasonable costs of return transportation of the alien abroad if the alien is dismissed from employment by the employer before the end of the period of authorized stay.

By failing to sign this signature block of the Form I-129, the petitioner has failed to attest that it will comply with § 214(c)(5) of the Act, which states the following:

In the case of an alien who is provided nonimmigrant status under section 101(a)(15)(H)(i)(b) or 101(a)(15)(H)(ii)(b) and who is dismissed from employment by the employer before the end of the period of authorized admission, the employer shall be liable for the reasonable costs of return transportation of the alien abroad.

The regulation at 8 CFR § 214.2(h)(4)(iii)(E) further states, in pertinent part, the following:

The employer will be liable for the reasonable costs of return transportation of the alien abroad if the alien is dismissed from employment by the employer before the end of the period of authorized admission pursuant to section 214(c)(5) of the Act. . . . Within the context of this paragraph, the term "abroad" refers to the alien's last place of foreign residence. This provision applies to any employer whose offer of employment became the basis for an alien obtaining or continuing H-1B status.

Thus, the petition has not been properly filed because the petitioning employer did not sign the signature block certifying that it would be liable for the reasonable costs of return transportation if the beneficiary is dismissed from its employment prior to the period of authorized stay. Pursuant to 8 C.F.R. § 103.2(a)(7)(i), an application or petition which is not properly signed shall be rejected as improperly filed, and no receipt date can be assigned to an improperly filed petition. While the Service Center did not reject the petition, the AAO is not controlled by service center decisions. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 at 3 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 534 U.S. 819 (2001). The AAO notes that the integrity of the immigration process depends on the employer signing the official immigration forms. The AAO conducts appellate review on a *de novo* basis, and it was in the exercise of this function that the AAO identified this additional ground for dismissing the petition. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Thus, for this reason as well, the petition may not be approved.

The appeal must be dismissed, thus rendering the remaining issues in this proceeding moot. Accordingly, the AAO does not need to examine the director's basis for denial of the petition. However, the AAO will note that, in any event it reviewed the record of proceeding and, based upon that review, hereby endorses the director's decision. That is, the AAO agrees with director's 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.

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a public relations manager to work on a full-time basis at a rate of pay of \$52,507 per year. In a support letter dated January 3, 2012, the petitioner stated that the beneficiary would perform the following duties in the proffered position:

Plan and direct public relations programs designed to create and maintain a favorable public image for the company. Negotiate & direct graphic designers & advertising companies in promoting the profits & services of the company.

In its letter of support accompanying the initial I-129 petition, the petitioner described the minimum educational requirements for the proffered position as a "[b]achelor[']s degree." The petitioner also provided documentation regarding the beneficiary's academic credentials, including an evaluation of the beneficiary's education from [REDACTED]. The evaluation indicates that the beneficiary holds the equivalent of a "Bachelor of Tourism with emphasis on Management from a regionally-accredited institution of higher education in the United States."

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 "Public Relations and Fundraising Managers" - SOC (ONET/OES Code) 11-2031, at a Level I (entry level) wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on January 31, 2012. The director outlined the evidence to be submitted. The AAO notes that the director specifically requested that the petitioner submit probative evidence to establish that the proffered position is a specialty occupation.

On April 11, 2012, the petitioner and counsel responded to the director's RFE by providing a revised description of the duties of the proffered position and additional evidence. Specifically, the petitioner provided the following description of its proffered position:

- [The beneficiary's] primary duty will be to plan and direct public relations programs designed to create and maintain a favorable public image for the Restaurant. As such, he will spend about 12 hours a week negotiating with and directing graphic designers and advertising firms in promoting the services of the company. This includes, communicating to the designers the image and messaging of the ads as well as choosing the best mediums for placement of the promotional materials. It will also include maintaining personal relationships with representatives of various media outlets and negotiating costs on both the design and display of advertisements.
- [The beneficiary] will spend about 8 hours a week on planning, coordinating and executing in-house and special outside events that will showcase the restaurants [sic] public images [sic]. This may include promotional events from product representatives such as wine tastings or sponsorship of outside events such as charities or festivals. [The beneficiary] will have to establish and maintain personal relationships with representatives and be able to identify the most advantageous events to be a part of. Events such as these are extremely important to the promotion of a restaurant because the help to establish and spread the company's name throughout the community and generate positive "buzz" about the restaurant. They will also serve to inform the community about the services that our company has to offer and expand our general client base.
- [The beneficiary] will also spend about 4 hours a week establishing our identity, not only with our customer base, but the entire community of business that surround [sic] the restaurant business including wine and liquor distributors and food vendors. He will be responsible for creating and maintaining personal relationships with all of our suppliers. He will also be responsible for creating and maintain [sic] relationships with peripheral members of the service industry such as local magazines and websites that

specialize in covering the service industry. This will enable him to spread the work about our business objectives within the service community. [The beneficiary] will also be responsible for creating and implanting any intra-company communications.

- He will spend about 4 hours a week creating and distributing materials to the staff for various promotions and training to inform the customers. These may include motivational materials, memos regarding changes in the rules or business plans and general communications designed to help the smooth operations of the business.
- [The beneficiary] will spend about 4 hours a week of his time finding and retrieving information on the latest trends in the restaurant business and in the community in general. This information may come from media sources or from [sic] personal contacts that he will generate and foster in the community both in the service industry and the general public. This includes not only the acquisition of information but relaying that information to the other managers.
- [The beneficiary] will spend an additional 6 hours a week at the restaurant, greeting guests, setting meetings for various departmental manager[s] for catering, special events, parties and banquets, ensuring that they are having a quality experience and satisfactory service performance and measure their feedback on the restaurant services and images. By doing this he will help the customer's place a friendly "face" on the business as well as gather important information on the customer's [sic] needs and want [sic] in order to help the restaurant keep pace with the public's expectations. [The beneficiary] will ask guests about their dining experience and find out what they liked about the restaurant as well as take suggestions from the customers about what they would like to see changed. He will then organize this information in a way that will help us further refine our business for maximum profitability.
- Finally, [the beneficiary] will spend about 2 hours a week creating reports for upper management and [the] owner for reviewing the progress of programs for marketing and promotion that have already been implemented. These will include detailed information on which elements of the programs have been implemented and any concrete effects the programs have had upon the business. He will use information that he had gathered from his other duties and analy[ze] based upon his education and experience. The reports will detail the current state of ongoing promotional activities and also offer suggestions and outline altered plans for new promotions. He would make recommendations for other adjustment[s] such as menu changes and any other sale/promotion adjustments that he feels will help the business appeal to customers in the competitive food service industry.

(Bullet points added.) The petitioner stated that "most of [its] employees do not have a bachelor's

degree and [the petitioner does not] need them as part of their employment requirements." The petitioner continued by stating that "certain executive job or manager position requires a bachelor degree in order to perform satisfactorily." The petitioner claimed that the "Public Relations Manager is one of the positions [the petitioner requires] a minimum of a bachelor degree to qualify."

In addition, the petitioner and counsel submitted additional documentation, including a statement from the beneficiary's prior employer regarding his duties in the previous position; an excerpt from the 2010-2011 edition of the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* regarding "Advertising, Marketing, Promotions, Public Relations, and Sales Managers"; several job postings for positions entitled "public relations manager"; a letter from the owner of another restaurant; a copy of a diploma for [redacted]; a copy of the petitioner's lease; printouts of the petitioner's website and Facebook page; marketing materials, such as clippings of the petitioner's newspaper advertisements and special event flyer; photographs of the petitioner's locale; a copy of a catering invoice; payroll documents; a list of the petitioner's employees; the petitioner's organizational chart; and copies of the petitioner's operating permits.

The director reviewed the information provided by the petitioner. 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 April 23, 2012. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition.¹

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO will make some preliminary findings that are material to the determination of the merits of this appeal.

The AAO notes that, on appeal, counsel asserts that the director did not apply the appropriate standard of proof while adjudicating the instant petition. Counsel for the petitioner indicates that the "preponderance of the evidence" standard is relevant to this matter, and claims that the petitioner established that the proffered position qualifies as a specialty occupation.

With respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states, in pertinent part, the following:

¹ In the appeal brief, counsel provided a revised job description. It is noted that this description of the duties of the proffered position is not probative evidence as the description was provided by counsel, not the petitioner. Counsel's brief was not endorsed by the petitioner and the record of proceeding does not indicate the source of the duties and responsibilities that counsel attributes to the proffered position. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Thus, in adjudicating the petition pursuant to the preponderance of the evidence standard, USCIS examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. The "preponderance of the evidence" standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, the petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. As will be discussed, in the instant case, that burden has not been met.

When determining whether a position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks 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. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the

evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, 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."

In its letter of support accompanying the initial I-129 petition, the petitioner described the minimum educational requirements for the proffered position as a "[b]achelor[']s degree." The AAO observes that the petitioner's claimed entry requirement of a bachelor's degree (no specific specialty) for the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. That is, the petitioner indicated that a general-purpose bachelor's degree is sufficient for the proffered position. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly to the duties and responsibilities of the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a general-purpose degree, 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. 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 may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).²

Again, the petitioner in this matter claims that the duties of the proffered position can be performed by an individual with a general-purpose bachelor's degree, and has not indicated a requirement for a bachelor's degree in a specific specialty. 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.

² Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

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

Further, upon review of the record of proceeding, the AAO notes that the enclosed LCA does not appear to correspond to the claimed duties and requirements of the proffered position. Consequently, as will be discussed below, the petitioner has failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

More specifically, the petitioner provided an LCA in support of the instant petition that indicates the occupational classification for the position is "Public Relations Managers" at a Level I (entry level) wage. Wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) 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.³ 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) 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.⁴ DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received as indicated by the job description.

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

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely

³ 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.

⁴ 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.

monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

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

In the instant case, the petitioner and counsel repeatedly claim that the nature of the proffered position involves complex, unique and/or specialized tasks. For example, in its support letter dated March 23, 2012, the petitioner characterizes its business as being "one of the largest Sushi Japanese Restaurants in Houston," and states that it is "in need of a professional Public Relations manager who has the knowledge and expertise to effectively expand [the] business in the area of catering services, private parties, major banquets, and other specialty functions." The petitioner indicates that this function is essential to its business model because "these extra 'services' actually yield much higher profits [sic] returns than a regular food service business." Further, the petitioner claims that the beneficiary will create reports for "upper management and [the] owner" on the marketing and promotion programs, and the effects of these programs on the business, and suggest new programs based on his analysis. In addition, the petitioner reports that the beneficiary would be responsible for making "recommendations for other adjustment[s] that he feels will help the business appeal to customers." The AAO observes that the organizational chart submitted in response to the RFE indicates that the proffered position reports directly to the president of the company. Moreover, based upon a review of the organizational chart, it appears that the proffered position is one of the most senior positions in the petitioner's company.

In the appeal brief dated June 19, 2012, counsel characterizes the proffered position as a "Senior-level" public relations manager. He further states that the position is a "complex technical job" and requires a "great amount of creative thinking, project management, attention to detail, and collaborative skills and analysis." Counsel indicates that in the proffered position the beneficiary will be required to "make decisions and solve difficult problems that require him to balance the interest of marketing and public relations with maintain positive relationships, budgeting, training staff, and satisfying the needs of the customers." Counsel further states that the position involves "complex technical expertise." According to counsel, the "job duties suggest that both complex technical know-how and a great amount of high-level written and verbal communications skills and knowledge of the specific Houston market, media, and potential customers" are necessary for the proffered position. Additionally, he claims that the position "performs' work that is highly specialized and complex."

The AAO thus observes that the petitioner has indicated that it will be relying heavily on the beneficiary's work product to make critical decisions regarding the direction of the company and that he will have a significant degree of independent involvement in various key company functions. Further, the AAO notes that the beneficiary will report directly to the president of the company. Such reliance on the beneficiary's work appears to surpass the expectations of a Level I position, as described above, where the employee works under close supervision, performing routine tasks that require only a basic understanding of the occupation and has limited exercise of

judgment. Here, rather than the beneficiary's work being "monitored and reviewed for accuracy," the petitioner claims that it is relying on the accuracy of the beneficiary's work product to make major business decisions that will directly affect the company's profits.

Thus, upon review of the assertions made by the petitioner and counsel, the AAO must question the level of complexity, independent judgment and understanding actually required for the proffered position as the LCA is certified for a Level I entry-level position. This characterization of the position and the claimed duties and responsibilities as described by the petitioner and counsel conflict with the wage-rate element of the LCA selected by the petitioner, 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, the selected wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

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 AAO notes that the prevailing wage of \$28.84 per hour on the LCA corresponds to a Level I position for the occupational category of "Public Relations and Fundraising Managers" for Harris County (Houston, TX).⁵ Notably, if the proffered position had been designated at a higher level, the prevailing wage at that time would have been \$40.91 per hour for a Level II position, \$52.99 per hour for a Level III position, and \$65.06 per hour for a Level IV position.⁶

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

⁵ For additional information regarding the prevailing wage for Public Relations and Fundraising Managers in Houston, Texas, see the All Industries Database for 7/2011 - 6/2012 for Public Relations and Fundraising Managers at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatcenter.com/OesQuickResults.aspx?area=26420&code=11-2031&year=12&source=1> (last visited February 20, 2013).

⁶ The AAO explains *infra* why the occupational category of "Public Relations Managers" fails to adequately encompass the duties of the proffered position as described by the petitioner.

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 [DOL] 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 understanding required for the proffered position 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 director's basis for denial of the petition (which it has not), the petition could not be approved for this independent reason.

The AAO will now specifically 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, and for the specific reasons described below, the AAO agrees with the director that the evidence fails to establish that the position as described constitutes a specialty occupation.

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 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:

- (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 147 (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether the proffered position qualifies as a specialty occupation, the AAO now turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). In the interest of efficiency, the AAO hereby incorporates the above discussion and analysis regarding the duties and requirements of the proffered position into the analysis of each criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which follows below.

The AAO will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that the petitioner demonstrate that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

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

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁷ As previously mentioned, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Public Relations and Fundraising Managers." The AAO reviewed the chapter of the *Handbook* entitled "Public Relations Managers and Specialists," but did not find that the duties of the proffered position correspond to this occupational category.⁸

The *Handbook* describes the duties of "Public Relations Managers" in the subsection entitled "Public Relations Managers and Specialists Do" and states, in part, the following about the duties of this occupation:

Public relations managers and specialists create and maintain a favorable public image for their employer or client. They write material for media releases, plan and direct public relations programs, and raise funds for their organizations.

Duties

Public relations managers and specialists typically do the following:

⁷ All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

⁸ For additional information regarding the occupational category "Public Relations and Fundraising Managers," see O*NET OnLine, Summary Report for: 11-2031.00 - Public Relations and Fundraising Managers, on the Internet at <http://www.onetonline.org/link/summary/11-2031.00> (last visited February 20, 2013). The report states that individuals in this occupation "[p]lan, direct, or coordinate activities designed to create or maintain a favorable public image or raise issue awareness for their organization or client; or if engaged in fundraising, plan, direct, or coordinate activities to solicit and maintain funds for special projects or nonprofit organizations."

- Write press releases and prepare information for the media
- Identify main client groups and audiences and determine the best way to reach them
- Respond to requests for information from the media or designate an appropriate spokesperson or information source
- Help clients communicate effectively with the public
- Develop and maintain their organization's corporate image and identity, using logos and signs
- Draft speeches and arrange interviews for an organization's top executives
- Evaluate advertising and promotion programs to determine whether they are compatible with their organization's public relations efforts
- Develop and carry out fundraising strategies for an organization by identifying and contacting potential donors and applying for grants

* * *

Public relations managers review and sometimes write press releases. They also sponsor corporate events to help maintain and improve the image and identity of their organization or client.

In addition, they help to clarify their organization's point of view to its main audience through media releases and interviews. Public relations managers observe social, economic, and political trends that might ultimately affect the organization, and they recommend ways to enhance the firm's image based on those trends. For example, in response to a growing concern about the environment, an oil company may create a public relations campaign to publicize its efforts to develop cleaner fuels.

In large organizations, public relations managers may supervise a staff of public relations specialists. They also work with advertising and marketing staffs to make sure that advertising campaigns are compatible with the image the company or client is trying to portray. For example, if the firm has decided to emphasize its appeal to a certain group, such as younger people, the public relations manager ensures that current advertisements will be well received by that group.

In addition, public relations managers may handle internal communications, such as company newsletters, and may help financial managers produce an organization's reports. They may help the organization's top executives by drafting speeches, arranging interviews, and maintaining other forms of public contact. Public relations managers must be able to work well with many types of specialists to accurately report the facts. In some cases, the information they write has legal consequences.

They must work with the company's or client's lawyers to be sure that the information they release is both legally accurate and clear to the public.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, Public Relations Managers and Specialists, on the Internet at <http://www.bls.gov/ooh/Management/Public-relations-managers-and-specialists.htm#tab-2> (last visited February 20, 2013).

The section of the *Handbook* entitled "Work Environment," states, in part, the following regarding Public Relations Managers and Specialists:

Employment of public relations managers and specialists was concentrated in the following industries in 2010:

Religious, grantmaking, civic, professional, and similar organizations	22%
Professional, scientific, and technical services	17
Educational services; state, local, and private	13
Health care and social assistance	9
Government	8

Public relations managers and specialists usually work in offices, but they also deliver speeches, attend meetings and community activities, and travel. They work in fairly high-stress environments, often managing and organizing several events at the same time.

Handbook, 2012-13 ed., Public Relations Managers and Specialists, on the Internet at <http://www.bls.gov/ooh/Management/Public-relations-managers-and-specialists.htm#tab-3> (last visited February 20, 2013).

The AAO reviewed the record of proceeding, but is not persuaded by the petitioner's claim that the proffered position falls under the occupational category for public relations manager positions. The AAO notes that in the Form I-129 the petitioner designated its business operations under the North American Industry Classification System (NAICS) code 722110 – "Full-Service Restaurants."⁹ The U.S. Department of Commerce, Census Bureau website describes this NAICS code 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 service) 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 February 20, 2013).

⁹ NAICS is used to classify business establishments according to type of economic activity, and each establishment is classified to an industry according to the primary business activity taking place there. See U.S. Dep't of Commerce, U.S. Census Bureau, NAICS, on the Internet at <http://www.census.gov/eos/www/naics/> (last visited February 20, 2013).

According to the *Handbook*, a full-service restaurant is not a typical place of employment for public relations managers. Rather, public relations managers are more typically found in industries such as religious and civic organizations, professional and scientific service organizations, educational entities, health care and social assistance entities, and in the government. The AAO notes that such industries are focused more on conveying particular ideas to the public or explaining policies, than on the sale of a particular product or service.

Furthermore, although the duties of the proffered position and the duties of public relations managers as described by DOL may have a few general duties in common, the AAO finds that there are qualitative differences. For instance, the petitioner does not claim that the beneficiary will "[d]evelop and carry out fundraising strategies for [the petitioner] by identifying and contacting potential donors and applying for grants." There is no indication in the record of proceeding that the beneficiary will be responsible for "rais[ing] issue awareness" or "plan[ning] activities to solicit and maintain funds for special projects or nonprofit organizations." Furthermore, the petitioner does not assert that the beneficiary will clarify the petitioner's "point of view to its main audience." Additionally, there is no indication that the beneficiary will "[w]rite press releases and prepare information for the media." Nor, does the petitioner state that the beneficiary will "[r]espond to requests for information from the media or designate an appropriate spokesperson or information source." The petitioner does not indicate that the beneficiary will "[d]raft speeches and arrange interviews for [the petitioner's] top executives."

The AAO finds that the media contact involved in the proposed duties of the proffered position relates primarily to advertising the petitioner's products/services, as opposed to the media contact of a public relations manager, which is focused on clarifying the employing organization's point of view to the public. The AAO observes that the petitioner has stated that the beneficiary will spend roughly a third of his time "negotiating with and directing graphic designers and advertising firms in promoting the services of the company." The heavy emphasis of the proffered position on placement of advertisements is not consistent with the job duties of a public relations manager, as described in the *Handbook*. Further, the petitioner stated that the beneficiary will spend roughly 22% of his time (eight hours per week) planning and executing special events. As an example, the petitioner included a flyer that appears to advertise an event sponsored by the petitioner that involves a cash prize. Thus, this task appears to be a primary and essential duty of the proffered position. However, the *Handbook* does not indicate that this duty is typically performed by public relations managers.

Upon review of the record of proceeding, the AAO finds that the petitioner has not demonstrated that the proffered position falls under the occupational category of "Public Relations Managers." Thus, the AAO will not further address this occupational category as it is not relevant to this proceeding.

The AAO reviewed the *Handbook* and finds that many of the duties of the proffered position correspond to the occupation "Promotions Managers." The chapter of the *Handbook* entitled "What Advertising, Promotions, and Marketing Managers Do," states, in part, the following about this occupational category:

Advertising, promotions, and marketing managers plan programs to generate interest in a product or service. They work with art directors, sales agents, and financial staff members.

Duties

Advertising, promotions, and marketing managers typically do the following:

- Work with department heads or staff to discuss topics such as contracts, selection of advertising media, or products to be advertised
- Gather and organize information to plan advertising campaigns
- Plan the advertising, including which media to advertise in, such as radio, television, print, online, and billboards
- Negotiate advertising contracts
- Inspect layouts, which are sketches or plans for an advertisement
- Initiate market research studies and analyze their findings
- Develop pricing strategies for products to be marketed, balancing the goals of a firm with customer satisfaction
- Meet with clients to provide marketing or technical advice
- Direct the hiring of advertising, promotions, and marketing staff and oversee their daily activities

Promotions managers direct programs that combine advertising with purchasing incentives to increase sales. Often, the programs use direct mail, inserts in newspapers, Internet advertisements, in-store displays, product endorsements, or special events to target customers. Purchasing incentives may include discounts, samples, gifts, rebates, coupons, sweepstakes, and contests.

Handbook, 2012-13 ed., Advertising, Promotions, and Marketing Managers, on the Internet at <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-2> (last visited February 20, 2013).

Upon thorough review of the above described section of the *Handbook* detailing the duties of a promotions manager, the AAO finds that duties of the proffered position are most accurately captured by this occupational designation. The AAO observes that the job duties specified by this section of the *Handbook*, particularly the duties of "negotiat[ing] advertising contracts"; "gather[ing] and organiz[ing] information to plan advertising campaigns"; "planning the advertising"; and "initiat[ing] market research studies and analyz[ing] their findings" are all duties encompassed by the proffered position, as described by the petitioner. The AAO notes that evidence in the record of proceeding, supplied by the petitioner, indicates that the proffered position includes promotion of the petitioner's business through special events, newspaper advertisements, flyers, coupons, and a direct e-mail "club."

The subchapter of the *Handbook* entitled "How to Become an Advertising, Promotions, or Marketing Manager" states, in part, the following about this occupation:

Education

A bachelor's degree is required for most advertising, promotions, and marketing management positions. For advertising management positions, some employers prefer a bachelor's degree in advertising or journalism. A relevant course of study might include classes in marketing, consumer behavior, market research, sales, communication methods and technology, visual arts, art history, and photography.

Most marketing managers have a bachelor's degree. Courses in business law, management, economics, accounting, finance, mathematics, and statistics are advantageous. In addition, completing an internship while in school is highly recommended.

Work Experience

Advertising, promotional, and marketing managers typically have work experience in advertising, marketing, promotions, or sales. For example, many managers are former sales representatives; purchasing agents; buyers; or product, advertising, promotions, or public relations specialists.

Handbook, 2012-13 ed., Advertising, Promotions, and Marketing Managers, available on the Internet at <http://www.bls.gov/ooh/management/advertising-promotions-and-marketing-managers.htm#tab-4> (last visited February 20, 2013).

The *Handbook* does not support the assertion that a baccalaureate or higher degree *in a specific specialty*, or its equivalent, is normally the minimum requirement for entry into the occupation. The *Handbook* states that for advertising management positions, some employers prefer a bachelor's degree in advertising or journalism. Clearly, a preference by *some employers* is not an occupational, entry requirement. The *Handbook* further states that a relevant course of study for these positions might include classes in marketing, consumer behavior, market research, sales, communication methods and technology, visual arts, art history, and photography. Thus, a range of courses of study are considered relevant for advertising management positions. The passage of the *Handbook* also states that most marketing managers have a bachelor's degree, but it does not indicate that any specific specialty is normally required for these positions.¹⁰ The *Handbook*

¹⁰ Moreover, the first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of these positions have a bachelor's degree, it could be said that "most" advertising, promotions, and marketing managers possess such a degree. It cannot be found, therefore, that the statement in the *Handbook* that a "bachelor's degree [with no specification as to the field of study] is required for most advertising, promotions, and marketing management positions" would equate to establishing that a baccalaureate or higher degree in a *specific specialty* or its equivalent is the normal minimum entry requirement for this occupation, much less for the particular position proffered by the petitioner (which as has been designated by the petitioner in the LCA as a Level I position). Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific

indicates that courses in business law, management, economics, accounting, finance, mathematics, and statistics are advantageous for marketing managers. The AAO notes that the courses that the *Handbook* indicates are advantages for marketing managers are in a wide-variety of disparate fields. The *Handbook* does not conclude that normally the minimum requirement for entry into these positions is at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the *Handbook* does not support the assertion that the proffered position falls under an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry.

The AAO reiterates that the *Handbook* does not denote that at least a bachelor's degree is a standard entry requirement for this occupation. However, assuming *arguendo* that the *Handbook* stated a requirement for at least a bachelor's degree for entry into this occupational category (which it does not), 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" 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," 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) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. See section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). As just stated, this also includes even seemingly disparate specialties provided the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Here, although the *Handbook* states that a bachelor's degree is required for most advertising, promotions, and marketing management positions, it also indicates that "[a] relevant course of study might include classes in marketing, consumer behavior, market research, sales, communication methods and technology, visual arts, art history, and photography" for advertising management positions. The *Handbook* further indicates that "[c]ourses in business law, management, economics, accounting, finance, mathematics, and statistics are advantageous" are advantageous for marketing managers. Thus, courses of study in a wide-range of disparate fields are considered relevant and/or advantageous for entry into the occupation. Notably, these dissimilar courses of study fail to delineate a specific specialty. Thus, the *Handbook's* narrative does not support the assertion that these positions normally require at least a bachelor's degree in a specific specialty, or its equivalent,

specialty (or its equivalent) as a minimum for entry into the occupation in the United States." § 214(i)(1) of the Act.

for entry into the occupation.

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 *Handbook* support on the issue. 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)).

In the instant case, 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 by the petitioner 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 of proceeding 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.

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. Thus, the AAO incorporates by reference the previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement.

The AAO notes that under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the petitioner must establish that "the degree requirement is common to *the industry in parallel positions among similar organizations.*" (Emphasis added.) That is, this prong requires the petitioner to establish that a requirement of a bachelor's 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.

In the Form I-129, the petitioner reported that it is a full service restaurant established in 2011. The petitioner further stated that it has 58 employees, with a gross annual income of \$3.5 million and a net annual income of \$450,000. As noted above, the petitioner designated its business operations under the North American Industry Classification System (NAICS) code 722110, corresponding to "Full-Service Restaurants."

For the petitioner to establish that organizations are similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such information, evidence submitted by a petitioner is 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 an 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 an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

In response to the RFE, counsel and the petitioner submitted a copy of a letter (dated October 19, 2009) from [REDACTED], president of [REDACTED], the beneficiary's prior employer, and a letter (dated March 28, 2012) from [REDACTED], owner of [REDACTED] restaurant. The AAO reviewed the letters in their entirety. However, the letters do not establish that the proffered position qualifies as a specialty occupation under this criterion of the regulations.

More specifically, regarding the letter from [REDACTED] the AAO makes the following observations. First, the letter from [REDACTED] states that "the company requires the services of a Public Relations Manager who has a Bachelor degree." While the letter states that the company requires a bachelor's degree for the indicated position, it does not state that the company requires a bachelor's degree in a *specific specialty* directly related to the duties and responsibilities of the position. Second, while a general description of duties is offered, the letter does not detail the duties of the indicated position with sufficient specificity such that the AAO can conclude that the position is "parallel" to the proffered position. The AAO notes that the job description is extremely brief – just two sentences – and does not adequately convey the substantive work performed. The letter does not provide such information as the day-to-day responsibilities of the position, the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, it is unclear whether the duties and responsibilities of this position are the same or parallel to the proffered position. Finally, although the AAO notes that in response to the RFE, counsel characterized the employer's business operations as "almost identical" to those of the petitioner, there is no evidence in the record to corroborate this claim. As previously mentioned, without documentary evidence to support the claim, the assertions of counsel will not satisfy the

petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence.¹¹ *Matter of Obaigbena*, 19 I&N Dec. 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. 506. Thus, the petitioner has not provided sufficient information to determine whether the organization and the petitioner share the same general characteristics such that it can be concluded that the organization is "similar" to the petitioner. For all of these reasons, the AAO finds that the letter from [REDACTED] is not probative evidence that a requirement of a bachelor's or higher degree in a specific specialty "is common to the industry in parallel positions among similar organizations," pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The letter from [REDACTED] states that in order to qualify for the company's public relations manager position, an individual "is required to have at least a bachelor's degree in a specific field." No further explanation or details were provided regarding the phrase "specific field," thus the AAO is unable to ascertain what educational requirement is associated with the indicated position.¹² Further, although the writer states that his business is a "Japanese restaurant which offers Japanese sushi, seafood, gourmet hot food, desserts and salads," the letter does not describe any other characteristics of the business operations to establish that the business is similar to the petitioner. Furthermore, the petitioner has not identified which aspects or traits (if any) it shares with this business. Therefore, the AAO find that this letter fails to demonstrates that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, "is common to the industry in parallel positions among similar organizations," pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO may, in its discretion, use advisory opinions or statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). As a reasonable exercise of its discretion the AAO discounts the advisory opinion letters as not probative of any criterion of 8 C.F.R.

¹¹ The AAO notes that counsel asserts that the instant petition must be approved because a prior H-1B petition was approved for the beneficiary through his prior employer. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of a prior approval that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, it would constitute material and gross error on the part of the director. It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval of a petition does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved a nonimmigrant petition on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

¹² [REDACTED] does not state that the company requires a degree in a specific specialty that directly relates to the duties and responsibilities of the position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 147 (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position").

§ 214.2(h)(4)(iii)(A). For efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the opinion letters into its analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In addition to the above described letters, the petitioner submitted several job announcements in response to the RFE. The AAO has reviewed the job announcements; however, it finds that the petitioner's reliance on these announcements is misplaced. As previously noted, the petitioner has described itself as a full-service restaurant, with 58 employees and gross annual revenue of \$3.5 million. Upon review of the documents, the AAO finds that they do not establish that a requirement for a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in similar organizations for parallel positions to the proffered position.

The job posting for an "IT [information technology] Consulting Public Relations Manager" is for [REDACTED], an IT consulting/services company. The job posting for a "Public Relations Manager" at Hayneedle indicates that the company "owns and operates 200 online specialty stores." The announcement for a Public Relations Manager at [REDACTED] notes that the company is the "#1 Toy Company in the world." Finally, the announcement for [REDACTED] states that the "Public Relations Manager" position it seeks to fill is for [REDACTED] Hotels and Casinos. Thus, none of the above described job announcements are for positions in the petitioner's full-service restaurant industry.

Further, the AAO notes that most of the advertised positions do not state a requirement for a bachelor's degree in a specific specialty, or its equivalent. The [REDACTED] job posting does not require a bachelor's degree in a specific specialty, but rather a "[c]ombination of education and experience equivalent to the receipt of a four-year college degree." The [REDACTED] job announcement requires a "bachelor's degree, preferably in journalism or communications." Obviously, a *preference* for a candidate with a degree in journalism or communications is not an indication of a *requirement* for the same. The IT Consulting Public Relations Manager job announcement states, "Undergraduate degree in public relations, marketing, communications or related field," however, it does not indicate the level of undergraduate education required (i.e., associate's degree, baccalaureate) for the position.

Finally, the AAO notes that the petitioner has not established that the advertised positions are for job opportunities that are parallel to the proffered position. For instance, all of the advertised positions require a degree and at least five years of experience. Thus, the advertised positions appear to be more senior positions than the proffered position, which as discussed earlier has been designated by the petitioner in the LCA as a low, entry-level position. Moreover, the Public Relations Manager at [REDACTED] will help oversee an in-house public relations team. The AAO notes that, according to the organizational chart that the petitioner has provided, the proffered position is the petitioner's only public relations position, and the proffered position does not have any direct reports. Notably, the IT Consulting Public Relations Manager will work as "part of [a] field Public Relations team," and work on "national communications platforms/initiatives." The scope of the advertised position is thus substantially different than the proffered position that focuses on the placement of individual advertisements in local publications. Thus, without further evidence, the advertised positions do not appear to be parallel to the proffered position.

As described above, the job announcements do not 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. Further, it must be noted that even if all of the job postings indicated that 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.¹³

Based upon a complete review of the record of proceeding, the AAO finds that the petitioner has not established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. Thus, 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 AAO acknowledges that the petitioner claims that its particular position is so complex and/or unique that it can be performed only by an individual with at least a bachelor's degree. In support of this assertion, the petitioner provided documents regarding its business operations, including advertising/promotional/marketing materials; financial documents; a two-page Profit and Loss Statement; a three-page document that counsel refers to as a customer list; a lease agreement; photographs of its premises; an employee list; an organizational chart; and business permits and licenses. The AAO reviewed the documentation in its entirety. However, the petitioner did not

¹³ 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 organizations similar to the petitioner in its industry commonly require, for positions parallel to the one here proffered, at least 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 statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

submit sufficient probative evidence regarding its business operations or the proffered position to establish how the beneficiary's responsibilities and day-to-day duties are so complex or unique that the position can be performed only by an individual with a bachelor's degree in a specific specialty, or its equivalent. Moreover, the petitioner and counsel fail to credibly demonstrate exactly what the beneficiary will do on a day-to-day basis such that complexity or uniqueness can even be determined. The petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. The AAO finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent.

More specifically, the petitioner fails to demonstrate how the duties of the proffered position as described in the record of proceeding require the theoretical and practical application of a body of highly specialized knowledge such that a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, in the appeal counsel claims that the beneficiary has attended classes during the course of his studies that are relevant to the position. However, the petitioner and counsel 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 that it claims are so complex or unique. While a few related courses may be beneficial, or even required, in performing certain duties of the proffered 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 particular position here.

The AAO again notes that the petitioner's assertion that a "bachelor's degree" 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 noted above, a petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Although a general-purpose bachelor's degree 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. The petitioner and counsel make various claims about the complexity and/or uniqueness of the duties of the proffered position, but they fail to explain or clarify which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment.

The AAO reviewed the record in its entirety and finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the LCA indicates 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 he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

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 example, 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."

The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. Thus, the record lacks sufficient probative evidence to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. The evidence of record does not establish that this position is significantly different from other promotions manager positions such that it refutes the *Handbook's* information to the effect that there is a spectrum of preferred degrees for these positions, including a degree not in a specific specialty. In other words, the record lacks sufficiently detailed information to discern the proffered position as unique from or more complex than similar positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO observes that the petitioner and counsel have indicated that the beneficiary's educational background and experience in the industry will assist him in carrying out the duties of the proffered position, and takes particular note of his academic degree and prior experience in the restaurant business. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not explain or clarify at any time in the record which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner has thus failed to establish the proffered position as satisfying the second prong of the criterion at 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. Upon review of the record of proceeding, the petitioner has not established 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.

In response to the RFE, counsel stated that the proffered position is a new position, as the restaurant was recently purchased by the petitioner. Additionally, in response to the RFE, counsel indicated that the proffered position was not advertised. Thus, no job postings or other evidence of

recruitment steps have been provided for the instant position.¹⁴ Based on the statement made by the petitioner with regard to its own claimed educational requirements for the position (i.e., the acceptance of a bachelor's degree), it is clear that a general bachelor's degree is sufficient to perform the duties. As previously noted, although a general-purpose bachelor's degree 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.

In response to the RFE, the petitioner submitted an organizational chart and a list of its employees. According to the list, only 2 of the 34 individuals have a bachelor's degree (which is the highest level of education obtained by any of the employees). No information was provided regarding their specific fields of study or disciplines. The educational level of the majority of the petitioner's employees is a middle school diploma or high school diploma. No evidence was provided that any of the positions have similar job duties to the proffered position. Thus, the evidence does not establish the petitioner's prior recruiting and hiring history for the proffered position.

On appeal, counsel asserts that the petitioner's owner also owns a sushi restaurant in [REDACTED], California, which employs a public relations manager who holds a degree. The petitioner failed to provide detailed job duties and day-to-day responsibilities of the position that it claims is the same as the proffered position. The petitioner did not provide any information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, aside from job title, it is unclear whether the duties and responsibilities of this individual are the same or related to the proffered position.

With the appeal, the petitioner submitted a copy of a certificate issued to [REDACTED] from the [REDACTED], indicating that she completed a "Master Course of Education." The petitioner did not provide an academic evaluation of [REDACTED] credentials. Although requested in the RFE, the petitioner failed to provide a transcript and substantive evidence confirming [REDACTED]'s employment with the petitioner. However, assuming *arguendo* that [REDACTED] has been employed by the petitioner as a public relations manager, the documentation does not establish the proffered position as qualifying as a specialty occupation. That is, contrary to the purpose for which it was submitted, the documentation indicates that the petitioner does not require a degree in a specific specialty, or its equivalent, for the proffered position as the job duties of this particular position can be performed by an individual with a certificate in an unrelated field (education). The documentation further confirms that the petitioner does not require a baccalaureate (or higher degree) in a specific specialty, or its equivalent, for the proffered position.

While a petitioner may believe or otherwise assert that a proffered position requires a specific

¹⁴ In the RFE response, counsel claims that the petitioner "purchased the asset of the [REDACTED], a national seafood Restaurant chain or franchise, which occupied the same location." Counsel further states that "the previous restaurant manager [REDACTED] who in charge of Public Relations position for [REDACTED] has a Bachelor Degree Certificate in Hotel Management Degree." A copy of [REDACTED]'s certificate of degree was submitted. The AAO reviewed the documentation but finds that it is not probative evidence in this matter for a number of reasons. For instance, the record contains no evidence of [REDACTED]'s employment (e.g., pay statements, Form W-2) or documentation substantiating his position and job duties.

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").

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.

Upon review of the record, the petitioner has not provided sufficient 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 notes that counsel repeatedly asserts that the nature of the proffered position involves complex, unique and/or specialized tasks. In the appeal brief dated June 19, 2012, counsel states that the position is a "complex technical job" and requires a "great amount of creative thinking, project management, attention to detail, and collaborative skills and analysis." Counsel indicates that in the proffered position the beneficiary will be required to "make decisions and solve difficult

problems that require him to balance the interest of marketing and public relations with maintain positive relationships, budgeting, training staff, and satisfying the needs of the customers." In its support letter dated March 23, 2012, the petitioner characterized its business as being "one of the largest Sushi Japanese Restaurants in Houston," and stated that it is "in need of a professional Public Relations manager who has the knowledge and expertise to effectively expand [the] business in the area of catering services, private parties, major banquets, and other specialty functions." The petitioner indicated that this function is essential to its business model because "these extra 'services' actually yield much higher profits [sic] returns than a regular food service business." Further, the petitioner stated that the beneficiary will create reports for "upper management and [the] owner" on the marketing and promotion programs, and the effects of these programs on the business, and suggest new programs based on his analysis. In addition, the petitioner stated that the beneficiary would be responsible for making "recommendations for other adjustment[s] that he feels will help the business appeal to customers."

In support of the H-1B petition, the petitioner provided documents regarding the proffered position and its business operations, such as advertising/promotional/marketing materials; financial documents; a two-page Profit and Loss Statement; a three-page document that counsel refers to as a customer list; a lease agreement; photographs of its premises; an employee list; an organizational chart; and business permits and licenses. The AAO acknowledges that the petitioner believes that the nature of the specific duties of the proffered position 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. However, the AAO reviewed the documentation submitted by the petitioner and finds that it fails to support the petitioner's assertion that the proffered position qualifies as a specialty occupation under this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, even considering nature of the specific duties of the proffered position within the context of the petitioner's business, 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.

Furthermore, the AAO also reiterates its earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category, and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that a Level I designation 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 significantly higher prevailing wage. For instance, as previously mentioned, 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."

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. 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.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree in a specific specialty, or its equivalent, also cannot be determined. However, the AAO will briefly note that the beneficiary's degree appears to be the equivalent of U.S. baccalaureate degree in "Tourism," which is not a specialization that is relevant to either a public relations manager or promotions manager position. Thus, even if the AAO had found that the proffered position constituted a specialty occupation, which it did not, the petition could not be approved because the petitioner has not established that the beneficiary would have been qualified.

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 145 (noting that the AAO conducts appellate review on a *de novo* basis).

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, 8 U.S.C. § 1361. Here, that burden has not been met.

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