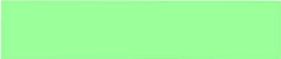


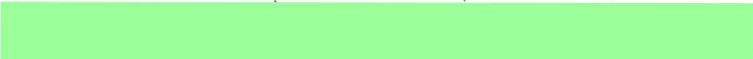


U.S. Citizenship
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Services

(b)(6)



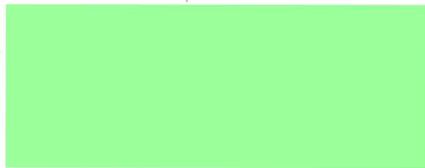
DATE: **JAN 11 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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:

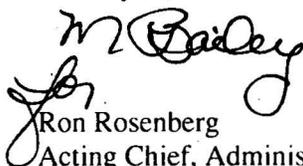


INSTRUCTIONS:

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.

On the Form I-129 visa petition, the petitioner describes itself as a hotel and condominium resort complex established in 1981. In order to employ the beneficiary in what it designates as an assistant general manager position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, 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 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 and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

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

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

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

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

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

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the

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

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

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

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

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

establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

In the petition signed on April 29, 2011, the petitioner indicates that it wishes to employ the beneficiary as an assistant general manager for 30 hours per week at the rate of pay of \$19.10 per hour (\$29,796 per year). In the letter of support, dated April 21, 2011, the petitioner describes the duties of the proffered position as follows:

[The beneficiary] will work with the General Manager to manage all facets of [the petitioner's] operations. Her responsibilities will include financial reporting, cash flow management for [the petitioner's] \$1.5 million budget, and oversight of all bookkeeping and audit functions. In addition, [the petitioner] is in the process of upgrading facilities and infrastructure, and [the beneficiary] is involved in the development of capital improvement plans and annual capital improvement budgets. She will oversee hotel and restaurant sales and marketing as well as website management, including negotiations with marketing outlets and vendors[,] and managing marketing budgets. [The beneficiary] has responsibility for direction of the guest service staff, and supervision of all other hourly staff members, assigning duties as required. She will manage the housekeeping and maintenance departments to ensure compliance with [the petitioner's] standards and financial targets. Lastly, [the beneficiary] will assist the General Manager in preparing [r]eports on Hotel operations and finances to the Board of Directors.

The petitioner also states, "Because of the complexities of the duties, [the petitioner] expects that a qualified applicant for the position must possess at least a Bachelor's degree (or equivalent) in Business Administration, with [a] background in hotel management."

With the Form I-129 petition, the petitioner submitted a copy of the beneficiary's Bachelor of Science degree from [redacted]. The diploma was awarded on December 29, 2010 (four months prior to the H-1B submission). The petitioner also submitted a document entitled "Grade Report for: [the beneficiary]." The AAO notes that the document is not on [redacted] letterhead and is not endorsed by the [redacted].

In addition, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Lodging Managers" - SOC (ONET/OES Code) 11-9081.00, at a Level I (entry level) wage.

Upon review of the documentation, the director found the evidence insufficient to establish eligibility for the benefit sought and issued an RFE on July 13, 2011. The petitioner was asked to submit probative evidence to establish that a specialty occupation position exists for the beneficiary. The director outlined the specific evidence to be submitted. The AAO notes that the director

specifically requested the petitioner 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, level of responsibility, etc.

On August 18, 2011, counsel for the petitioner responded by submitting a brief and additional evidence. Specifically, counsel submitted, in part, (1) an excerpt entitled "Lodging Managers" from the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*); (2) a letter from [REDACTED] (3) a printout from Hospitalitynet.org, which lists the universities in the United States that offer hotel management programs; (4) a line-and-block organizational chart; and (5) a one-page brochure regarding the petitioner's operations.

In addition, a letter from the petitioner dated August 16, 2011 was submitted. In the letter, the petitioner provided a revised description of the duties of the proffered position. Specifically, the petitioner stated that the beneficiary's day-to-day duties are as follows:

- Observe and monitor staff performance to ensure efficient operations and adherence to [the] Hotel's policies and procedures;
- Train staff members;
- Monitor the revenue activity of the Hotel and maintain records of sales, activity, maintenance, operating costs, and room availability;
- Manage financial activities such as the setting of room rates, the establishment of budgets, capital improvement budgeting, and the allocations of funds to departments;
- Collect payments and record data pertaining to funds and expenditures;
- Manage and oversee operations, maintenance, administration, and improvement of Hotel property;
- Coordinate front-office activities of Hotel and resolve problems;
- Manage and maintain temporary or permanent lodging facilities;
- Coordinate marketing initiatives, including meeting with prospective guests and groups, explain terms of occupancy, and provide information about local areas;
- Inspect guest rooms, grounds, facilities, and equipment routinely to determine necessity of repairs or maintenance;
- Investigate complaints, disturbances and violations, and resolve problems following management rules and regulations; [and]

- Answer inquiries pertaining to hotel policies and services, and resolve occupants complaints.

The amount of time spent on these functions varies from day to day. However, the percentage of time spent on the following broad categories of these duties is as follows:

- Financial functions (including financial reporting, cash flow management, bookkeeping and audit functions, budgeting, capital improvement budgeting, etc.] for [the petitioner's] \$1.5 million budget, etc.): 40%
- Oversight of hotel and restaurant sales and marketing as well as website management, including negotiations with marketing outlets and vendors[,] and managing marketing budgets: 15%
- Direction of the guest service staff, including training, customer service, resolving complaints, supervision of all hourly staff members, assigning duties as required: 20%
- Management of the housekeeping and maintenance departments to ensure compliance with [the petitioner's] standards and financial targets: 15%
- Assist the General Manager in preparing [r]eports on Hotel operations and finances to the Board of Directors: 10%

The director reviewed the information provided by the petitioner and counsel. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on November 15, 2011. The petitioner submitted an appeal of the denial of the H-1B petition. In addition, counsel submitted a brief and additional evidence.¹

¹ With regard to the documentation submitted on appeal that was encompassed by the director's RFE, the AAO notes that this evidence is outside the scope of the appeal. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. See 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have

On appeal, counsel states that the "preponderance of the evidence" standard is applicable in this matter, and that the petitioner submitted sufficient evidence to establish that "more likely than not" the proffered position qualifies as a specialty occupation.

The AAO notes that 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:

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

submitted it with the initial petition or in response to the director's request for evidence. *Id.* The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, the AAO need not and does not consider the sufficiency of such evidence submitted for the first time on appeal. The appeal will be adjudicated based on the record of proceeding before the director.

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.

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

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

As previously discussed, the petitioner submitted an LCA in support of the petition that designated the proffered position to the corresponding occupational category of "Lodging Managers" - SOC (ONET/OES) code 11-9081.00. The wage level for the proffered position in the LCA corresponds to a Level I (entry) position. The prevailing wage source is listed in the LCA as the OES (Occupational Employment Statistics) OFLC (Office of Foreign Labor Certification) Online Data Center.² The LCA was certified on May 5, 2011. The AAO notes that by completing and submitting the LCA, and by signing the LCA, the petitioner attested that the information contained in the LCA was true and accurate.

Wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) occupational code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.³

² The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. See Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at <http://www.bls.gov/oes/>. The OES All Industries Database is available at the Foreign Labor Certification (OFLC) Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatacenter.com/>.

³ For additional information regarding prevailing wage determinations, see U.S. Department of Labor, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*.

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) position after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.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.

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

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

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

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

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.

OnLine Help Center, at <http://www.onetonline.org/help/online/zones>, for a discussion of Job Zone 3.

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

Furthermore, the petitioner and counsel repeatedly claim that the duties of the proffered position are complex, unique and/or specialized. For instance, in the April 21, 2011 letter of support, the petitioner stated that the beneficiary will "work with the General Manager to manage all facets of [the petitioner's] operations." The petitioner also stated that the beneficiary will be responsible for the "direction of the guest service staff, and supervision of all other hourly staff members." In addition, the petitioner stated that the beneficiary will "manage the housekeeping and maintenance departments." Furthermore, in the August 16, 2011 letter, submitted in response to the RFE, the petitioner stated that the beneficiary will "[t]rain staff members" and "will manage the primary departments in [the petitioner's] structure (Front Desk, Housekeeping and Maintenance)." The petitioner submitted an organizational chart depicting the hierarchy of its staff. It appears that the proffered position supervises approximately 15 employees. Furthermore, in response to the RFE, the petitioner discusses the stature of its operations and "the discriminating guests and residents" as well as the petitioner's need "to provide the level of managerial service expected within [its] market segment."

In the appeal brief, counsel claims that the beneficiary "will perform a variety of highly-specialized, complex duties" in the proffered position. Counsel further states that the beneficiary will perform the following complex specialty duties:

- Financial budgeting and management, including cash-flow management for a \$1.5 million budget;
- Hotel and restaurant sales and marketing;
- Management and training of guest-service, housekeeping, and maintenance staff; [and]
- Preparing reports on Hotel operations and finances.

In addition, counsel states that "the job of Assistant General Manager involves an array of complex financial, marketing, and management functions."

In addition, the petitioner submitted a letter dated December 5, 2011 from [redacted] the president of its association. [redacted] states that the petitioner's operations "make the duties and expectations for the position far above that of a normal hotel operation." She also states that the "owners expect a high degree of expertise in sales, marketing and operational methods." According to [redacted] the petitioner's "management needs are more extensive and require knowledge of the

rules governing a historical building" its managerial staff must be knowledgeable about historical restoration and management, as well as swimming pool management. In addition, [REDACTED] claims that the managerial staff must be "very creative and experienced in unique marketing concepts." [REDACTED] asserts that the role of the proffered position "requires [a] far greater set of hospitality management skills and knowledge."

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

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

The AAO notes that the prevailing wage of \$19.10 per hour on the LCA corresponds to a Level I for the occupational category of "Lodging Managers" for Milwaukee County (Milwaukee, Wisconsin).⁵ The petitioner stated in the Form I-129 petition and LCA that the offered salary for the proffered position was \$19.10 per hour for 30 hours per week. Notably, if the proffered position were designated as a higher level position, the prevailing wage at that time would have been \$22.91 per hour for a Level II position, \$26.72 per hour for a Level III position, and \$30.53 per hour for a Level IV position.

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. As such, the petitioner has failed to establish that it would pay the beneficiary an adequate salary for her work, as required under the Act, if the petition were granted. Thus, even if it were determined that the petitioner

⁵ For additional information regarding the prevailing wage for lodging managers in Milwaukee County, see the All Industries Database for 7/2010 - 6/2011 for Lodging Managers at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatabase.com/OesQuickResults.aspx?code=11-9081&area=33340&year=11&source=1> (last visited January 2, 2013).

overcame the director's ground for denying the petition (which it has not), for this reason also the H-1B petition cannot be approved. It is considered an independent and alternative basis for denial.

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

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

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

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

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

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

The statements regarding the claimed level of complexity, independent judgment and knowledge required for the proffered position, along with the petitioner's claimed academic requirements, are materially inconsistent with the certification of the LCA for a Level I entry-level position. This

conflict undermines the overall credibility of the petition. The AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

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

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

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To make its determination whether the proffered position qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether DOL's *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁶ As previously discussed, the petitioner designated the proffered position in the LCA under the occupational category "Lodging Managers."

⁶ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2012 – 2013 edition available online.

The AAO reviewed the chapter of the *Handbook* entitled "Lodging Managers," including the sections regarding the typical duties and requirements for this occupational category.⁷ However, the *Handbook* does not indicate that normally the minimum requirement for entry into lodging manager positions is at least a bachelor's degree, in a specific specialty, or its equivalent.

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

Many applicants may qualify with a high school diploma and long-term experience working in a hotel. However, most large, full-service hotels require applicants to have a bachelor's degree. Hotels that provide fewer services generally accept applicants who have an associate's degree or certificate in hotel management or operations.

Education

More than 500 educational facilities across the United States provide academic training for prospective lodging managers.

Most full-service hotel chains hire people with a bachelor's degree in hospitality or hotel management. Hotel management programs typically include instruction in hotel administration, accounting, economics, marketing, housekeeping, food service management and catering, and hotel maintenance and engineering. Computer training is also an integral part of many degree programs, because hotels use hospitality-specific software in reservations, billing, and housekeeping management. The Accreditation Commission for Programs in Hospitality Administration accredits about 100 hospitality management programs.

At hotels that provide fewer services, candidates with an associate's degree or certificate in hotel, restaurant, or hospitality management may qualify for a job as a lodging manager.

Many technical institutes and vocational and trade schools also offer courses leading to formal recognition in hospitality management.

About 245 high schools in 45 states offer the Lodging Management Program created by the American Hotel and Lodging Educational Institute. This 2-year program for high school juniors and seniors teaches management principles and leads to a professional certification called the Certified Rooms Division Supervisor.

Work Experience

Many hotel employees who do not have hospitality management training, but who

⁷ For additional information regarding the occupational category "Lodging Managers," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Lodging Managers, on the Internet at <http://www.bls.gov/ooh/management/lodging-managers.htm#tab-1> (last visited January 2, 2013).

show leadership potential and have several years of experience, may qualify for assistant manager positions.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Lodging Managers, on the Internet at <http://www.bls.gov/ooh/management/lodging-managers.htm#tab-4> (last visited January 2, 2013).

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

The *Handbook* does not indicate that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupation. Rather, the occupation accommodates other paths for entry, including less than a bachelor's degree in a specific specialty. The *Handbook* clearly indicates that many applicants may qualify for positions in the occupation with a high school diploma and long-term experience working in a hotel. While the *Handbook* reports that "[m]ost full-service hotel chains hire people with a bachelor's degree in hospitality or hotel management," such a statement does not support the view that any lodging manager job qualifies as a specialty occupation as "most" is not indicative that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.⁸ More specifically, "most" is not indicative that a position normally requires at least a bachelor's degree in a specific specialty, or its equivalent, (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I)), or that a position is so specialized and complex as to require knowledge usually associated with attainment of a baccalaureate or higher degree in a specific specialty (the

⁸ The petitioner states on the Form I-129 petition that it has 18 employees, and further lists its gross annual income as approximately \$1.4 million and its net annual income as approximately \$30,350. With regard to the petitioner's business operations, the record of proceeding contains a one-page brochure and a copy of a photograph (which is not annotated). The brochure provides general information about the history and the location of the petitioner's business. No further documentation was provided. There is no indication that the petitioner is a hotel chain. Notably, the petitioner and counsel make various claims about the petitioner's services, but fail to provide probative evidence to support the assertions. 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). The record of proceeding does not contain documentary evidence demonstrating that the petitioner would fall under the group of employers described by the *Handbook* as "large, full-service hotels" or "full-service hotel chains." Furthermore, as will be discussed, the term "most" is not indicative that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).⁹

The *Handbook's* narrative states that candidates with an associate's degree or certificate in hotel, restaurant, or hospitality management may qualify for jobs as a lodging managers at hotels that provide fewer services. Accordingly, individuals who have less than a bachelor's degree in a specific specialty, or its equivalent, can obtain lodging manager positions. In addition, the *Handbook* states that many hotel employees who do not have hospitality management training, but who show leadership potential and have several years of experience, may qualify for assistant manager positions. (The petitioner identifies its proffered position as an assistant general manager position.) The *Handbook* does not indicate that this experience must be equivalent to at least a bachelor's degree in a specific specialty. Thus, the *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation.

In response to the RFE, counsel submitted an opinion letter from [REDACTED]. The letter is dated August 12, 2011. Mr. [REDACTED] did submit his curriculum vitae, nor did he provide any information regarding his professional and academic credentials (aside from the signature line on the letter).

In the letter, [REDACTED] states that he has "done a review of position advertisements for several hotel companies to ascertain the level of education that is required of hotel managers." [REDACTED] then claims that "[g]enerally, it requires a bachelor's degree to rise to the level of Assistant General Manager (AGM), Hotel Manager, or General Manager (GM), along with experience." [REDACTED] states that "[d]uring the searches, it should be noted that there were no AGM positions listed."

First, it must be noted that [REDACTED] stated that a bachelor's degree is required for upper-level hotel manager positions, but he did not indicate that a bachelor's degree in a *specific specialty* is required. The AAO notes that a general-purpose bachelor's degree (no specific specialty) is inadequate to establish that a position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly to the position in question. Since there must be a close correlation between the required specialized studies and the

⁹ For instance, the first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "Greatest in number, quantity, size, or degree." As such, if merely 51% of the positions need at least a bachelor's degree, it could be said that "most" of the positions need such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. (The AAO notes that the proffered position has been designated by the petitioner in the LCA as a low, entry-level position relative to others within the occupation). 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 specialty (or its equivalent) as a minimum for entry into the occupation in the United States." § 214(i)(1) of the Act.

position, the requirement of a degree with a bachelor's 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. As explained above, 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. USCIS has consistently stated that, 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 147.¹⁰

also fails to provide any information regarding any expertise or specialized knowledge of the instant matter. His opinion 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 assistant general managers (or parallel 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 opinion letter contains no evidence that it was based on scholarly research conducted by in the specific area upon which he is opining. In reaching this determination, provides no documentary support for his ultimate conclusion regarding the education required for the position (i.e., statistical surveys, authoritative industry publications, or professional studies).¹¹ Notably, as has not established his credentials as a recognized authority on the academic standards for this occupation, his opinion in this area merits no special weight.

Furthermore, there is no indication that possesses any knowledge of the petitioner's

¹⁰ 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.

¹¹ In his opinion letter, references several websites but he did not provide printouts of the webpages. If the petitioner wished for the AAO to review the information, it should have provided the printouts from the referenced Internet sources.

proffered position.¹² The fact that he attributes a degree requirement to such a generalized treatment of the proffered position undermines the credibility of his opinion. [REDACTED] does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. His opinion does not relate his conclusion to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. There is no evidence that [REDACTED] has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. [REDACTED] provides general conclusory statements regarding assistant general manager positions, but he does not provide a substantive, analytical basis for his opinion and ultimate conclusions.

Moreover, it must be noted that there is no indication that the petitioner and counsel advised [REDACTED] that the petitioner characterized the proffered position as a low, entry-level position (as indicated by the wage-level on the LCA). It appears that [REDACTED] would have found this information relevant for his opinion letter. Moreover, without this information, the petitioner has not demonstrated that [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine similar positions based upon job duties and responsibilities.

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

On appeal, the petitioner submitted an opinion letter from [REDACTED]. The letter is dated December 12, 2011. As previously discussed, where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764; *see also Matter of Obaiqbena*, 19 I&N Dec. 533. Nevertheless, even if the AAO were to consider [REDACTED] opinion letter, the AAO finds that the letter would not be probative in this matter. The AAO will briefly address a few of

¹² The record does not contain copies of the advertisements. [REDACTED] failed to provide the job duties and day-to-day responsibilities of the advertised positions, and there is no information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received for any of the referenced jobs. Accordingly, it is unclear whether the duties and responsibilities of the advertised jobs are the same or related to the proffered position. Thus, [REDACTED] has not established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position. Furthermore, [REDACTED] references advertisements that require a degree and a significant amount of experience (up to 6 years of experience). Thus, based upon the requirements, the advertised positions appear to be more senior positions than the proffered position. As previously noted, the petitioner designated its position as a Level I, entry-position in the LCA.

the deficiencies it observes in [REDACTED] letter.

[REDACTED] briefly describes his professional and academic background. However, he describes his credentials in general terms and fails to provide information such as specific dates, titles and descriptions for courses that he teaches, etc. Moreover, he does not provide any documentation to substantiate his professional experience or even his curriculum vitae. [REDACTED] states that his conclusions are based upon his "25 years of experience, [his] current experience with student placement and [his] personal experience." He fails to specifically describe how any of this experience is relevant to, or equipped him with any particular knowledge of the issue here. [REDACTED] self-endorsement does not establish his expertise pertinent to the *current* recruiting and hiring practices of organizations seeking to fill positions similar to the proffered position in the instant case.

Notably, [REDACTED] does not state his experience giving advisory opinions on this matter and he fails to cite specific instances in which his past opinions have been accepted or recognized as authoritative on this particular issue. [REDACTED] does not claim that he possesses any specific knowledge of the educational requirements for assistant general manager positions (or parallel positions) in the petitioner's industry for similar organizations based upon actual research or any particular authoritative sources (e.g., statistical surveys, authoritative industry or government publications, or professional studies). Rather, his experience and knowledge on the issue appears to be based on assisting a limited group of people – students and recent college graduates of the [REDACTED]

[REDACTED] states that he has "read the position description from [the petitioner]," however, he does not clarify which job description he reviewed. Similar to the opinion letter from [REDACTED], there is no indication that [REDACTED] possesses any knowledge of the petitioner's proffered position beyond this information. Furthermore, again, there is no evidence that he has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. [REDACTED] states that a "Bachelor's degree in either Hotel management or Business management is without question the baseline educational preparation to obtain a management position in this industry." The AAO observes that [REDACTED] makes an assertion, but fails to provide any supporting authority or any empirical basis for the pronouncement and the AAO finds that the opinion is not in accord with other information in the record.

In summary, and for each and all of the reasons discussed above, the AAO concludes that the opinion letters rendered by [REDACTED] are not probative evidence to establish the proffered position as a specialty occupation. The conclusions reached by [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which 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.

Counsel also submitted a printout from Hospitalitynet.org, which lists the universities in the United States that offer hospitality/tourism management degree programs. Counsel claims that the proffered position qualifies as a specialty occupation because some colleges and universities offer degree programs in hotel management. The AAO reviewed the printout in its entirety, but finds no merit in counsel's contention that the document is relevant to this matter. Counsel cites no statutory or regulatory authority, case law, or precedent decision to support it. Moreover, neither the statutory nor regulatory provisions governing USCIS adjudication of Form I-129 H-1B specialty occupation petitions provide for the approval of a petition on the grounds argued by the petitioner's counsel, or even indicate that the availability of college and university programs is relevant to USCIS adjudications of Form I-129 H-1B specialty occupation petitions. The issue here is not whether degree programs in the field of hotel management are available at colleges or universities in the United States. Rather, the issue is whether the petitioner has established that its proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. Thus, the submission appears to be extraneous.

On appeal, counsel refers to *Matter of Sun*, 12 I&N Dec 535 (D.D. 1966) to state that hotel management positions have been recognized by the Service to be professional occupations. Notably, *Sun* pertains to an immigrant visa petition and whether the beneficiary in that case was a member of the profession as defined in section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), and as interpreted at those times. Furthermore, it must be noted that *Sun* did not find that all hotel managers are members of the profession but rather that some hotel managers, under certain circumstances, may qualify for professional status. The issue before the AAO is whether the petitioner's proffered position qualifies as a nonimmigrant H-1B specialty occupation and not whether it is a profession. Thus, the matter cited by counsel is irrelevant to the instant petition.¹³ Counsel's reliance on the case is misplaced.

It is incumbent upon the petitioner to provide persuasive evidence that the proffered position qualifies as a specialty occupation under this criterion, notwithstanding the absence of the *Handbook's* support on the issue. As previously mentioned, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be

¹³ The AAO notes that the current, primary, and fundamental difference between qualifying as a profession and qualifying as a specialty occupation is that specialty occupations require the U.S. bachelor's or higher degree to be in a specific specialty. For example, while "teachers in elementary or secondary schools" are specifically identified as qualifying as a profession as that term is defined in section 101(a)(32) of the Act, that occupation would not necessarily qualify as a specialty occupation unless it met the definition of that term at section 214(i)(1) of the Act.

accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

As stated earlier, in determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

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

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.

Upon review of the record of proceeding, the AAO finds that the petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. That is, 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. That is, the petitioner has not developed or established complexity or uniqueness as attributes of the proffered position that would require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent.

In the instant case, the petitioner and counsel repeatedly claim that the proffered position is so complex and/or unique that the duties can be performed only by an individual with at least a baccalaureate degree. However, the petitioner failed to demonstrate how the assistant general manager duties as described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position.

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 "Lodging Managers" at a Level I (entry level) wage. The wage level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."¹⁴

Therefore, the evidence of record does not establish that this position is significantly different from other lodging manager positions such that it refutes the *Handbook's* information to the effect that a bachelor's degree in a specific specialty, or its equivalent, is not required for entry into the occupation in the United States. The record lacks sufficiently detailed information to distinguish

¹⁴ 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.

the proffered position as unique from or more complex than lodging manager 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 has indicated that the beneficiary's educational background and experience in the industry will assist her in carrying out the duties of the proffered position, and takes particular note of her academic degrees. 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. Upon review of the record of proceeding, the AAO finds that the petitioner has 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. 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").

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

generally *Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The petitioner stated in the Form I-129 petition that it has 18 employees and that it was established in 1981 (approximately 30 years prior to the H-1B submission). 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 employees who previously held the position. Moreover, the petitioner did not submit any documentation regarding its recruiting and hiring practices.

In a letter dated August 16, 2011, the general manager stated that he has a university degree from [REDACTED] and over 20 years of experience. No further information or documentation was provided. The general manager did not state the type of degree (e.g., associate's degree, baccalaureate, master's degree), the major field of study, when he obtained the degree, his academic and professional qualifications when he was hired by the petitioner, his job duties and responsibilities, etc. Consequently, it cannot be determined how representative the petitioner's claim regarding *one individual over a 30 year period* is of the petitioner's normal recruiting and hiring practices. (Furthermore, the individual serves in a different position.) It must be noted that without further information, the general manager's statement is not persuasive in establishing that the petitioner normally requires at least a bachelor's degree in a specific specialty for the position. The record is devoid of information to satisfy this criterion of the regulations.

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

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

The AAO acknowledges that the petitioner and counsel claim that the proffered position involves specialized and complex duties. However, upon review of the record of the proceeding, the AAO notes that relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than

positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent. Furthermore, there is a lack of substantive evidence substantiating the petitioner's assertions. The AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupational category of "Lodging Managers." The petitioner designated the position as a Level I position (the lowest of four assignable wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation."

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

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

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

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

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

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

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's

enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

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

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