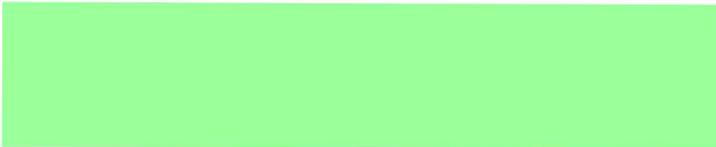
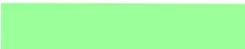




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: DEC 01 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:

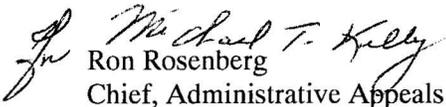


INSTRUCTIONS:

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 August 26, 2013. In the Form I-129 visa petition and supporting documents, the petitioner describes itself as a restaurant/catering business that was established in [REDACTED]. In order to employ the beneficiary in a position it designates as "Manager, Restaurant & Catering," 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 February 3, 2014, 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. The appeal will be dismissed, and the petition will be denied.

The petitioner should also be aware that there is an aspect of this petition which the director did not address but which nonetheless also precludes approval of this petition. That aspect is the fact that, for the corresponding and supporting Labor Condition Application (LCA) required by regulation for H-1B specialty occupation petitions, the petitioner submitted an LCA that had been certified for use with a different and lower-paying occupational group than the one to which the petition asserts the proffered position belongs. That is, while the petitioner claims that the proffered position belongs to the Food Managers occupational group, the LCA submitted into the record had been certified for a position within a different occupational group, with a lower prevailing-wage scale, namely, First Line Supervisors of Food and Preparation and Serving Workers. This aspect of the record of proceeding not only precludes approval of the petition because the LCA does not correspond to the type of position asserted in the petition, but also the difference between the type of position asserted in the petition and type for which the LCA was certified undermines the credibility of the petition, and so, too, its merits. We shall discuss these negative impacts of the LCA later in the decision.

I. SPECIALTY OCCUPATION: LEGAL FRAMEWORK

A. Statutory and Regulatory Requirements for H-1B Specialty Occupation

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

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

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

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

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

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

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

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

B. Standard of Review

In light of counsel's references to the requirement that USCIS apply the "preponderance of the evidence" standard, we affirm that, in the exercise of its appellate review in this matter, as in all

matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states the following:

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

* * *

The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.

* * *

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

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

Id.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved.

Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determinations in this matter were correct. Upon our review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that the petitioner has not established that its claims are "more likely than not" or "probably" true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads us to believe that the petitioner's claims are "more likely than not" or "probably" true.

In this regard, we note that satisfying the preponderance of the evidence standard is not just a function of the volume of evidence submitted by a petitioner. Rather, the quality of the evidence must also be weighed, that is, not just for its authenticity, but also for its credibility, relevance, and probative value.

II. EVIDENTIARY OVERVIEW

In this matter, the petitioner states in the Form I-129 that it seeks the beneficiary's services as a full-time restaurant and catering manager at a rate of pay of \$37,500 per year. In a letter dated August 16, 2013, the petitioner described the duties of the proffered position as follows:

As a Manager, Restaurant/Catering, [the beneficiary] will continue to be overall responsible for the profitable and smooth running of our restaurant/catering business. He will continue to be involved and responsible for all aspects of Customer Satisfaction, Human Resource Management, Retail and Financial Management. Specifically, some of the duties of our Manager, Restaurant & Catering are as follows:

1. Coordinate food service activities of the restaurant as well as at social functions;
2. Estimate food and beverage costs, requisition supplies;
3. Confer with food preparation and other personnel to plan menus & related activities, such as dining room, bar, catering, conventions and festivals;
4. Direct hiring, training and supervise personnel;
5. Investigate and resolve food quality and service complaints;
6. Review financial transactions and monitor budget to ensure efficient operation and to ensure expenditures stay within budget limitations;
7. Responsible for restaurant security, personnel and equipment safety inspections;
8. Responsible for overseeing catering operations.

In further support of the petition, the petitioner submitted a (1) copy of the beneficiary's foreign academic credentials as well as an evaluation of those credentials; and (2) copies of the beneficiary's recent paystubs.

As we noted earlier, for the corresponding LCA that the regulations require in support of all H-1B specialty-occupation petitions, the petitioner submitted an LCA that had been certified for a

position within the occupational category "First-Line Supervisors of Food Preparation and Serving Workers" – SOC (ONET/OES Code) 35-1012, at a Level II wage. For future reference in this decision we note that - as evident not only in the governing USCIS regulations, the governing Department of Labor (DOL) regulations the LCA-form instructions, and the attestations that the petitioner makes by signing and submitting the certified LCA - by submitting the LCA certified for the respective SOC/OES Code and occupational group 35-1012 - First-Line Supervisors of Food and Preparation Workers – the petitioner attested that this occupational group (not the Food Service Managers group) is not only the appropriate reference for the prevailing-wage levels to be applied to the proffered position but also as the occupational group by which the educational requirements of the proffered position should be assessed.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on January 3, 2014. The director outlined the evidence to be submitted, and specifically requested evidence establishing that the proffered position was a specialty occupation, including evidence pertaining to other employees that previously held the proffered position.

Counsel responded to the RFE by submitting additional evidence in support of the H-1B petition. Included was a letter from the petitioner, dated January 14, 2014, which provided additional details regarding the petitioner's business and the beneficiary's role therein. Specifically, the petitioner contended that it provides catering services on a "large scale," noting that it "cater[s] functions and events at various prestigious hotels and clubs (such as the [REDACTED] where the standards of operation are extremely high."

The petitioner's RFE-response repeated the same list of duties previously provided in the initial letter of support, and claimed that the position required at least a bachelor's degree since the petitioner provides higher-end catering services. The petitioner claimed that it has been its standard practice and policy to hire managers who possess a bachelor's degree in restaurant management or its equivalent. In support of this contention, the petitioner provided a list of five persons which it claims currently hold the position of restaurant/catering manager, as well as the names of two former employees who held the proffered position.

The petitioner also submitted additional documentary evidence in support of the petition, including (1) a list of all of its catering assignments; (2) sample contracts for such catering assignments; (3) letters from hotels/restaurants regarding their hiring standards for restaurant/catering managers;¹ (4) information pertaining to other persons the petitioner employed in the proffered position, including their W-2 forms and academic credentials evaluations; and (5) copies of job vacancy announcements for positions the petitioner claims are parallel to the proffered position in this matter.

¹ Specifically, the petitioner submitted three letters from hotels, two of which have had contractual agreements with the petitioner, stating that all managerial or supervisory personnel that they hire or that conduct business on their premises are required to have a bachelor's degree or higher. The petitioner also submitted a letter from [REDACTED] a New Jersey-based restaurant, which states that its managerial personnel are required to have a bachelor's degree.

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 additional documentation.

III. ANALYSIS

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.

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.² We find that the duties of the proffered position, as described by the petitioner, comport with the general duties that the *Handbook* reports for the Food Service Managers occupational category.

We reviewed the chapter of the *Handbook* entitled "Food Service Managers," including the sections regarding the typical duties and requirements for this occupational category. Specifically, the *Handbook* states the following, in relevant part, about food service managers:

Food service managers typically do the following:

- Interview, hire, train, oversee, and sometimes fire employees
- Manage the inventory and order food and beverages, equipment, and supplies
- Oversee food preparation, portion sizes, and the overall presentation of food
- Inspect supplies, equipment, and work areas
- Ensure employees comply with health and food safety standards and regulations
- Investigate and resolve complaints regarding food quality or service
- Schedule staff hours and assign duties
- Maintain budgets and payroll records and review financial transactions
- Establish standards for personnel performance and customer service

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-2> (last visited November 25, 2014).

² 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/>.

The *Handbook*, however, 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 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 November 25, 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." The *Handbook* also reports that "some receive training at a community college, technical or vocational school, culinary school, or at a 4-year college." Accordingly, the *Handbook's* information about food service managers does not support the proffered position as being one for which the minimum requirement for entry is a bachelor's or higher degree, or the equivalent, in a specific specialty.

Next, we also find that the *Handbook's* information for the occupational group identified in the LCA submitted by the petitioner also does not support a favorable finding for the petitioner under this first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The *Handbook's* brief discussion of this occupational group, in its section "Data for Occupations Not Covered in Detail," includes the following information. It conveys that a position's inclusion within the First-Line Supervisors of Food Preparation and Serving Workers occupational group is not indicative of the position being one for which the normal requirement for entry is at least a bachelor's degree, or the equivalent, in a specific specialty.

Food Preparation and Serving Occupations

First-Line Supervisors of Food Preparation and Serving Workers

(O*NET 35-1012.00)

Directly supervise and coordinate activities of workers who prepare and serve food.

- 2012 employment: **848,500**
- May 2012 median annual wage: **\$29,270**
- Projected employment change, 2012-22:
 - Number of new jobs: **109,400**
 - Growth rate: **13 percent (about as fast as average)**
- Education and training:
 - Typical entry-level education: **High school diploma or equivalent**
 - Work experience in a related occupation: **Less than 5 years**
 - Typical on-the-job-training: **None**

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Food Preparation and Serving Occupations, on the Internet at <http://www.bls.gov/ooh/about/data-for-occupations-not-covered-in-detail> (last visited November 25, 2014).

Thus, we conclude that the petitioner has not established that the proffered position falls within 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 has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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* reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent.

In response to the RFE, counsel submitted copies of four letters: three appear to be from hotel/hospitality facilities that had agreements whereby the petitioner would be allowed to operate as a caterer on their premises, and (b) one is written by a general manager of a restaurant that had been in business for four years. As such, we first find that the letters carry little or no weight (1) because they do not establish themselves as authored by persons within the petitioner's industry, and, additionally, (2) because they do not even purport to address common recruiting and hiring practices in the catering industry for whatever position is the subject of this petition. In addition, the year-2009 dates of the letters materially discount the letters' worth, as those dates suggest that the letters' content may not accurately represent pertinent facts current at the time this extension petition was filed, that is, years later in 2013.

In addition, the letters' content has no probative weight.

The first letter is from [REDACTED] Director of Sales and Marketing for the [REDACTED]. Mr. [REDACTED] outlines the [REDACTED] requirements for vendors doing business on its property, and states that "Supervisory, management and key leadership positions require a Bachelors degree or higher level of formal education as an indication of scholastic achievement and capacity for increased learning and application of skills in an 'on brand' environment where everything communicates."

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 supervisory, management, or key leadership position within the hospitality industry

would be a bachelor's degree. He does not specify a field in which such degree should be held, nor does he not relate his conclusion to specific, concrete aspects of this petitioner's business operations. Instead, Mr. [REDACTED] provides a general, conclusory statement establishing that the [REDACTED] imposes hiring standards on its outside vendors, and generally requires all managerial or supervisory personnel working onsite at its location to hold a bachelor's degree.

Aside from the fact that Mr. [REDACTED] does not purport to speak for the petitioner's industry (catering), he does not even state that a degree in *a specific specialty* is required for caterers to be authorized to do business on his employer's premises, let alone for persons hired in the catering industry to perform the specific type of job that is the subject of this petition. We find, therefore, that this letter is not persuasive evidence that a requirement for at least a bachelor's degree, or the equivalent, in a specific specialty is common among the petitioner's industry for positions parallel to the one proffered here.

The second letter submitted for consideration is from [REDACTED] of the [REDACTED]. Mr. [REDACTED] simply states: "At [REDACTED], it has been our practice to hire those individuals with a bachelor's degree coupled with related work experience for the position as manager in our different departments." This letter is likewise not persuasive evidence that a degree requirement is common among the petitioner's industry, since this letter (1) does not state that a degree in a specific specialty is required, and (2) applies this general statement to all managerial positions within its operation, and not exclusively to that of a restaurant and catering (or food service) manager as is proffered here.

Also, the petitioner submits a letter from [REDACTED], General Manager of the [REDACTED]. Mr. [REDACTED] states: "Individuals with a Bachelor's Degree coupled with related work experience will be ideal for managerial positions throughout our departments." Like the letter from Mr. [REDACTED] this letter addresses the author's employer's standards for its departments, and even then does not state that a degree in a specific specialty is required. Instead, like the letter from Mr. [REDACTED] Mr. [REDACTED] generally concludes that all managerial positions within the [REDACTED] require a bachelor's degree.

Lastly, there is the letter from the general manager of [REDACTED] which states nothing about general recruiting and hiring practices in the catering industry, let alone about the particular type of position here proffered. The general manager merely speaks to its restaurant's hiring practice for its restaurant-manager position, i.e., a requirement for a bachelor's degree (with no requirement for a particular academic concentration or major) and "related work experience."

In summary, for the reasons discussed above, we conclude that the letters discussed above are not probative evidence for establishing the proffered position as a specialty occupation. As discussed above, the letters provide no indication that the writers possess any knowledge of the petitioner's proffered position. Instead, the writers generally conclude that the duties of managers in the hospitality industry, and in a particular restaurant, typically require at least a bachelor's degree. The letters do not, however, provide any information regarding the nature of their businesses such that they could be deemed similar to that of the petitioner, nor do they provide any information

regarding the nature of the managerial and supervisory positions they discuss, such that they could be deemed parallel to the proffered position here. Further, none of them specify a degree in a specific specialty for any position discussed. We find, therefore, that these letters are not probative evidence towards satisfying this first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner also submitted five 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 describes itself as a restaurant with fifteen employees that was established in 2005. In the Form I-129 and on the LCA, the petitioner selected North American Industry Classification System (NAICS) Code 722320 for its industry, which corresponds to "Caterers." According to the definition, the petitioner's industry is defined as follows:

This industry comprises establishments primarily engaged in providing single event-based food services. These establishments generally have equipment and vehicles to transport meals and snacks to events and/or prepare food at an off-premise site. Banquet halls with catering staff are included in this industry. Examples of events catered by establishments in this industry are graduation parties, wedding receptions, business or retirement luncheons, and trade shows.

See www.census.gov/cgi-bin/sssd/naics/naicsrch (last accessed November 25, 2014).

For the petitioner to establish that an organization is similar, it must demonstrate that it shares the same general characteristics with the advertising organization, which has been classified as a caterer. 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.

Specifically, the petitioner submitted the following job-postings:

1. Restaurant Manager at [REDACTED]
2. Restaurant Manager (Buffet Style) at [REDACTED]
3. Restaurant manager at [REDACTED]

4. Restaurant Manager at [REDACTED] and
5. Restaurant Manager at [REDACTED]

Preliminarily, we note that all five of these postings are for restaurant managers within restaurants. As noted above, the petitioner claims to be a catering company, which, according to the NAICS definition cited above, means that it is "engaged in providing single event-based food services." All five of the postings are for managerial positions onsite at the advertiser's restaurant or chains of restaurants, and require duties such as front and back of house management. In addition, the position advertised by [REDACTED] combines the position of restaurant manager with the position of head chef. Although we note that the hospitality industry in general provides a variety of food services, the petitioner's catering business is distinctly differentiated from restaurants that provide meals and services onsite to customers. To the limited extent that the advertised and the proffered positions are described, there is an insufficient factual basis to conclude that the advertised positions are parallel to the one proffered here, or, for that matter, that the advertised positions are within organizations that are both in the petitioner's industry and similar to the petitioner, as would be required to establish relevance under this particular criterion.

We note in addition that counsel resubmits these job vacancy announcements on appeal for reconsideration, along with several new job postings for the position of restaurant manager. Again, all of the new postings advertise position within restaurants. As discussed above, these postings are not persuasive, since they are for stand-alone restaurants and not for catering companies like the petitioner.

Additionally, contrary to the purpose for which the advertisements were submitted, none of the postings submitted prior to adjudication and again on appeal 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 managerial positions advertised, there is no indication that a bachelor's degree in a specific specialty is required for entry into these positions. Specifically, all of the postings require simply a bachelor's degree, without mandating that the degree be in a specific specialty.

The job advertisements do not establish that similar organizations to the petitioner (i.e., catering companies) routinely employ only 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, we conclude that 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.

The petitioner claims that it requires a person with a bachelor's degree in restaurant management to perform the duties of the proffered position. However, the petitioner provides 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)).

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. In this regard, we find that the petitioner describes the proffered position and its constituent duties in terms of generalized functions that do not distinguish the proffered position from the general spectrum of positions within the claimed Food Service Managers occupational group – a group which the *Handbook* indicates is generally composed of positions which do not require persons with at least a bachelor's degree or higher, or the equivalent, in a specific specialty. The evidence of record does not provide any credible and objective factual basis for us to find the relative complexity or uniqueness required to satisfy this particular criterion.

Aside from and in addition to the lack of evidence to satisfy this criterion, we note that the petitioner has designated the proffered position as a Level II position on the submitted LCA, indicating that it is a "qualified" position for an employee who has obtained a good understanding of the field but who will only perform moderately complex tasks. See Employment and Training Administration (ETA), *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009). In the particularly lean factual context of this record of proceeding - which we find lacks affirmative evidence of the requisite level of complexity or uniqueness - this LCA prevailing-wage factor also weighs against the position being sufficiently complex or unique to satisfy this criterion.

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 satisfy this particular criterion, the evidence of record must first establish the requisite history of the petitioner's recruiting and hiring for the proffered position only persons who had attained the degree requirement claimed by the petitioner. We see, however, that the petitioner has variously stated its educational requirement. For instance, the petitioner's January 14, 2014 letter of reply to the RFE (at page 2) states that "it has been [the petitioner's] standard and policy to hire managers who possess a Bachelor's Degree in Restaurant Management or its equivalent." However, on appeal, counsel's brief (at page 4) contends advertisements submitted on appeal that specify Hotel/Restaurant Management, Culinary Arts, or Business Administration degree-requirements are stating requirements "similar to the petitioning employer's requirement." Additionally, in contrast

to the above-quoted January 14, 2014 statement that the petitioner's "standard and policy [is] to hire managers who possess a Bachelor's Degree in Restaurant Management or its equivalent," the petitioner's one-page letter submitted in support of the appeal states a broader range of acceptable degrees, by stating that "it has been our standard practice and policy to hire managers who possess a Bachelor's Degree in Restaurant/Hotel Management or in a related field or its equivalent." Consequently, we find that these documents alone undermine any basis for a reasonable finding that the petitioner even conceived educational requirements that are consistent with the H-1B specialty-occupation requirement, namely, a requirement for at least a bachelor's degree, or the equivalent, in either a specific specialty or group of specific specialties closely related to the proffered position.

Next, we find that the petitioner has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

In response to the RFE, the petitioner stated that it currently employs five individuals in the position of Manager, Restaurant and Catering, and that it previously employed two individuals in the position. With regard to its current employees, the petitioner provides copies of their W-2 Forms (Wage and Tax Statements) for 2013, as well as copies of their foreign academic credentials evaluations. Regarding the prior employees, the petitioner again provides copies of their foreign academic credentials evaluations as well as a copy of one of the individual's W-2 forms for 2013.

While we note the submission of evidence establishing the employment of these persons with the petitioner in 2013, there is no independent evidence, such as employment contracts or offer of employment letters, to corroborate the petitioner's claim that all five of these employees work in the position of "Manager, Restaurant and Catering." There is no organizational chart demonstrating the hierarchy of the petitioner's business or the places of these employees within that hierarchy. This omission is critical, since it raises questions regarding the nature of the petitioner's catering business. Specifically, the petitioner claims to be a catering company that specializes in the provision of single-event, on-site food services for upscale hotels. However, if the petitioner's claims are valid, it would suggest that at least one-third of its staff (5 out of the claimed 15 employees) is managerial in nature. If the beneficiary is added to this calculation, that would leave only nine employees to provide the remaining essential services of the catering business such as food preparation, chef/cook duties, and wait service.

Additionally, as noted by the director, one of the claimed managers is in fact the petitioner's president. Although counsel for the petitioner on appeal contends that the president is a "hands-on" owner and thus operates simultaneously as a manager, it is unclear why the petitioner would require the services of the president, four other managers, and the beneficiary in the same position, particularly when they would oversee a very small food service staff. It is further noted that the annual salaries of these claimed managers vary significantly, with salaries ranging from \$36,634 to \$52,000.

The next materially adverse aspect of the record that undermines the petitioner's claim to an employment history that satisfies this criterion is the fact that the evidence of record does not

establish that the petitioner's claimed employment history was generated by the actual performance requirements of the proffered position itself. While the petitioner and counsel may claim this to be the case, the record of proceeding lacks documentary to support the claim. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190. 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).

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").

Next, there is the materially significant discrepancy between the claimed nature of the proffered position – that is as one within the Food Service Managers occupational group - and the fact that the beneficiary's pay and the content of the LCA submitted into the record reflects that the beneficiary is to be paid not as a Level II - Food Service Manager (which the Department of Labor's Online Wage Library reports as \$57,574 per year for the pertinent period and location) but at the significantly lower salary of only \$37,086, which is the annual salary of only a Level II - First-Line Supervisor of Food Preparation and Serving Workers for the pertinent time and place. This aspect fatally undermines the petitioner's claim that the beneficiary's position should even be assessed by us as a Food Service Managers 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. at 591-92.

Moreover, although the petitioner submits documentation, in the form of third-party evaluations, suggesting that these individuals possess the equivalent of U.S. bachelor's degrees in various food service areas such as restaurant management or hospitality. The petitioner submits similar evaluations for both its claimed current and prior employees. However, the petitioner did not submit documentary evidence of their claimed foreign degrees, such as copies of diplomas or transcripts. 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. at 165. 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. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506 (BIA 1980).

Regardless of whether these individuals truly possess these claimed academic credentials, the record as currently constituted does not establish that these individuals are actually employed in the same position proffered to the beneficiary. Similarly, the evidence submitted regarding the prior employees of the petitioner, whom it claims also occupied the proffered position, is insufficient to establish that these employees in fact held the position of Manager, Restaurant and Catering. Again, 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. at 165.

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.

In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. We find, in particular, that the duties of the proffered position have not been developed with sufficient substantive detail and explanation to establish their nature as so specialized and complex to require knowledge usually associated with attainment of at least bachelor's degree in a specific specialty. Rather, the duties of the proffered position are presented in relatively abstract terms of generalized functions common to the Food Service Managers occupational group as addressed in the *Handbook*, and the *Handbook's* information does not state, reflect, or suggest that such duties require knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty.

Aside from and in addition to the decisive aspects of the record discussed above, we reiterate our earlier comments and findings with regard to the implications of the petitioner's designation of the proffered position in the LCA as that of only a Level II – First-Line Supervisor of Food Preparation and Serving Workers. Those implications (1) undermine the relevance of the petitioner's assertion

that the proffered position should be regarded and assessed as if it belonged to the Food Service Managers occupational group, and (2) also, by the relatively low prevailing-wage designation of Level II, undermine the credibility of claiming that the duties of the proffered position have the requisite specialization and complexity to satisfy this particular criterion. Again, a Level II occupation represents a position for an employee who has a good understanding of the occupation but who will only perform moderately complex tasks that require limited judgment. See Employment and Training Administration (ETA), *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009).

The petitioner has submitted insufficient 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 them 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. BEYOND THE DIRECTOR'S DECISION

Beyond the decision of the director, it appears that approval of the petition is also precluded by the fact that the petitioner did not submit an LCA certified for the type of position for which the petition was filed. Thus, the petitioner failed to meet a condition-precedent for the approval of any H-1B specialty-occupation petition, namely, that the petition be filed with an LCA that (1) corresponds with the petition filed with USCIS and (2) was certified before the petition's filing.

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) in pertinent part as follows:

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions . . . and such instructions are incorporated into the regulations requiring its submission.

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from the U.S. Department of Labor (DOL) in the occupational

specialty in which the H-1B worker will be employed. See 8 C.F.R. §§ 214.2(h)(4)(i)(B) and 214.2(h)(4)(iii)(B)(I). The instructions that accompany the Form I-129 also specify that an H-1B petition must be filed with evidence that an LCA has been certified by DOL.

Moreover, 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 the content of an LCA filed for a particular Form I-129 actually supports that petition. See 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

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

The regulation at 20 C.F.R. § 655.705(b) therefore requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary.

In the instant matter, the petitioner filed the Form I-129 with USCIS on August 26, 2013. The LCA provided at the time of filing was certified (1) for a First-Line Supervisor of Food Preparation and Serving Workers, (2) pursuant to SOC (ONET/OES) Code 35-1012, (3) within the [REDACTED] New Jersey metropolitan statistical area (MSA), and (4) at a prevailing wage of \$37,086 per year. However, as we have discussed, throughout the petition the petitioner characterizes the proffered position as one within the Food Service Managers occupational group, which is separate and distinct group from, and which commands higher prevailing-wage levels than, the one specified in the LCA. Further, since the petitioner specifically contends that the beneficiary will be responsible for the management of all aspects of the petitioner's catering business, and not simply the supervision of the food preparers and servers, the petitioner has clearly elevated the proffered position above the scope of a first-line supervisor's duties and responsibilities. By that fact alone, the submitted LCA does not correspond to the petition.

Also, to correspond to the petitioner's claims throughout the petition, the petitioner should have filed an LCA that had been certified for use with (1) for a position within the Food Service Managers occupational group, SOC (ONET/OES) Code 11-9051, and (2) within the [REDACTED] New Jersey metropolitan statistical area (MSA) for the period in question. Use of the Search Wizard at DOL's Federal Labor Certification Data Center's Online Wage Library Internet site (accessible at <http://www.flcdatcenter.com/>) reveals that the pertinent Food Service Managers Level I prevailing-wage was \$49,296, and that the Level II was \$57,574. Both levels are significantly higher than the levels for positions within the First-Line Supervisor of Food Preparation and Serving Workers occupational group, the group specified in the certified LCA submitted by the petitioner.

Thus, the petitioner has failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B) and 214.2(h)(i)(2)(B) by providing a certified LCA that corresponds to the instant petition. For this additional reason, the petition may not be approved.

VI. CONCLUSION

The petitioner noted that USCIS approved a prior petition on behalf of the beneficiary. The director's decision does not indicate whether she reviewed the prior approvals of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petition on behalf of the beneficiary, we would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

In addition, an application or petition that fails to comply with the technical requirements of the law may be denied by us even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that we conduct appellate review on a *de novo* basis).

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of our enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, 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.