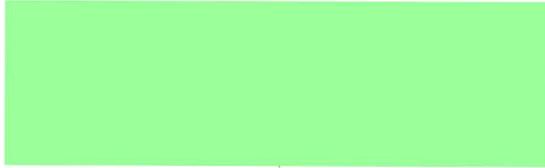




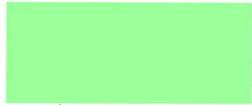
U.S. Citizenship  
and Immigration  
Services

(b)(6)

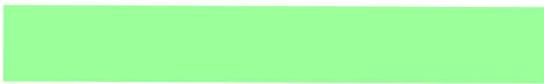


DATE: FEB 22 2013

OFFICE: VERMONT SERVICE CENTER

FILE: 

IN RE: Petitioner:  
Beneficiary:



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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 Vermont Service Center on July 21, 2011. In the Form I-129 visa petition, the petitioner describes itself as a fine dining restaurant established in 2010.<sup>1</sup> In order to employ the beneficiary in what it designates as a restaurant 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 March 20, 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, the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that it satisfied all evidentiary requirements.

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 petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B. The AAO reviewed the record in its entirety before issuing its decision.

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

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a restaurant manager to work on a full-time basis at a salary of \$41,600 per year. In a letter dated July 11, 2011, the petitioner provided the following description of the duties of the proffered position:

As Restaurant Manager, [the beneficiary] will plan, direct and coordinate activities of a fine dining, two hundred seat restaurant. He will estimate food and beverage costs and purchase supplies. [The beneficiary] will work with the Executive Chef to plan menus and related activities, including dining room, bar and banquet operations. He will resolve quality and service complaints; schedule staff hours and assign duties; and establish and monitor standards for personnel performance and customer service. [The beneficiary] will also select, requisition and store fine wines and assist guests in making wine selection, applying his knowledge of wines.

---

<sup>1</sup> The record contains a copy of the petitioner's articles of incorporation, indicating that the petitioner was incorporated in 2010. However, the AAO notes that in the support letter filed with the Form I-129, the petitioner states that it was established in 2003. Further, in response to the RFE, the petitioner again claims that the restaurant opened in 2003. No explanation was provided for the discrepancy.

In the letter of support, the petitioner stated that to perform the duties of the position, an individual must have a minimum of "a Bachelor's Degree in Hospitality Administration." With the petition, the petitioner provided documentation regarding the beneficiary's credentials.<sup>2</sup> In addition, the petitioner provided (1) a copy of its menu; (2) a printout from its website; and (3) a two-page Profit and Loss Statement for [REDACTED] indicating a net income of approximately \$49,900.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Food Service Managers" – SOC (ONET/OES Code) 11-9051, at a Level II (qualified).<sup>3</sup>

The AAO notes that the petitioner has described the duties of the beneficiary's employment in the same general terms as those used by the Dictionary of Occupational Titles (DOT) for the occupation "Manager, Food Service," and those used by U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* for the occupational category "Food Service Managers." That is, the AAO notes that the wording of the above duties as provided by the petitioner for the proffered position is largely taken (virtually verbatim) from DOT and the *Handbook*.

Specifically DOT states, in pertinent part, the following regarding the occupational title "Manager, Food Service" (hotel & rest.; personal ser.) – Code 187.167-106:

**Coordinates** food service activities of hotel, restaurant, or other similar establishment or at social functions: **Estimates food and beverage costs and requisitions or purchases supplies. Confers with** food preparation and other

---

<sup>2</sup> The AAO notes that some of the documentary evidence submitted by the petitioner is in a foreign language and is not accompanied by a full English language translation that has been certified by the translator as complete and accurate, and that the translator is competent to translate from the foreign language into English. Because the petitioner failed to submit a certified translation of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence that is in a foreign language that does not comply with 8 C.F.R. § 103.2(b)(3) is not probative and will not be accorded any weight in this proceeding. The AAO will not attempt to decipher or "guess" the meaning of documents that are not accompanied by a full, certified English language translation.

<sup>3</sup> 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 LCA was certified on June 9, 2011 and signed on July 18, 2011. The H-1B petition was filed on July 21, 2011. In the LCA, the petitioner indicated that the prevailing wage for Food Service Managers, OES/SOC Code 11-9051 in Broward County, Florida at Level II was \$36,171 per year. The prevailing wage source is listed as OES (Occupational Employment Statistics) Online Wage Library (OWL). The AAO notes this data covers the period from 07/2010 to 06/2011. The OWL data indicates that as of July 2011, the prevailing wage for Food Service Managers, OES/SOC Code 11-9051 in Broward County, Florida at Level II was \$50,690.

personnel to plan menus and related activities, such as dining room, bar, and banquet operations. Directs hiring and assignment of personnel. Investigates and resolves food quality and service complaints.

(Emphasis added.) Dictionary of Occupational Titles, Occupational Information Network (O\*NET), Manager, Food Service (hotel & rest.; personal ser.) – Code 187.167-106, on the Internet at <http://www.occupationalinfo.org/18/187167106.html> (last visited February 6, 2013).

Additionally, the *Handbook* states, in pertinent part, the following regarding the duties of "Food Service Managers":

- **Monitor the actions of employees and patrons to ensure everyone's personal safety**
- **Investigate and resolve complaints regarding food quality or service**
- **Schedule staff hours and assign duties**
- **Keep budgets and payroll records and review financial transactions**
- **Establish standards for personnel performance and customer service**

[Emphasis added]. U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Food Service Managers, on the Internet at <http://www.bls.gov/ooh/management/food-service-managers.htm#tab-2> (last visited February 6, 2013).

The AAO notes that providing general duties for the occupation from DOT, the *Handbook* (or other sources) for a proffered position is generally not sufficient for establishing H-1B eligibility. That is, while this type of generalized description may be appropriate when defining the range of duties that may be performed within an occupational category, it cannot be relied upon by a petitioner when discussing the duties attached to specific employment for H-1B approval. These generic descriptions fail to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations and, thus, cannot be relied upon when discussing the duties attached to specific employment. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner's business operations, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

Such generalized information does not in itself establish a correlation between any dimension of the proffered position and a need for a particular level of education, or educational equivalency, in a body of highly specialized knowledge in a specific specialty. The AAO also observes, therefore, that it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they are described, the AAO finds, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire period requested, so as to persuasively support the claim that the position's actual work would require the theoretical and practical application of any

particular educational level of highly specialized knowledge in a specific specialty directly related to the duties and responsibilities of the proffered position.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on December 12, 2011. The AAO notes that the director specifically requested the petitioner submit probative evidence to establish that the proffered position is a specialty occupation. In the RFE, the petitioner was asked to provide a more detailed description of the work to be performed by the beneficiary for the entire period requested, including the specific job duties, the percentage of time to be spent on each duty, etc. The director outlined the specific evidence to be submitted.

In response to the RFE, the petitioner submitted a letter of support and additional evidence. In the letter dated January 17, 2012, the petitioner claimed that in "addition to fine dining [the petitioner] offers, the restaurant carries an extensive selection of wines" and its inventory includes "approximately 400 different types of wine." The petitioner stated the following regarding the beneficiary's duties:

As [a] Restaurant Manager, one of [the beneficiary]'s primary responsibilities is the selection and purchasing of wines for [the petitioner]. [The beneficiary] is responsible for budgeting the wine inventory and negotiating with wine vendors. In the past year, the \$70,000 inventory of wine and liquor accounted in almost \$1 million in revenue for [the petitioner]. The restaurant's revenue for the prior year [was] approximately \$3 million, meaning that [the beneficiary] is responsible for managing a function that generates one third of [the petitioner's] revenues.

In general, the overall percentage of profit made in a restaurant is typically between 4% and 7% of the amount invested. In other words, the operating costs of a restaurant is [sic] about 93%. With a profit margin of less than 7%, an error in management could lead to the bankruptcy of our business. This is particularly true with respect to [the beneficiary's] responsibilities for the wine purchasing and sales because those sales comprise one third of the restaurant's revenues. Accordingly, it is essential that the individual responsible for the selection, purchase, and sale of wine has a degree in Hospitality Administration or the equivalent experience so that he or she is well versed in the fundamentals of accounting principles, economic principles, and finance principles, as well as the knowledge specific to the food and beverage industry.

Managing these margins and percentages is only one component of [the beneficiary]'s position. He is also responsible for managing the staff of sales people who help to market our wine and liquor inventory and sell it for a profit. [The beneficiary] is responsible [for] educating, training, scheduling, and managing a sales force to sell the inventory of wine and liquor with [the petitioner's] food. [The beneficiary] also assists in the hiring of servers for the restaurant. He is responsible for all aspects of customer service while on duty, resolving issues customers may have, and resolving any issues that may arise between servers.

The petitioner stated that "it is difficult to assign precise percentages of time that [the beneficiary] spends performing his various tasks, [the petitioner] estimate his duties [sic] as follows":

40% of time-Spent on the floor of the restaurant during serving hours to ensure that every guest is attended to by his or her servers, resolving complaints or issues that arise, resolving issues between or among servers, and offering expert advice regarding the selection of the approximate wine to accompany a meal.

25% of time-Wine purchasing, including tasting and selecting wines and negotiating with vendors and managing the inventory.

15% of time-Staff management, including training, scheduling and hiring staff.

10% of time-Confer with [chef, co-owner] regarding costs and operations of the restaurant as well as planning for menu selections and banquet operations.

10% of time-Financial management, including (1) closing of the restaurant on a nightly basis to balance receipts with the cash drawer and credit card charges and (2) banking issues.

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 March 20, 2012. The petitioner submitted an appeal of the denial of the H-1B petition.

The AAO reviewed the record of proceeding in its entirety and will make some preliminary findings that are material to the determination of the merits of this appeal.

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."

Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the

position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through attainment of at least a baccalaureate degree in a specific discipline.

Upon review of the record of proceeding, the AAO notes that there are inconsistencies and discrepancies in the petition and supporting documents, which undermine the petitioner's credibility with regard to the services the beneficiary will perform, as well as the actual nature and requirements of the proffered position. When a petition includes such discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions.

More specifically, the record of proceeding contains discrepancies between what the petitioner claims about the level of responsibility and requirements inherent in the proffered position set against the contrary level of responsibility and requirements conveyed by the wage level indicated in the LCA submitted in support of petition. That is, the petitioner provided an LCA in support of the instant petition that indicates the occupational classification for the position is "Food Service Managers" at a Level II (qualified) 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.<sup>4</sup> It is important to note that prevailing wage determinations start with an entry level wage (Level I) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) 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.<sup>5</sup> 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.

---

<sup>4</sup> 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](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

<sup>5</sup> 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.

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

**Level II** (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O\*NET Job Zones.

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](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

As noted above, a requirement for years of education and/or experience that are generally required as described in the O\*NET Job Zones would be an indication that a wage determination at Level II would be proper classification for a position.<sup>6</sup> The occupational category "Food Service Managers," has been assigned an O\*NET Job Zone 3, which groups it among occupations for

---

<sup>6</sup> As mentioned above, the wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." Level III and a Level IV wage rates are describes as follows:

**Level III** (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O\*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. Words such as 'lead' (lead analyst), 'senior' (senior programmer), 'head' (head nurse), 'chief' (crew chief), or 'journeyman' (journeyman plumber) would be indicators that a Level III wage should be considered.

**Level IV** (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

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](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

(b)(6)

which medium preparation is needed. More specifically, most occupation in this zone "require training in vocational schools, related on-the-job experience, or an associate's degree." See O\*NET OnLine Help Center, at <http://www.onetonline.org/help/online/zones>, for a discussion of Job Zone 3.

In the instant case, the petitioner designated the proffered position as a Level II position. This suggests that the petitioner's academic and/or professional experience requirements for the proffered position would correspond to "training in vocational schools, related on-the-job experience, or an associate's degree" as stated for occupations designated as O\*NET Job Zone 3. However, in the letter of support submitted with the petition, the petitioner claims that an individual serving in the proffered position must have a minimum of "a Bachelor's Degree in Hospitality Administration."

In response to the RFE, the petitioner claims that the beneficiary will be "responsible for managing a function that generates one third of [the petitioner's] revenues." In addition, according to the petitioner, the beneficiary will be "responsible for managing the staff of sales people" and "educating, training, scheduling, and managing the sales force." Moreover, the petitioner states that the beneficiary will be "responsible for all aspects of customer service while on duty." Further, the beneficiary will be responsible for "offering expert advice." On appeal, the petitioner asserts that "a Food management position in a high class fine dining restaurant cannot be possibly associated with the same Food management position of a Mc Donald's fast food restaurant."<sup>7</sup> The petitioner continues by stating that the "skills, responsibilities, management skills and customer relations abilities are vastly different in these two examples." Additionally, the petitioner reports that the proffered position "requires a lot more precision and expertise in business management" to make the restaurant successful. The petitioner asserts that the complexity of the proffered position is an important factor in the instant case.

However, the AAO observes that the designation of the proffered position as a Level II position is an indication that beneficiary will be required to moderately complex tasks that require limited judgment. Notably, the petitioner's assertions that the duties require a significant level of responsibility and expertise, as well as the petitioner's stated academic requirement for the position, do not appear to be reflected in the wage level chosen by the petitioner on the LCA for the proffered position. The statements regarding the claimed level of complexity, independent judgment and understanding required for the proffered position appear to be materially inconsistent with the certification of the LCA for a Level II 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.

---

<sup>7</sup> The AAO observes that the designation of the appropriate wage level on an LCA assists a petitioner in distinguishing its position within the occupational category. As previously mentioned, 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. Obviously, the petitioner may consider these factors within the context of its business operations.

The AAO will now address the director's basis for denial of the petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

For 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 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To make its determination 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).

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 a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position.

The AAO recognizes DOL's *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>8</sup> In the Form I-129 petition, the petitioner designated the proffered position as a "Restaurant Manager." As noted earlier, the petitioner submitted an LCA in support of the petition identifying the occupational category as "Food Service Managers."

---

<sup>8</sup> 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/>.

The AAO reviewed the chapter of the *Handbook* entitled "Food Service Managers," including the sections regarding the typical duties and requirements for this occupational category. However, the *Handbook* does not indicate that "Food Service Managers" comprise 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 into the occupation.

The subchapter of the *Handbook* entitled "How to Become a Food Service Manager" states, in pertinent part, the following about this occupation:

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

#### **Education**

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

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

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

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Food Service Managers, on the Internet at <http://www.bls.gov/ooh/management/food-service-managers.htm#tab-4> (last visited February 6, 2013).

In the instant case, the AAO notes again that the petitioner designated the position as a Level II position (out of four assignable wage-levels). A Level II position is indicative that the beneficiary is expected to have a good understanding of the occupation but that he will only perform moderately complex tasks that require limited judgment.

Here, the *Handbook* does not indicate that a bachelor's degree is normally the minimum requirement for entry into the occupation. Instead, the *Handbook* states that experience in the food services industry (as a cook, waiter or waitress, or counter attendant) is the most common training for food service managers. The *Handbook* continues by stating that most food service managers have less than a bachelor's degree. According to the *Handbook*, a growing number of manager positions require postsecondary education in a hospitality or food service management program. The narrative of the *Handbook* states that for those not interested in a bachelor's degree, community and junior colleges, technical institutes, and other institutions offer programs in the field leading to an associate's degree or other formal certification. The *Handbook* clearly indicates that a degree is not normally *required* for food service manager positions. Accordingly, as such evidence fails to establish that normally the minimum requirement for entry into the occupation is at least a bachelor's degree in a specific specialty or its equivalent, the *Handbook* does not support the assertion that the proffered position qualifies as a specialty occupation.

On appeal, the petitioner states that USCIS "relies heavily on the OOH [the *Handbook*] to determine whether a position warrants the level of a bachelor's degree[;] however[,] as it is in a case like this, a Food management position in a high class fine dining restaurant cannot be possibly associated with the same Food management position of a Mc[ ]Donald's fast food even though those two positions are wrapped all into one under the OOH system." The petitioner asserts that "the skills, responsibilities, management skills and customer relations abilities are vastly different in these two examples." The petitioner points out that it "runs a \$2.6M business employing a staff of 40," and "the position of a restaurant manager in these conditions requires a lot more precision and expertise in business management to make a restaurant of that nature successful."

While the petitioner claims that *Handbook* does not accurately capture the nature of the petitioner's industry, the petitioner failed to provide any other authoritative sources to establish the educational requirements for the proffered position.<sup>9</sup> Further, the petitioner failed to provide probative evidence to substantiate its claim regarding the scope of its operations. For example, the petitioner submitted a two-page Profit and Loss Statement for "[REDACTED]". However, there is no evidence that [REDACTED] and the petitioner are the same businesses. Moreover, the document indicates that the net income for the period (January through June 2011) was approximately \$49,900. No further financial documentation was submitted.<sup>10</sup> Additionally, while the petitioner claims that its restaurant requires "a lot more precision and expertise in business management," the AAO notes

<sup>9</sup> Notably, the *Handbook* states that the work environment for this occupational category includes fine-dining restaurants. See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Food Service Managers, on the Internet at <http://www.bls.gov/ooh/management/food-service-managers.htm#tab-3> (last visited February 6, 2013).

<sup>10</sup> In addition, the owner/chef of the petitioning restaurant claims to have been featured in numerous publications, been involved with several successful restaurants, received positive reviews from various publications, as well as awarded several honors. However, the petitioner's owner/chef elected not to provide documentation substantiating these specific claims. Instead, the petitioner submitted a printout of anonymous reviews posted on the internet site Open Table. While the AAO reviewed the submission, it must be noted that the document provides limited information regarding the petitioner's business operations.

again that the petitioner designated this position as a Level II position, which is indicative that the beneficiary is expected to have a good understanding of the occupation but that he will only perform moderately complex tasks that require limited judgment.

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 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 1151, 1165 (D. Minn. 1999) (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 for 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. The petitioner did not submit documentation from the industry's professional association indicating that it has made a degree a minimum entry requirement.

In the Form I-129, the petitioner stated that it is a fine dining restaurant with approximately 40 employees. The petitioner also reported its gross annual income as approximately \$2.6 million and its net annual income as \$50,000 for the first half of 2011. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 722110.<sup>11</sup> The AAO notes that this NAICS code is designated for "Full-Service Restaurants." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

---

<sup>11</sup> According to the U.S. Census Bureau, the North American Industry Classification System (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 <http://www.census.gov/eos/www/naics/> (last viewed February 6, 2013).

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

See U.S. Dep't of Commerce, U.S Census Bureau, 2007 NAICS Definition, 722110-Full-Service Restaurants, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last viewed February 6, 2013).

For the petitioner to establish that an organization is similar under this criterion of the regulations, 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 the 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 to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner submitted letters from the following individuals: (1) [redacted] Director of Human Resources of [redacted] Miami; (2) [redacted] Food and Beverage Manager of the [redacted] Fort Lauderdale; (3) [redacted] Director Human Resources, [redacted] in Miramer, Florida; and (4) [redacted] Manager/Wine Director for the [redacted]. However, contrary to the purpose for which these letters were submitted, they do not establish the proffered position qualifies as a specialty occupation.

In the letter from [redacted], she states that she is "writing at the request of [the petitioner] to explain why a Bachelor's degree in Hospitality Administration or Management is necessary to serve as a General Manager of a dining establishment such as [the petitioner.]" [redacted] further states that she is "the director of Human Resources at the [redacted] Miami and have worked with [redacted] for 10 years, in four different locations." However, [redacted] did not provide independent documentary evidence to substantiate her experience or expertise. Moreover, the AAO notes that [redacted] Miami is a hotel, not a restaurant. While the hotel may have fine dining options (which are not specified in the letter), the letter lacks sufficient information regarding the [redacted] Miami to conduct a meaningfully substantive comparison of the business operations to the petitioner. The petitioner and [redacted] failed to provide any supplemental information to establish that the organization is similar to the petitioner. Thus, from the onset, the letter from [redacted] is not probative in establishing eligibility under this prong of the regulations.

states that "[i]n [her] experience, it is common for restaurant managers in fine dining establishments to hold a bachelor's degree in hospitality administration/management or to possess an equivalent amount of work experience." She asserts that "[t]o perform the position at the caliber necessary of a fine dining restaurant requires a restaurant manager with a Bachelor's degree or the equivalent level of experience." She further claims the "restaurant management degree provides the aspiring restaurant manager with a mixture of classroom structure and hands-on-training, giving the individual the knowledge and skills necessary to learn and execute the myriad job duties required of a restaurant manager." According to the "education and experience one gains from a bachelor's degree in hospitality administration/management enhances the likelihood that the individual will have the ability to function at such a high level under the stress commonplace in a restaurant environment."

The AAO notes that makes various claims, but did not identify the specific elements of her knowledge and experience that she may have applied in reaching her conclusions here. She did not indicate that she relied on any authoritative sources to support her assertions. did not include the results of outside formal surveys, research, statistics, or any other objective quantifying information to substantiate her opinions. Notably, her opinions are not supported by independent, objective evidence demonstrating the manner in which she reached such conclusions. asserts a general industry educational standard without referencing any supporting authority or any empirical basis for the pronouncement.

Furthermore, the AAO observes that did not provide any documentary evidence to corroborate that she currently or in the past employed individuals in parallel positions to the proffered position, nor did she provide any documentation to substantiate the claimed academic requirements. She failed to submit any probative evidence of her recruitment and hiring practices. Moreover, letter does not cite specific instances in which her past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication of recognition by professional organizations (or anyone else) that is an authority on those specific requirements. makes general claims about the educational requirements for restaurant managers, but does not provide a substantive, analytical basis for her opinion and ultimate conclusion.

The letters from and also do not establish that the proffered position meets this criterion of the regulations.

In the letter from he states that he is the "Food and Beverage Manager of the , Fort Lauderdale" and that he "is writing to confirm that a bachelor's degree in Hospitality Administration or Management is necessary to serve as a Manager of a fine dining establishment such as [the petitioner]." However, failed to establish that the organization is similar to the petitioner. states that Fort Lauderdale is Fort-Lauderdale's only and has earned a " and that the hotel "was named Top New Hotel on the adds that the hotel "offers fine dining in with a 5,000 bottle wine cellar." However, does not provide further evidence to establish that the fine dining options at the hotel are similar to the petitioner. In fact, the petitioner previously stated that its wine

and liquor inventory consists of approximately 400 different types of wine, and there is no evidence that the dining options at the [REDACTED] are similar to the petitioner. Likewise, [REDACTED] states that he is the Manager/Wine Director for The [REDACTED] which is a "premier restaurant in the United States and offers a wine selection unparalleled in South Florida." However, he fails to provide sufficient information regarding the restaurant and wine bar to conduct a legitimate comparison of its business operations to the petitioners.

Further, [REDACTED] claims that his organization "only employs Restaurant Managers who hold a bachelor's degree in Hospitality Administration or Management." In addition, [REDACTED] asserts "[i]n our experience, only individuals holding such a degree have the right combination of knowledge and experience to ensure that [REDACTED] offers the level of service our patrons expect." He also adds, "[i]n our experience and in my opinion, a restaurant manager in fine dining establishment must possess a bachelor's degree in Hospitality." [REDACTED] asserts that in his opinion, "only those individuals with a bachelor's degree in hospitality management or administration or the equivalent amount of experience are qualified to serve as restaurant managers in fine dining restaurants." However, the writers did not provide any documentary evidence to corroborate that they currently or in the past employed individuals in parallel positions to the proffered position, nor did they provide any documentation to substantiate their claims. The writers failed to submit any probative evidence of their recruitment and hiring practices.

Moreover, [REDACTED] did not identify the specific elements of their knowledge and experience that they may have applied in reaching these conclusions. Notably, the opinions are not supported by independent, objective evidence demonstrating the manner in which they reached such conclusions. Further, the letters do not cite specific instances in which the writers' past opinions have been accepted or recognized as authoritative on this particular issue. Therefore, the letters are not probative evidence in establishing that the proffered position is a specialty occupation.

Similarly, the AAO finds that [REDACTED] letter also does not establish that the proffered position qualifies as a specialty occupation under this criterion. In the letter, [REDACTED] that he is the director of human resources for [REDACTED] and that the "sales force and Sales Managers interact with all fine dining establishments in the State of Florida." However, he does not substantiate his claim with documentary evidence to establish that the fine dining establishments that he refers share the same general characteristics as the petitioner. Without such evidence, [REDACTED] letter is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner.

[REDACTED] claims that it is "common and has been [his] experience that throughout the state of Florida, Assistant Managers and many managers of Fine Dining Establishments typically hold a Bachelor's degree in Hospitality and or Management or a combination of education and experience." He further asserts "[w]hen an employer hires a candidate with a Bachelor's Degree they can be assured that an institution of higher learning has certified, by bestowing the degree, that the individual possess a certain body of knowledge that is absolutely critical to ensure success."

\_\_\_\_\_ claims that the basis of his knowledge is from his experience, however, there is no documentary evidence to support \_\_\_\_\_ claimed experience and/or expertise. He did not indicate that he relied on any authoritative sources to support his assertions. He did not include the results of outside formal surveys, research, statistics, or any other objective quantifying information to substantiate his opinions. Notably, his opinions are not supported by independent, objective evidence demonstrating the manner in which he reached such conclusions. \_\_\_\_\_ asserts a general industry educational standard without referencing any supporting authority or any empirical basis for the pronouncement.

Further, \_\_\_\_\_ letter does not cite specific instances in which his past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication that he has published any work or conducted any research or studies pertinent to the educational requirements for "restaurant manager" positions in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that he is an authority on those specific requirements. The AAO further observes that the letter contains no evidence that it was based on scholarly research conducted by \_\_\_\_\_ in the specific area upon which he is opining. \_\_\_\_\_ makes general claims about the educational requirements for restaurant managers but he does not provide a substantive, analytical basis for his opinion and ultimate conclusion.

In summary, and for each and all of the reasons discussed above, the AAO concludes that the letters provided by the petitioner are not probative evidence in establishing the proffered position as a specialty occupation. The conclusions reached by the individuals above lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which they reached such conclusions. There is an inadequate factual foundation established to support the opinions. As such, neither the findings nor the ultimate conclusions are worthy of any deference, and the opinion letters are not probative evidence towards satisfying any criterion of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). As a reasonable exercise of its discretion the AAO discounts the advisory opinion letters as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the opinion letters into each of the bases in this decision for dismissing the appeal.

In support of the petitioner's assertion that the proffered position is a specialty occupation position, the record of proceeding also contains several job announcements. The AAO reviewed the job advertisements submitted by the petitioner. Notably, the petitioner and counsel did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices. Upon review of the documents, the AAO finds that the petitioner's reliance on the job announcements is misplaced.

The petitioner submitted the following job postings:

- An advertisement from The Capital Grille for a Dining Room Manager in Atlanta, GA. The advertisement states that the employer is "a nationally respected name in fine dining" and that this position is for "Atlanta, Georgia location," suggesting that it has multiple locations throughout the country. Further, the advertisement indicates that there are 3 openings for dining room managers at this location. No further information is provided. Accordingly, the record is devoid of sufficient information regarding the advertising organization to conduct a legitimate comparison of the organization to the petitioner. The petitioner did not provide any additional information to establish that the advertising company and the petitioner share the same general characteristics, as well as information regarding which aspects or traits (if any) it shares with the advertising organization.

Moreover, the position appears to be a more senior position than the proffered position since it requires a degree and more than five years of experience in a related field. More importantly, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised position are parallel to the proffered position.

Furthermore, the employer requires a bachelor's degree, but does not indicate that a degree in a specific specialty is required for the position. Thus, contrary to the purpose for which the advertisement was submitted, the posting does not indicate that a bachelor's degree in a *specific specialty* that is directly related to the occupation is required. Thus, further review of the advertisement is not necessary.

- An advertisement from Ruth's Christ Steak House in Atlanta, Georgia. The AAO notes that a part of the advertisement is cut off and the details of the job description cannot be deciphered. However, based on the information available, the advertisement does not appear to contain sufficient information regarding the organization's business operations. That is, the record is devoid of sufficient information regarding the advertising organization to conduct a legitimate comparison of the organization to the petitioner. The petitioner did not provide any additional information to establish that the advertising company and the petitioner share the same general characteristics, as well as information regarding which aspects or traits (if any) it shares with the advertising organization.

Contrary to the purpose for which the advertisement was submitted, the posting does not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the position. The advertisement states that a "four year degree in business, preferably in hospitality management" is required. Obviously, a *preference* for an individual with a degree in hospitality management is not an indication of a *requirement* for such a degree. Moreover, the advertising

employer's statement does not indicate that a bachelor's degree in a *specific specialty* that is directly related to the occupation is required. More specifically, 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 position. Although a general-purpose bachelor's degree, such as a degree in business, 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).<sup>12</sup>

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed.

Further, it must be noted that even if all of the job postings indicated that a bachelor's degree in a specific specialty, or its equivalent, 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.<sup>13</sup>

---

<sup>12</sup> 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.

*Id.*

<sup>13</sup> According to the *Handbook's* detailed statistics on food service managers, there were approximately 320,600 persons employed in 2010. *Handbook*, 2012-13 ed., available at <http://www.bls.gov/ooh/management/food-service-managers.htm#tab-1> (last accessed February 6, 2013). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the industry. 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").

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

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

The AAO acknowledges that the petitioner may believe that the proffered position involves complex and/or unique duties. In the instant case, the record of proceeding contains documentation regarding the petitioner's business operations, including the petitioner's articles of incorporation; the petitioner's menu; a printout from the petitioner's website; a printout of anonymous reviews posted to the website Open Table; as well as a Profit and Loss Statement for [REDACTED]. The AAO reviewed the record in its entirety and finds that even in the context of the evidence provided, 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 wage level based upon the occupational classification "Food Service Managers" at a Level II wage. In accordance with the relevant DOL explanatory information on wage levels, a Level II position is indicative that the beneficiary is expected to have a good understanding of the occupation but that he will only perform moderately complex tasks that require limited judgment. 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."<sup>14</sup> 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. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more

---

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.

<sup>14</sup> 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](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

complex than positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of restaurant manager. More specifically, the petitioner failed to demonstrate how the duties of the restaurant manager as described in the record require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While related courses may be beneficial, or even required, in performing certain duties of the 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 observes that the petitioner has indicated that the beneficiary's background will assist him in carrying out the duties of the proffered position. 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. Consequently, as the petitioner fails to demonstrate 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, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To satisfy this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

While a petitioner may believe or otherwise assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is

overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. See § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

The petitioner stated in the Form I-129 petition that it has approximately 40 employees and that it was established in 2010. The petitioner did not provide the total number of people it has employed to serve in the proffered position. The petitioner also did not submit any documentation regarding the academic credentials of employees who currently or in the past served in the proffered position. Moreover, the petitioner did not submit probative evidence of its recruiting and hiring practices. The record is devoid of information to satisfy this criterion of the regulation.

Upon review of the record, the petitioner has not provided any 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.

In the appeal, the petitioner emphasizes the "complexity of the position." In support of the H-1B petition, the petitioner provided information regarding its business operations, including the petitioner's articles of incorporation; the petitioner's menu; a printout from the petitioner's website; a printout of anonymous reviews posted to the website Open Table; as well as a Profit and Loss Statement for [REDACTED]. However, upon review of the record of the proceeding, the AAO notes that the petitioner has not provided probative evidence to satisfy this criterion of the regulations. 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, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than similar positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.

As reflected in this decision's earlier comments and findings with regard to the generalized level at which the proposed duties are described, the petitioner has not presented the proposed duties with sufficient specificity and substantive content to even establish relative specialization and complexity as distinguishing characteristics of those duties, let alone that they are at a level that would require knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, also, the proposed duties have not been described with sufficient specificity to establish their nature as more specialized and complex than the nature of the duties of other positions in the pertinent occupational category whose performance does not require the application of knowledge requiring attainment of at least a bachelor's degree in a specific specialty, or its equivalent. Furthermore, although the petitioner submitted various documents (including evidence regarding its business operations), the documentation is insufficient to satisfy this criterion of the regulations.

Moreover, the AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a Level II position (out of four assignable wage-levels), and hence one not likely distinguishable by relatively specialized and complex duties. Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a substantially higher prevailing wage. As previously discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems" and requires a significantly higher wage.

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

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

A beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner has failed to establish that the proffered position requires a baccalaureate or higher degree in a specific specialty, or its equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications further.

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.