



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **MAY 24 2013**

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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)

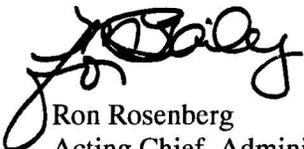
ON BEHALF OF PETITIONER:  
[REDACTED]

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 director initially approved the nonimmigrant visa petition. Upon subsequent review of the record, the director issued a notice of intent to revoke (NOIR) the approval of the petition, and ultimately did revoke the approval of the petition. Counsel for the petitioner filed a combined motion to reopen and motion to reconsider with the Vermont Service Center, and on April 17, 2012, the director affirmed the revocation of the approved petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The approval of the petition remains revoked.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on June 1, 2010. In the Form I-129 petition and supporting documentation, the petitioner describes itself as a company, established in 2009, that owns and operates a full service restaurant. Seeking to employ the beneficiary in what it designates as a food service manager position, the petitioner filed this H-1B petition in an endeavor 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 petition was initially granted. Thereafter, the director reviewed the record and issued a NOIR. The NOIR contained a detailed statement regarding the new information that U.S. Citizenship and Immigration Services (USCIS) had obtained and notified the petitioner that it was afforded an opportunity to submit evidence in support of the petition and in opposition to the ground alleged for revocation of the approval of the petition. The petitioner did not submit a response to the NOIR, and, on January 6, 2012, the director revoked the approval of 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. Counsel timely filed a combined motion to reopen and motion to reconsider with the Vermont Service Center, and the director affirmed the revocation of the approved petition. On appeal, counsel asserts that the director's basis for the revocation of the approval of the petition was erroneous and contends that the petitioner 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 NOIR; (3) the director's revocation notice; (4) the petitioner's Motion to Reopen and Motion to Reconsider; (5) the director's Dismissal of the Motion to Reopen and Motion to Reconsider; (6) the Form I-290B and the allied submissions on appeal; (7) the AAO's RFE; and (8) the response to the AAO's RFE. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the petitioner established that the proffered position qualifies as a specialty occupation. A review of the record, however, demonstrates a more critical issue pertaining to the petitioner's eligibility for the benefit sought.<sup>1</sup> As will be discussed in more detail below, even if the petitioner were to overcome the ground for the director's revocation of the approval of the petition, it could not be found eligible for the benefit sought because it failed to establish that it is, and has remained, an active business in good standing since the petition was filed

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<sup>1</sup> The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

on June 1, 2010. Thus, for this reason also the approval of the petitioner remains revoked.

During the adjudication of the appeal, evidence came to light that the petitioner's corporate status was listed as "Not in Good Standing" in the State of Texas where it was incorporated.<sup>2</sup> On March 4, 2012, the AAO issued a Request for Additional and Missing Evidence. The AAO notified the petitioner that it appeared that it was not in good standing and requested that the petitioner submit the following:

1. Evidence that, when the visa petition was filed, the petitioner was a corporation in good standing;
2. Evidence that it has remained in good standing during the interim and that it is now a corporation in good standing; and
3. Evidence including invoices, banking statements, and Federal tax returns for 2010, 2011 and 2012 (if available), demonstrating that the petitioner has done business since June 1, 2010 and continues to do business in the United States.

On April 8, 2013, counsel responded to the AAO's Request for Additional and Missing Evidence. Specifically, counsel submitted (1) a Certificate of Account Status from the Texas Comptroller of Public Accounts, dated April 5, 2013; (2) printouts from the petitioner's website; (3) copies of the petitioner's bank statements from November 1, 2012 through November 30, 2012, March 31, 2012 through April 30, 2012, January 1, 2013 through January 31, 2013, and March 1, 2013 through March 29, 2013; (4) copies of the petitioner's receipts and invoices; (5) 2011 Income Tax Return; and (6) 2010 Employee Quarterly Federal Tax Return.

The AAO reviewed the evidence submitted by counsel and finds that the petitioner has failed to establish that it is, and has remained, a corporation in good standing since the Form I-129 petition was filed on June 1, 2010. The AAO notes that the evidence does not refute the findings that during the interim the petitioning company's corporate status was not in good standing.

It must be noted that the regulation at 8 C.F.R. § 214.2(h)(11)(ii) addresses the grounds for automatic revocation of the approval of a petition and states, in pertinent part, that the "approval of any petition is immediately and automatically revoked if the petitioner goes out of business." It logically flows that a petitioner must be doing and continue to do business for the director to grant the petition. If the petitioner were not in business and the director granted the petition, it would result in the absurd result of the approved petition immediately and automatically being revoked the instant it was approved. See 8 C.F.R. § 214.2(h)(11)(ii).

The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). The record does not contain evidence that the petitioner was in good standing at the time of filing the petition and remained in good standing. While counsel claims that

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<sup>2</sup> For additional information, see the State of Texas, Texas Comptroller of Public Accounts, Franchise Tax Certification of Account Status website at <https://ourcpa.cpa.state.tx.us/coa/Index.html>.

the petitioner "has continuously been doing business and is still in business," counsel failed to substantiate the claim and failed to establish that the petitioner was in good standing at the time of H-1B filing and remained in good standing, and that the petitioner had the authority or right to transact business in the State of Texas.<sup>3</sup> Accordingly, the AAO finds that the petition cannot be approved as the petitioner has not established that it was in business when it submitted the Form I-129, making any employment of the beneficiary purely speculative.

Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Accordingly, the AAO finds that the approval of the petition remain revoked. As the petitioner failed to establish eligibility for the benefit sought, the AAO finds that the approval of the petition remains revoked and the appeal must be dismissed.

Although the AAO finds that the petitioner has failed to establish that it was a corporation in good standing and had the authority or right to transact business in Texas, the AAO will now address the director's basis for revocation of the approved petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position.

As will be evident in the discussion below, the AAO finds that, fully considered in the context of the entire record of proceeding, the petitioner has failed to credibly establish that it will provide qualifying H-1B employment to the beneficiary in accordance with the applicable statutory and regulatory provisions. The documents submitted on motion and on appeal fail to effectively rebut and overcome the basis for revocation specified at 8 C.F.R. § 214.2(h)(11)(iii)(5) below. Accordingly, the appeal will be dismissed, and approval of the petition remains revoked.

USCIS may revoke the approval of an H-1B petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii), which states the following:

- (A) Grounds for revocation. The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:
- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
  - (2) The statement of facts contained in the petition was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
  - (3) The petitioner violated terms and conditions of the approved petition; or

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<sup>3</sup> In the Form I-129 petition and Labor Condition Application, the petitioner listed the beneficiary's place of employment as a specific address in Sugar Land, Texas and a specific address in Houston, Texas. No other addresses were provided.

- (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
  - (5) The approval of the petition violated paragraph (h) of this section or involved gross error.
- (B) Notice and decision. The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

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

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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 determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of

the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

In this matter, the petitioner stated that it seeks the beneficiary's services as a food service manager on a full-time basis at the rate of pay of \$39,700 per year. In the Form I-129 (page 1) and Labor Condition Application (LCA) (page 1), the petitioner listed its address in Sugarland, Texas. In addition, the petitioner indicated that the beneficiary would be working at this address in Sugarland, Texas and at a specific address in Houston, Texas. In the May 23, 2010 letter of support, the petitioner described the proposed duties of the beneficiary as follows:

As Food Service Manager, [the beneficiary] will manage and monitor the food operations of both [the petitioner] and [its sister company]. He will plan, direct and coordinate the companies' food operations, formulating policies, managing daily operations, and planning the use of materials and human resources. [The beneficiary] will oversee the inventories and ordering of food, equipment and supplies. He will arrange for routine maintenance and upkeep of the companies' equipment and facilities. He will also be responsible for all administrative and human resource functions, including recruiting new employees, monitoring employee performance and training, keeping employee work records, and maintaining business records regarding supplies and equipment purchases.

In addition, [the beneficiary] will ensure that diners and customers are served properly in a timely manner, and will investigate and resolve any complaints about food quality and service. He will ensure that health and safety standards and any local regulations are obeyed. In this position, he will receive an annual salary of \$39,700.

In the instant case, the AAO observes that the duties of the proffered position, as described by the petitioner in support of the Form I-129 are virtually verbatim from the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*), 2010-2011 edition, for the occupational category "Food Services Managers."

In addition the petitioner stated that "[t]he specialty occupation position of Food Service Manager requires advanced knowledge of food preparations and management and therefore requires a bachelor's degree or the equivalent in Restaurant or Hospitality Management, Culinary Arts or a related field."

With the Form I-129 petition, the petitioner submitted a copy of the beneficiary's foreign degree and transcript. In addition, the petitioner submitted a credential evaluation from Morningside Evaluations and Consulting. The evaluation indicates that the beneficiary's foreign education is

equivalent to three years of academic coursework from an accredited institution of higher education in the United States. A letter from [REDACTED] was also submitted. The letter states that based upon the academic evaluation and considering the beneficiary's work experience and professional training, it is [REDACTED] opinion that the beneficiary has attained the equivalent of a Bachelor of Arts degree in Culinary Arts from an accredited institution of higher education in the United States.

The petitioner also submitted an 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) 11-9051.00, at a Level I (entry level) wage.

The director approved the petition on September 13, 2010. Thereafter, the director reviewed the record of proceeding and issued a NOIR on April 15, 2011. The NOIR contained a detailed statement regarding the director's intent to revoke the approval of the petition, and notified the petitioner that it was afforded an opportunity to submit evidence in support of the petition. The petitioner did not submit a response to the NOIR, and, on January 6, 2012, the director revoked the approval of the petition.

On February 8, 2012, counsel for the petitioner filed a combined motion to reopen and motion to reconsider. In support of the motion, the petitioner provided a letter dated February 6, 2012. In the letter, the petitioner stated, "We would like to take the opportunity at this time to highlight the technical and specialty skills of [the beneficiary] and how such skills are needed and utilized in [the petitioning company] for this position." Specifically, the petitioner expanded on the previously submitted job description as follows:

1. Main restaurant and main technical duties, necessary to the food preparation process of the restaurant and of the bakery:

a) Producing specialty food and bakery items, which need special knowledge:

- Manage and monitor food operations; [and]
- Produce and create specialty foods unique to India and China.

Example of specialty recipes prepared, executed and taught by [the beneficiary]:

Indian-Tandoor food: Dal Peshawari, Naan breads, Lamb Chettinad, Palak and Mutter Paneer, Chicken Biryani;

Indo-Chinese food: Chow Mein, Szechuan chicken, Pavoallappa, Chicken Manchurian Dry;

Bakery food: Paneer Masala, Aloo Spinach, Aloo Capsicum, Chicken Tikka puffs, croissants and buns.

b) Training and supervising kitchen staff to take over specialized tasks:

- Plan, direct and coordinate food operations;
- Oversee inventories, manage daily operations, and plan use of materials and human resources;

- Arrange for routine maintenance and upkeep of companies' equipment and facilities;
- Responsible for all administrative and human resources functions; [and]
- Recruiting, Training, and monitoring new employees.

c) Oversee restaurant operations and participate in development and planning strategies:

- Maintain business records regarding supplies and equipment purchases;
- Oversee diner's food service to include complaints; [and]
- Responsible for health and safety along with adherence to local regulations.

2. Percentage of time devoted to each duty and educational requirements to proceed with those duties:

Producing specialty food and bakery items, which need special knowledge:

Requires a Bachelor's degree in Culinary Arts – 50% of the time

Training and supervising kitchen staff to take over specialized tasks:

Requires a Bachelor's degree or 12 years of experience in this position – 40% of the time

Oversee restaurant operations and participate in development and planning strategies:

Requires a Bachelor's degree or 12 years of experience in a similar position – 10% of the time

In addition, the petitioner and counsel submitted a copy of the petitioner's menus.

The director found the evidence insufficient to overcome the basis for revocation of the approved petition. Thereafter, the petitioner submitted a joint motion to reopen and reconsider. The director reviewed the joint motion and affirmed the decision to revoke the approval of the petition. On May 18, 2012, counsel submitted an appeal. With the appeal, counsel submitted a brief and additional evidence.

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 and, thus, overcome the grounds for the revocation of the petition. 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."

The AAO reviewed the record in its entirety and will make some findings that are material to this decision's application of the H-1B statutory and regulatory framework to the proffered position as described in the record of proceeding.

In the instant case, the AAO observes that the duties of the proffered position, as described by the petitioner in support of the Form I-129 are virtually verbatim from the *Handbook*, 2010-2011 edition, for the occupational category "Food Services Managers."

The AAO notes that providing job duties for a proffered position that are from the *Handbook* 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 as this type of generic description fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operation. Accordingly, it 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.

Moreover, upon review of the job descriptions provided by the petitioner with the initial petition and in the motion, the AAO notes that the petitioner's job duties for the proffered position are generalized and generic as the petitioner fails to convey either the substantive nature of the work that the beneficiary would actually perform, any particular body of highly specialized knowledge that would have to be theoretically and practically applied to perform it, or the educational level of any such knowledge that may be necessary. The responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's business operations. Furthermore, the petitioner did not provide sufficient documentation to substantiate the job duties and responsibilities of the proffered position.

The petitioner failed to provide sufficient details regarding the nature and scope of the beneficiary's employment or substantive evidence regarding the actual work that the beneficiary would perform. Without a meaningful job description, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. The tasks as described fail to communicate (1) the actual work that the beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. The petitioner's assertion with regard to the educational requirement is conclusory and unpersuasive, as it is not supported by the job description or substantive evidence.

Furthermore, the AAO notes that the petitioner has provided inconsistent information as to the academic requirements of the proffered position. The AAO observes that in the May 23, 2010

support letter, the petitioner indicates that the proffered position "requires a bachelor's degree or the equivalent in **Restaurant or Hospitality Management, Culinary Arts or a related field.**" However, in February 6, 2012 letter, submitted on motion, the petitioner states that the proffered position requires a bachelor's degree in **culinary arts.** The AAO also notes that further in the letter, the petitioner also states that "a **Bachelor's degree or 12 years of experience** in a similar position" is required for the proffered position.<sup>4</sup> No explanation for the variances was provided.<sup>5</sup>

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.<sup>6</sup> As previously discussed, the petitioner designated the proffered position in the LCA under the occupational category "Food Service Managers."

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<sup>4</sup> For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must generally be demonstrated for each year of college-level training the alien lacks, in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty. *Id.*

<sup>5</sup> The petitioner has provided inconsistent information as to the academic 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).

<sup>6</sup> 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 "Food Service Managers," including the sections regarding the typical duties and requirements for this occupational category.<sup>7</sup> However, the *Handbook* does not indicate that normally the minimum requirement for entry into food service 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 Food Service Manager" states the following about this occupation:

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

### **Education**

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

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

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

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Food Service Managers, on the Internet at <http://www.bls.gov/ooh/management/food-service-managers.htm#tab-4> (last visited May 21, 2013).

When reviewing the *Handbook*, the AAO must note that the petitioner designated the proffered

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<sup>7</sup> For additional information regarding the occupational category "Food Service Managers," 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-1> (last visited May 21, 2013).

position as a Level I (entry level) position on the LCA. This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.<sup>8</sup> That is, 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 he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results.

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

It is incumbent upon the petitioner to provide persuasive evidence that the proffered position qualifies as a specialty occupation under this criterion, notwithstanding the absence of *Handbook*

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<sup>8</sup> The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

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

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance, Nonagric. Immigration Programs* (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

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

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 will review 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).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports a standard industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference its previous discussion on the matter. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry into those positions.

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 and counsel may believe that the proffered 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. In support of this assertion, the petitioner provided documents regarding its business operations and the proffered position, including a printout of its restaurant profile from [REDACTED] menus; its business plan; financial documents; and an organizational chart. The AAO reviewed the documentation in its entirety. However, the petitioner did not submit sufficient probative evidence regarding its business operations or the proffered position to establish how the beneficiary's responsibilities and day-to-day duties are so complex or unique that the position can be performed only by an individual with a bachelor's degree in a specific specialty, or its equivalent.

In the instant case, the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. Specifically, the petitioner failed to credibly demonstrate exactly what the beneficiary will do on a day-to-day basis such that complexity or uniqueness can even be determined. Further, the petitioner failed to demonstrate how the food service manager duties 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 a few related courses may be beneficial, or even essential, in performing certain duties of a food service manager 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 proffered.

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 I (entry level) wage. The wage level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.<sup>9</sup>

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."

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<sup>9</sup> For additional information on wage levels, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

The AAO observes that the petitioner and counsel have indicated that the beneficiary's educational background and experience in the industry will assist him in carrying out the duties of the proffered position, and takes particular note of his academic degree and prior experience. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not explain or clarify at any time in the record which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner has 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. 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 contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that 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 five employees and was established in 2009 (approximately one year prior to the filing of the H-1B petition). However, upon review of the record, the petitioner did not provide any documentary evidence regarding current or past recruitment efforts for this position. Furthermore, the petitioner did not submit any information regarding employees who currently or previously held the position. The record does not establish a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

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

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

In support of the H-1B petition, the petitioner provided documents regarding its business operations and the proffered position, including a printout of its restaurant profile from [www.b4-u-eat.com](http://www.b4-u-eat.com); menus; financial documents; a copy of its business plan; and an organizational chart. The AAO reviewed the documentation in its entirety. The AAO acknowledges that the petitioner may believe 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. However, upon review of the record of the proceeding, the AAO notes that the petitioner has not provided probative evidence that satisfies 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 positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.

Furthermore, 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 occupation. 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." 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 proffered 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. Accordingly, the director correctly found that the petition was approved in error and the petitioner failed to overcome this ground of the director's NOIR. Therefore, the director properly revoked the approval of the petition, and the appeal must be dismissed.

Moreover, the AAO observes that even if the petitioner had overcome the grounds discussed above for revoking the approval of the H-1B petition, the petition would still be remanded to the director for issuance of a new NOIR and initiation of a new revocation-on-notice process with regard to this petition's approval because of several additional matters that the AAO observes in the record of proceeding.

As noted above, the petitioner submitted an LCA in support of the petition that designated the proffered position to the corresponding occupational category of "Food Service Managers" - SOC (ONET/OES) code 11-9051.00. The wage level for the proffered position in the LCA corresponds to a Level I (entry) position. The prevailing wage source is listed in the LCA as the OES (Occupational Employment Statistics) OFLC (Office of Foreign Labor Certification) Online Data Center.<sup>10</sup> The LCA was certified on May 10, 2010. The AAO notes that by completing and submitting the LCA, and by signing the LCA, the petitioner attested that the information contained

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<sup>10</sup> 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/>.

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.<sup>11</sup>

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.<sup>12</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 previously discussed, the wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

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

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<sup>11</sup> For additional information regarding prevailing wage determinations, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

<sup>12</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.

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

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

In the instant case, the petitioner designated the proffered position as a Level I position. This suggests that the petitioner's academic and/or professional experience requirements for the proffered position would be *less than* the preparation listed for Job Zone 3 occupations (i.e., "training in vocational schools, related on-the-job experience, or an associate's degree"). However, the AAO observes that the petitioner claims that the proffered position "requires a bachelor's degree or the equivalent in Restaurant or Hospitality Management, Culinary Arts or a related field."

Furthermore, the petitioner and counsel repeatedly claim that the duties of the proffered position are complex, unique and/or specialized. For instance, in the May 23, 2010 letter of support, the petitioner stated that the beneficiary "will manage and monitor the food operations of both [the petitioning company] and LSM, Inc." The petitioner also reported that the duties of the position include "monitoring employee performance and training." In addition, in the February 6, 2012 letter, submitted on motion, the petitioner indicated that the proffered position's duties involved "[t]raining and supervising kitchen staff to take over specialized tasks" and "[r]ecruiting, [t]raining, and monitoring new employees." Moreover, the petitioner claimed that "the position of Food Service Manager in our restaurant and bakery requires a highly skilled and experienced individual, holding a Bachelor's degree in Culinary Arts and particularly knowledgeable of Indian and Chinese specialty foods and baked goods."

On appeal, counsel states that "[t]he proffered position requires specialized knowledge of Indian cooking and spices, Chinese cooking and spices, and specialty bakery items." Counsel further states that "[d]ue to the highly specialized knowledge and skill set required to perform and oversee this particular style of cooking, a fusion of Indian and Chinese specialties, this position's job duties clearly establish the need for an individual who possesses the minimum of a bachelors [sic] degree in Culinary Arts." In addition, counsel claims that "[t]he specialized nature and level of sophistication of the responsibilities of the position necessitate that the incumbent have the background and analytical expertise required to assess and analyze complex food service matters not only from the specialized cooking side, but from the other aspects of the business as well: various food service, business, financial, marketing, and operations issues." According to counsel, "[t]his position is more complex and specialized than that of an ordinary food service manager because it requires specialized knowledge in different areas of cuisine."

In addition, on appeal, counsel submitted an organizational chart. The chart depicts the hierarchy of the petitioner's organization, including the position of food service manager. When reviewing the placement of the proffered position, the AAO notes that one position is more senior (the president) and that there are approximately eight positions that are more junior than the food service manager position (including the restaurant manager, the executive chef, two cooks, the waitstaff, the hostess, the bakery manager, and the bakery staff).

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 he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he 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 prevailing wage of \$39,700 per year on the LCA corresponds to a Level I for the occupational category of "Food Service Managers" for Fort Bend County (Sugar Land, Texas) and Harris County (Houston, Texas).<sup>13</sup> Notably, if the proffered position were designated as a higher level position, the prevailing wage at that time would have been significantly higher.

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. In the instant case, it appears from the record of proceeding that the petitioner failed to offer the beneficiary an adequate wage to serve in the position that meets the applicable statutory and regulatory provisions. However, as previously discussed, the petitioner failed to overcome the grounds for revocation of the approval of the petition. Accordingly, the AAO finds that it would serve no useful purpose to

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<sup>13</sup> For additional information regarding the prevailing wage for food service managers in Fort Bend County and Harris County, *see* the All Industries Database for 7/2009 - 6/2010 for Food Service Managers at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatabase.com/OesQuickResults.aspx?code=11-9051&area=26420&year=10&source=1> (last visited May 21, 2013).

remand the case for the director to review the petition on this additional issue.

Nevertheless, 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 . . . 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 grounds for revocation of the approval of the petition, the petition would be remanded to the director to review for issuance of an RFE or NOIR.

In addition, the AAO notes that it finds that the record of proceeding contains additional issues, not identified by the director in the NOIR that could also be remanded to the director for review and for consideration of issuance of an RFE or new NOIR. More specifically, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states, in pertinent part:

*Service or training in more than one location.* A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions. The address that the petitioner specifies as its location on the Form I-129 shall be where the petitioner is located for purposes of this paragraph.

The itinerary language at 8 C.F.R. § 214.2(h)(2)(i)(B), with its use of the mandatory "must" and its inclusion in the subsection "Filing of petitions," establishes that the itinerary as there defined is a material and necessary document for an H-1B petition involving employment at multiple locations, and that such a petition may not be approved for any employment period for which there is not submitted at least the employment dates and locations. Here, given the indications in the record that the beneficiary would work in Sugar Land, Texas and Houston, Texas during the requested period of employment and as the petitioner failed to provide this initial required evidence when it filed the Form I-129 in this matter, the petition could be remanded to the director for review and to contemplate the issuance of a request for evidence or new NOIR and initiation of a new revocation-on-notice process with regard to this petition's approval.

Further, the AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the position is a specialty occupation. The beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, in any event, the evaluation of the beneficiary's training and experience submitted by the petitioner is insufficient to establish that the beneficiary possesses the equivalent of a U.S. bachelor's degree in any specific specialty. Specifically, as the claimed equivalency was based on training and experience, there is no evidence that the evaluator has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based

on an individual's training and/or work experience and that the beneficiary also has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty. *See* 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) and (D)(1). As such, evidence was not presented that the beneficiary has at least a U.S. bachelor's degree in any specific specialty, or its equivalent. Thus, even if eligibility for the benefit sought had been otherwise established, the appeal could not be granted. That is, for this reason as well, the petition would be remanded to the director to review for issuance of an RFE or NOIR.

In conclusion, based upon a complete review of the record of proceeding, the petitioner has failed to overcome the ground specified in the NOIR for revoking the approval of the petition by establishing that the proffered position is a specialty occupation. In addition, even if the petitioner had overcome this ground for revocation of the approval of the petition, the approval of the petition would remain revoked as the petitioner failed to establish that when the H-1B petition was submitted the petitioner's corporate status was in good standing and remained in good standing. Furthermore, even if the petitioner had overcome these grounds for revocation of the approval of the petition, the petition would still be remanded to the director for review for issuance of an RFE or NOIR regarding the additional issues discussed above.

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 approval of the petition remains revoked.