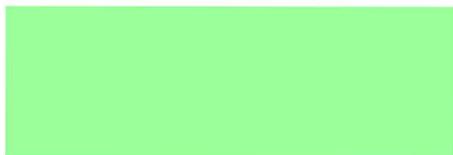
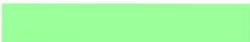




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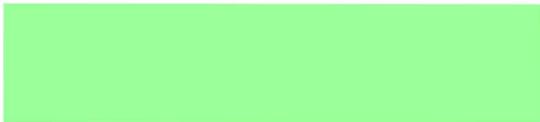


DATE: **AUG 26 2014** OFFICE: VERMONT SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
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. The appeal will be dismissed. The petition will be denied.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center on June 7, 2012. In the Form I-129 visa petition and supporting documents, the petitioner describes itself as a restaurant that was established in 2010. In order to employ the beneficiary in what it designates as a food service manager position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on July 31, 2013, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before us contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and supporting materials. We reviewed the record in its entirety before issuing our decision.

For the reasons that will be discussed, we agree with the director's decision that the record of proceeding does not establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. Accordingly, the director's decision will not be disturbed.

I. FACTUAL AND PROCEDURAL HISTORY

In this matter, the petitioner states in the Form I-129 that it seeks the beneficiary's services as a full-time food service manager at a rate of pay of \$30,000 per year. In a letter dated June 6, 2012, the petitioner claims that the duties of the proffered position include the following duties:

- Preparation and review of weekly reports;
- Generation and management of billing records;
- Financial and administrative record keeping;
- Interfacing and managing guests' billing questions and problems;
- Management of inventory;
- Coordination of distribution and retention of mails and other communications;
- Hiring, orientation and training all new employees;
- Ensure that each customer receives outstanding customer service by providing a customer friendly environment which includes greeting and acknowledging every customer, maintaining outstanding standards, solid knowledge of menu offering and all other components of customer service;

- Assist in developing marketing and business expansion strategies;
- Conduct thorough clean sweep of the restaurant on weekly basis to ensure all Health Department's requirements are met;
- Coordinate special event caterings by assisting event planners and individuals with their special event needs. This includes customizing a menu with the restaurant's chefs to meet a specific client's requests and budget.

The petitioner further states that a bachelor's degree in restaurant or hospitality management is required for entry into the proffered position. The petitioner claims that the beneficiary is qualified to perform the duties of the proffered position by virtue of his foreign qualifications which it claims are equivalent to a U.S. bachelor's degree in hospitality management

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The petitioner indicates on the LCA that the proffered position corresponds to the occupational category "Food Service Managers" – SOC (ONET/OES Code) 11-9051, at a Level I (entry level) wage.

Finally, the petitioner submitted the following documentary evidence in further support of the petition: (1) an excerpt from the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)* pertaining to food service managers; (2) the O*Net Online Summary Report pertaining to food service managers; (3) copies of the beneficiary's foreign academic transcripts and diplomas;¹ (4) copies of certificates demonstrating the beneficiary's completion of numerous specialized training courses; (5) a copy of the beneficiary's resume; and (6) copies of recommendation and experience letters written on the beneficiary's behalf.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on October 11, 2012. The director outlined the evidence to be submitted, and specifically requested (1) evidence establishing that the proffered position was a specialty occupation as well as (2) a copy of an evaluation of the beneficiary's foreign academic credentials.

Counsel responded to the RFE by submitting additional evidence in support of the H-1B petition. Counsel submitted a letter from the petitioner dated October 25, 2012, which provided additional details regarding a typical day of work for the beneficiary in the proffered position. The petitioner also stated that the percentage of time the beneficiary would devote to each of the stated duties was as follows:

Accounting and Budget:	25%
Client Interaction:	25%
Management:	25%

¹ We note that counsel's letter of support states that an evaluation of the beneficiary's foreign academic credentials, equating them to a U.S. bachelor's degree in hospitality management, was included with the supporting documents. Upon review, however, we were unable to locate this document. As noted below, counsel submitted an evaluation of the beneficiary's foreign academic credentials that is dated after the RFE requesting such an evaluation was sent.

Inventory Management:	15%
Management of Personnel:	10%

In addition and contrary to its statements in the initial letter of support, the petitioner claimed that due to the complex nature of the position, it required candidates to have at least a baccalaureate degree in food science or a related discipline. It also stated that it required "a university degree from a field that relates to the management of business."

The petitioner, through counsel, also submitted the following documents: (1) letters from the [redacted] and industry peer [redacted] in support of the contention that there is common degree requirement for the proffered position within the petitioner's industry; (2) a copy of a published decision by a federal district court in Colorado; (3) a copy of a resume for the petitioner's prior food service manager; (4) copies of approval notices and petitions for three petitions previously approved by USCIS for the occupation of food service manager; (5) copies of job postings for positions the petitioner claims are parallel to the proffered position in similar organizations; (6) additional information pertaining to the petitioner, including photographs, copies of its menu, website and [redacted] page, and (7) a copy of the beneficiary's foreign academic credentials evaluation.

The director reviewed the record of proceeding, and determined that the petitioner did not establish eligibility for the benefit sought. The director denied the petition on July 31, 2013. Thereafter, counsel submitted an appeal of the denial of the H-1B petition accompanied by a brief and a copy of a recent decision by our office.²

The issue before us is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, and for the specific reasons described below, we agree with the director and find that the evidence fails to establish that the position as described constitutes a specialty occupation.

II. PRELIMINARY FINDINGS

As a preliminary matter, we will address *Arctic Catering, Inc. v. Thornburgh*, 769 F. Supp. 1167 (D. Colo. 1991), and *Matter of Sun*, 12 I&N Dec. 535 (Dist. Dir. 1966), cited by counsel, as well as the cases listed in bullet points in counsel's letter dated June 6, 2012. The matters cited pertain to

² We note that counsel submits a copy of a recent, unpublished decision by our office pertaining to an L-1A intracompany transferee. Counsel relies on the findings in that decision, noting that USCIS should not limit its review to the size of a petitioner when reviewing a petition. While we concur with counsel's assertion, we also note that it is reasonable to assume that the size of an employer's business has or could have an impact on the claimed duties of a particular position. See *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the actual duties of a particular position.

immigrant visa petitions and whether the beneficiaries are members of the professions as defined in section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), and as interpreted at those times. The issue before us is whether the petitioner's proffered position qualifies as a nonimmigrant H-1B specialty occupation and not whether it is a profession. Thus, the matters cited by counsel are irrelevant to the instant petition.³

III. SPECIALTY OCCUPATION

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

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

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

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

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

³ We note 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, or its equivalent. Thus, 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.

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

To 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.

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

We recognize the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁴ As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Food Service Managers."

We reviewed the chapter of the *Handbook* entitled "Food Service Managers," including the sections regarding the typical duties and requirements for this occupational category. While we concur with the petitioner's assertion that the proffered position is that of a food service manager, the *Handbook* does not indicate that "Food Service Managers" comprise an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry.

The subchapter of the *Handbook* entitled "How to Become a Food Service Manager" states the following about this occupational category:

Most applicants qualify with a high school diploma and long-term work experience in the food service industry as a cook, waiter or waitress, or counter attendant. However, some receive training at a community college, technical or vocational school, culinary school, or at a 4-year college.

Education

Although a bachelor's degree is not required, some postsecondary education is increasingly preferred for many manager positions, especially at upscale restaurants and hotels. Some food service 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.

Many colleges and universities offer bachelor's degree programs in restaurant and hospitality management or institutional food service management. In addition, numerous community and junior colleges, technical institutes, and other institutions offer programs in the field leading to an associate's degree. Some culinary schools

⁴ All of our references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. We hereby incorporate into the record of proceeding the chapter of the *Handbook* regarding "Food Service Managers."

offer programs in restaurant management with courses designed for those who want to start and run their own restaurant.

Regardless of length, nearly all programs provide instruction in nutrition, sanitation, and food planning and preparation, as well as courses in accounting, business law, and management. Some programs combine classroom and practical study with internships.

Work Experience in a Related Occupation

Most food service managers start working in industry-related jobs, such as cooks, waiters and waitresses, or dining room attendants. They often spend years working under the direction of an experienced worker, learning the necessary skills before they are promoted to manager positions.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Food Service Managers, on the Internet at <http://www.bls.gov/ooh/management/food-service-managers.htm#tab-4> (last visited Aug. 19, 2014).

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 this occupational category. Rather, the *Handbook* states that most food service managers "qualify with a high school diploma and long-term work experience in the food service industry as a cook, waiter or waitress, or counter attendant." While not required, the *Handbook* goes on to state that "some receive training at a community college, technical or vocational school, culinary school, or at a 4-year college."

The *Handbook*, therefore, does not indicate that employers normally require a degree in a specific specialty, or its equivalent, for entry into the occupation.

In response to the RFE, counsel submitted a copy of an undated letter from [REDACTED] Senior Vice President and General Counsel for the [REDACTED] in support of the contention that the proffered position qualifies as a specialty occupation. We reviewed the opinion letter in its entirety. However, as discussed below, the report is not persuasive in establishing the proffered position as a specialty occupation position.

Specifically, counsel contends that Mr. [REDACTED] "is an expert in the field qualified to render an opinion regarding the specialized nature of the profession of Food Service Manager." Mr. [REDACTED] claims that the position of food service manager is a "highly complex specialty occupation," and claims that it requires either a university degree in the field or an equivalent number of years of experience in the field. Mr. [REDACTED] concludes that an individual with lesser qualifications will "likely not be qualified to hold the position of Food Service (Restaurant) Operations Manager."

It is noted that Mr. [REDACTED] does not address the petitioner's business or the proffered position in this matter. There is no indication that he possesses any knowledge of the petitioner's proffered position. To the contrary, he simply claims that the appropriate knowledge required to perform the duties of a

food service manager would be a university degree in the field. He 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. For instance, there is no evidence that Mr. [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. Mr. [REDACTED] 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. Rather, Mr. [REDACTED] provides a general, conclusory statement equating all positions with the title of "Food Service Manager" to that of a specialty occupation.

Moreover, other than stating that he is the Senior Vice President and General Counsel for the [REDACTED] Mr. [REDACTED] provides no information regarding the basis of his claimed expertise on this particular issue. The documentation does not establish his expertise pertinent to assessing the minimum requirements for entry into the proffered position. Without further clarification, it is not apparent how his position with the [REDACTED] would translate to expertise or specialized knowledge regarding educational requirements for the proffered position.

Moreover, it does not appear that the petitioner notified Mr. [REDACTED] that it designated the proffered position on the LCA as a Level I (entry) position relative to others within the occupational category. It appears that this information would have been relevant for his assessment of the proffered position.

Accordingly, the very fact that he attributes a degree requirement to such a generalized treatment of the proffered position, and the occupation of "food service manager" in general, undermines the credibility of his opinion. Importantly, his statements are not supported by copies or citations of research material that may have been used. Moreover, while he claims that the occupation of food service manager always requires at least a "university degree in the field," he has not provided sufficient facts that would support this contention. We may, in our 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, we are 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 our discretion we discount the advisory opinion letter as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, we hereby incorporate the above discussion and analysis regarding the opinion letter into each of the bases in this decision for dismissing the appeal.

In summary, for the reasons discussed above, we conclude that the opinion letter rendered by Mr. [REDACTED] is not probative evidence to establish the proffered position as a specialty occupation. The conclusions reached by Mr. [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which he reached such conclusions. Therefore, we decline to defer to Mr. [REDACTED] findings and ultimate conclusions, and further find that his opinion letter is not probative evidence towards satisfying any criterion of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook* (or other objective, authoritative source) indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. 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)(I).

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

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook* (or other objective, authoritative source), reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Also, while the submission by Mr. [REDACTED], on behalf of the [REDACTED] is noted, we incorporate by reference the previous discussion on the matter and find this letter insufficient to establish that the industry's professional association has made a degree a minimum entry requirement.

We note the petitioner's submission of a letter from [REDACTED], owner of [REDACTED] which appears to be a restaurant business based in [REDACTED], Oklahoma. Mr. [REDACTED] states that, since the inception of his restaurant business six years ago, he has employed several food service managers. He claims that he has always required a bachelor's degree or the experiential equivalent for entry into that position, and concludes that the position of food service manager meets all four of the regulatory requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Like the letter from Mr. [REDACTED] discussed above, Mr. [REDACTED] letter provides no indication that he possesses any knowledge of the petitioner's proffered position. Instead, Mr. [REDACTED] generally concludes that the duties of a food service manager require an individual with a university degree in the field. He does not provide any information regarding his claimed restaurant business, such that it could be deemed similar to that of the petitioner, nor does he provide any information regarding the nature of his food service manager positions, such that they could be deemed parallel to the proffered position here. Most importantly, he does not state that a degree in a specific specialty is required for entry into the position of food service manager in his restaurant business. We find,

therefore, that this letter is not persuasive evidence that a degree requirement is common among the petitioner's industry for similar positions.

The petitioner also submitted two job announcements in support of its contention that a degree requirement is common among parallel positions in similar organizations. However, upon review of the evidence, we find that the petitioner's reliance on the job announcements is misplaced.

In the Form I-129 and supporting documentation, the petitioner claims that it is a restaurant with three employees that was established in 2010. In its support letter dated June 6, 2012, the petitioner indicated that it is a family-owned bistro. The petitioner reported its net annual income as approximately \$100,000.

For the petitioner to establish that an organization is similar, it must demonstrate that it shares the same general characteristics with the advertising organization. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the advertising organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

Upon review of the documentation, the petitioner fails to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) located in organizations that are similar to the petitioner.

Specifically, the petitioner submitted the following job postings:

1. Restaurant General Manager at [REDACTED] and
2. Restaurant General Manager at [REDACTED]

Preliminarily, we note that while both entities posting these announcements appear to be restaurants, the job title of the proffered position (Food Service Manager) differs from the job titles in the vacancy announcements (Restaurant General Manager). Although we note that the descriptions of the positions being offered share some duties with the proffered position, there is virtually no evidence regarding the nature of the posting restaurants, such as their size and scope of operations, which would allow us to determine whether they are similar to the petitioner's 3-employee family-owned bistro.

Additionally, contrary to the purpose for which the advertisements were submitted, the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. Consequently, even if the proffered position were deemed parallel in duties to the general manager positions advertised, there is no indication that a bachelor's degree in a specific

specialty is required for entry into these positions. Specifically, the posting by [REDACTED] requires either (1) a bachelor's degree from a four-year college; (2) five years of related experience and/or training; or (3) an equivalent combination of education and experience. There is no requirement that a degree in a specific specialty or related field be attained, and experience is an acceptable substitute for baccalaureate education. Moreover, the posting by [REDACTED] merely lists "Bachelor's Degree" under the educational requirements, and does not specify whether the degree must be in a specific specialty.

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

We 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.

In support of its assertion that the proffered position qualifies as a specialty occupation, we again refer to the letters from Mr. [REDACTED] and Mr. [REDACTED] in which they contend that the occupation of food service manager is so complex and unique that only a person holding a university degree or its equivalent can perform the associated duties. As discussed previously, the writers provide no details with regard to how this conclusion is reached. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). We once again incorporate the above discussion and analysis regarding these letters here.

A review of the record of proceeding indicates that the petitioner has not demonstrated that the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent. Additionally, 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.

In addition, the petitioner provided conflicting academic requirements in its letter of support and its response to the RFE. In its letter dated June 6, 2012, the petitioner claimed that the incumbent for the proffered position should have a degree in restaurant or hospitality management. In response to the RFE, however, the petitioner claimed the minimum educational requirement was a bachelor's

degree in food science or a related field.⁵ Moreover, the petitioner contends through the course of adjudication, based largely upon the advisory letters by Mr. [REDACTED] and Mr. [REDACTED] that the minimum requirement for entry into the proffered position is a "university level" degree. 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). The record of proceeding, as currently constituted, does not establish that the petitioner requires a bachelor's or higher degree in a specific specialty, or its equivalent.

Moreover, we incorporate by reference and reiterate our earlier discussion that the LCA indicates that the position is a low-level, entry position relative to others within the occupation. Based upon the Level I wage rate, the beneficiary is only required to have a basic understanding of the occupation. Further, the wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment; his work will be closely supervised and monitored; he will receive specific instructions on required tasks and expected results; and his work will be reviewed for accuracy.

Without further evidence, it is 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 III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."⁶ The evidence of record does not establish that this position is significantly different from other positions such that it refutes the *Handbook's* information that a bachelor's degree in a specific specialty is not required for the proffered position.

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, and attainment of a bachelor's or higher

⁵ We note that, in response to the RFE, the petitioner for the first time submits an evaluation of the beneficiary's foreign academic credentials, equating his education to a U.S. bachelor's degree in food science. It appears that the petitioner's amendment to its claimed educational requirements was to correspond to the beneficiary's academic qualifications. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See 8 C.F.R. § 103.2(b)(1); *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

⁶ For additional information regarding wage levels as defined by DOL, 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.

degree in the specific specialty (or its equivalent). The petitioner and counsel do not sufficiently explain or clarify which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Upon review of the record of proceeding, the petitioner has failed to establish the proffered position as satisfying this 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, we usually review the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position. In addition, the petitioner may submit any other documentation it considers relevant to this criterion of the regulations.

To merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. Upon review of the record of proceeding, the petitioner has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

While a petitioner may assert that a proffered position requires a specific degree, that statement 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").

In response to the RFE, counsel stated that the petitioner previously employed one food service manager. Counsel provides a copy of the resume for [REDACTED] whom counsel claims previously performed the duties of the proffered position, and claims that her employment in this position establishes the hiring history contemplated by this criterion.

Ms. [REDACTED] resume claims that she holds a bachelor's degree in "Communication Art" from [REDACTED] Thailand. While the record does not contain an evaluation of her foreign academic credentials, it appears that her degree in the field of "Communication Art" is not related to the performance of duties associated with the position of a food services manager. Further, the petitioner did not submit probative evidence to establish the above-mentioned individual's current or past employment with the petitioner (e.g., pay statements, Form W-2 Wage

and Tax Statements). It is further noted that the petitioner did not submit documentary evidence of Ms. [REDACTED] claimed degree.

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

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

The petitioner provided information regarding the proffered position and its business operations, including the documentation previously outlined. While the evidence provides some insights into the petitioner's business activities, the documents do not establish that the nature of the specific duties of the proffered position is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. Moreover, the petitioner itself does not require a bachelor's or higher degree *in a specific specialty*, or its equivalent.

In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. We reiterate our earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category of "Food Service Managers," and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, the petitioner has not demonstrated that the 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 III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. As previously mentioned, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. We conclude, therefore, 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.

IV. BENEFICIARY'S QUALIFICATIONS

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

V. CONCLUSION AND ORDER

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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