



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **APR 14 2015** OFFICE: VERMONT SERVICE CENTER FILE: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

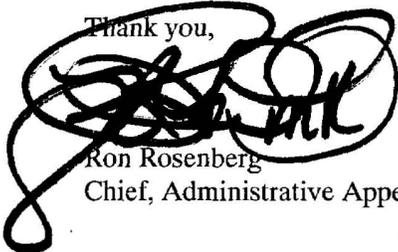
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:
[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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 October 4, 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 extend the employment of 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, concluding that the petitioner had not established 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 even exceeds the responsibilities and requirements of 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

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 specialty occupation claim is "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.

C. Evidentiary Overview

The petitioner states in the Form I-129 that it seeks the beneficiary's services in a position to which it has assigned the job title "Manager, Restaurant and Catering." In a letter dated September 20, 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. She 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. Supervise & coordinate pricing & preparation of menus including specialties;
2. Estimate food and beverage costs;
3. Maintain cash & inventory control, as well as ordering and receiving supplies;
4. Review financial transactions and monitor budget to ensure efficient operation and to ensure expenditures stay within budget limitations;
5. Implement proper guest service procedures, sanitary food & equipment handling;
6. Investigate and resolve food quality and service complaints;
7. Direct hiring, training and supervise personnel;
8. Responsible for restaurant security, personnel and equipment safety inspections;
9. Responsible for marketing and generating new business; and
10. 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 is the occupational group by which the educational requirements of the proffered position should be assessed.

Finding the initial evidence insufficient to establish eligibility for the benefit sought, the director issued an RFE. There 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 April 17, 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." (Although for efficiency's sake we are not summarizing all of the petitioner's descriptive statements about the scope of its business and the proposed duties, we have considered all of them as well as the totality of the evidence submitted in favor of the petition.)

The petitioner's response to the RFE 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/hospitality management or a related field. In support of this contention, the petitioner provided a list of four persons which it claims currently hold the position of restaurant/catering manager, as well as the names of three former employees who held the proffered position.

The petitioner also submitted additional documentary evidence in support of the petition, including (1) an expert opinion letter by Professor [REDACTED] (2) a list of all of its catering assignments; (3) sample contracts for such catering assignments; (4) letters from hotels/restaurants regarding their hiring standards for restaurant/catering managers;¹ (5) information pertaining to other persons the petitioner employed in the proffered position, including their W-2 forms and academic credentials evaluations; (6) copies of job vacancy announcements for positions the petitioner claims are parallel to the proffered position in this matter; and (7) a copy of its Form 1065, U.S. Return of Partnership Income, for 2012.

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 May 22, 2014. Thereafter, newly-retained counsel for the petitioner submitted an appeal of the denial of the H-1B petition accompanied by a brief and additional documentation.

D. 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 April 7, 2015).

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 April 8, 2015).

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.

The *Handbook* notes an increasing preference for "some postsecondary education," but not for a bachelor's or higher degree in a specific specialty (and, we note, a preference is not a requirement.) Further, 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 that was 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 April 8, 2015).

In response to the RFE, former counsel for the petitioner submitted an expert opinion letter from Professor [REDACTED] Professor [REDACTED] indicates that he is the Associate Dean for Faculty Development, a Professor of Management, and [REDACTED] Professor of Human Resources at [REDACTED]

Professor [REDACTED] provides an analysis of the requirements of the proffered position, and concludes that the proffered position of Manager, Restaurant and Catering "cannot properly be performed without bachelor's-level training in hospitality management, restaurant management, or a related field."

We have considered the entire content of both Professor [REDACTED] letter and the attached resume. For the reasons now to be discussed, we find that the documents have no probative weight towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

At the outset, we note find that the content of the professor's submissions do not substantiate Professor [REDACTED] self-endorsement as an expert in the area upon which he here opines. The professor has styled his letter as an "Expert Opinion Letter"; and, in the letter's second and third paragraphs, he asserts several reasons why his opinion should be given deference as that of an expert in the area upon which he is opining. We shall address those assertions in the order in which they appear in the letter. As will be evident, we are not persuaded by the professor's claim.

In support of his claim to expert status, Professor [REDACTED] states that he is "providing this opinion letter based upon [his] experience as [(1)] a professor and [(2)] evaluator of professional and educational credentials at [REDACTED]" However, we find that the professor has not provided a substantive explanation of the extent, if any, to which either (a) his professorial experience or (b) his evaluations of professional and educational credentials for [REDACTED] involved study, research, and analysis of the educational requirements of the specific type of position that is the subject of this petition.

Additionally, in the second paragraph at page 2 of the "Expert Opinion Letter," Professor [REDACTED] also endorses himself as a person who, "[o]ver the course of [his] professional and academic experiences" has "had ample opportunity to observe standard industry hiring practices as they pertain to a variety of positions in the areas of hospitality and restaurant management." Professor [REDACTED] provides no factual details to substantiate his claim to such "ample opportunity," so as to merit deference from us with regard to his opinion about the minimum requirements for the particular position here in question. Also, while the professor asserts "ample opportunity to observe standard industry hiring practices as they pertain to a variety of positions in the area of hospitality and restaurant management," he does not describe any experience with the particular type of position before us - either as a professor, as an academic evaluator at his educational institution, or as otherwise engaged in "professional experiences."

We also see that Professor [REDACTED] recommends himself on the basis of his "experience in guiding graduating students into multi-varient industry positions" - but he provides no details as to how, if at all, that experience provided him with any particularly insightful knowledge regarding the educational requirements of the particular position upon which he is opining.

The professor next endorses his opinion as expert on the basis that he has "conducted extensive research into human resource issues and selection theories in the particular theater of hospitality and food/beverage management." While we do not doubt that the professor has conducted the type of

research he claims, his letter neither identifies, nor explains the relevance of, any such studies to his analysis of the educational requirements of the particular position upon which offers his opinion.

The final basis that Professor [REDACTED] offers as reason for regarding his opinion as expert is what he describes as intimate familiarity with "the nature and depth of knowledge and skill, both theoretical and practical, gained by University students who study in the fields of hospitality management and restaurant management, and how that knowledge and skill is recruited and applied by employers in a variety of industries." We find that this broadly stated claim also does not identify or establish any particularly insightful basis of knowledge about the recruiting and hiring practices of employers similar to the petitioner, in the petitioner's industry, for a position that matches the substantive duties and related performance requirements of the particular position here proffered.

In sum, we find that Professor [REDACTED] has not established himself as a person who has a foundation of such particularized knowledge about the minimal educational requirements for the position in question that his opinion in that area should merit special weight, regard, or deference.

That being said, we also find that the content of Professor [REDACTED] submission does not have probative value.

Professor [REDACTED] does not reference or discuss any studies, surveys, industry publications, other authoritative publications, or any other sources of empirical information which he may have consulted in the course of whatever evaluative process he may have followed.

In addition, we note that Professor [REDACTED] submission is not accompanied by a copy of whatever documents about the petitioner and the proffered position he consulted in reaching his findings. On the basis of the following statement in his submission, we know that the professor materially relied upon some such documentation:

I have reviewed an outline of the job duties required for the subject position of "Manager, Restaurant and Catering" with [the petitioner], a subsidiary of [REDACTED] as well as the circumstances surrounding the position's staffing. . . .

As the professor neither identified the "outline" nor provided a copy of it, he has not established that it is anywhere in the record of proceeding. Thus, the record of proceeding does not establish either the extent of the information provided to the professor or that it is the same as that provided to us in the record of proceeding. We find that this aspect in itself fatally undermines the evidentiary value of the professor's submission. It deprives us from evaluating the accuracy of the "outline" in comparison to the information that the petitioner presented in the record, and, consequently, it undermines both the relevance and reliability of the proffered submission as an evaluation of the proffered position as it was presented in the record. We also reach the same conclusion, for the same reasons, with regard to the professor's failure to provide a copy of whatever is the "detailed position support letter" to which the last paragraph of his letter refers as the basis of his opinion.

In addition, we find that, from its introductory identification of its subject as "Position: Manager, Restaurant and Catering" and throughout its narrative, the professor's submission makes no distinction

between the title that the petitioner assigned to the position (i.e., Manager, Restaurant and Catering) and the actual occupation that the petitioner identified in the LCA (i.e., First-Line Supervisors of Food Preparation and Serving Workers). That LCA was certified *not* for use with a job with position in the Food Services Managers occupational group, or in any managerial or executive occupational group, but rather for use with a position within a lower-echelon, and lower-paying, occupation, that being First-Line Supervisors of Food Preparation and Serving Workers, which, as evidenced in the O*NET excerpt above, is an occupation for which O*NET reports a "[h]igh school diploma or equivalent" as the typical entry-level education. We find that the professor's failure to address the LCA information reflects incomplete information with regard to the particular position upon which he opines, and so also an inadequate factual basis for his opinion.

We note but accord no probative weight to the professor's statement that requiring a bachelor's degree in a particular specialty shows that the petitioner "pursues sound and appropriate business practice." As so phrased, this assertion does not directly relate to any statutory or regulatory definition of specialty occupation and it does not address any supplemental criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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).

For all of these reasons, we find that the letter submitted for consideration as an expert opinion is not probative evidence towards satisfying any criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). For economy's sake, we hereby incorporate the above discussion and findings into our analysis of each of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 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 restaurant/catering industry for whatever position is the subject of this petition. In addition, the fact that all four letters were drafted in May of 2009 materially discounts 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] [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, 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] Mr. [REDACTED] simply states: [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."

On appeal, counsel for the petitioner submits three new letters. The first is from [REDACTED] New Jersey. Mr. [REDACTED] states simply that its current manager has a bachelor's degree, and that "in the past we have only hired a manager with a bachelor's degree with related work experience."

The next letter is from [REDACTED] founder of [REDACTED] in New York. Mr. [REDACTED] states that its restaurant only hires individuals with bachelor's degrees, and lists a variety of fields it finds acceptable for these degrees, including business administration in finance, business administration in marketing, and culinary arts. He concludes by stating that all current managers have a bachelor's degree. The last letter is from [REDACTED] New Jersey, who provides a statement that is virtually identical to that of Mr. [REDACTED]

For reasons similar to those articulated above, we find these newly-submitted letters 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 petitioner's industry for whatever position is the subject of this petition.

Upon review, we find that these newly-submitted letters, similar to the letters submitted in response to the RFE, 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 particular restaurants, typically require at least a bachelor's degree. None of the letters 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. The mere submission of a copy of their website or menu is not sufficient. 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 fourteen 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/catering business with nine employees that was established in [REDACTED]. In the Form I-129 and in the LCA, the petitioner selected North American Industry Classification System (NAICS) Code 722110 for its industry, which corresponds to "Full Service Restaurants." According to the definition, the petitioner's industry is defined as follows:

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

See www.census.gov/cgi-bin/sssd/naics/naicsrch.

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 full-service restaurant. 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.

Preliminarily, we note that counsel takes issue on appeal with the director's comment equating the petitioner to an "independent Indian restaurant." While we note that the record demonstrates that

the petitioner is simultaneously engaged in catering services, we refer back to the above section, where the petitioner has chosen to classify its business operation as a full-service restaurant. Therefore, we find the director's comment to this extent was harmless. In any event, as part of our *de novo* review pursuant to the appeal, we have independently reviewed all of the evidence of record, including all of the submitted letters and job advertisements, and, based upon that review, we find that neither the letters nor the advertisements are probative evidence for satisfying this first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner submitted the following job postings:

1. Manager/Supervisor of Staff at [REDACTED]
2. Restaurant Manager at the [REDACTED]
3. Restaurant Manager at [REDACTED]
4. Restaurant Manager at [REDACTED]
5. Restaurant General Manager at [REDACTED]
6. Restaurant Manager at [REDACTED] in the [REDACTED]
7. Restaurant Manager at [REDACTED]
8. Restaurant Manager (Buffet Style) at [REDACTED]
9. Restaurant manager at [REDACTED]
10. Restaurant Manager at [REDACTED]
11. Restaurant Manager at [REDACTED]
12. Restaurant Manager at [REDACTED]
13. Restaurant Manager at [REDACTED]
14. Restaurant General Manager at [REDACTED] and
15. Restaurant Manager at [REDACTED]

We note that the hospitality industry in general provides a variety of food services. However, the petitioner's restaurant and catering business is distinctly differentiated from the restaurants represented in these postings, in that these companies appear to only provide meals and services onsite to customers as stand-alone restaurants. While we again note that the petitioner classified itself as a full-service restaurant, it provides substantial evidence of its offsite catering services, which are services that do not appear to be included in the business operations of the posting companies.

We note counsel's submission of three new job vacancy announcements on appeal for the positions of Catering Services Manager with [REDACTED]

[REDACTED] and Assistant Manager, Restaurant-Food Service with the [REDACTED]

³ All of the new postings, however, advertise for positions with different titles, and within different branches of the hospitality industry than that of the petitioner. 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

³ Counsel also submits a vacancy announcement for a restaurant manager position with [REDACTED] similar to the one previously submitted.

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.

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 advertised. While some of the postings state a preference for a degree in hospitality or a related field, most simply require a bachelor's degree or, in the alternative, relevant experience in place of education. 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.

Finally, we note that some of the postings require the performance of duties beyond those typically contemplated by the title of "Restaurant Manager." For example, the position advertised by [REDACTED] combines the position of restaurant manager with the position of head chef.

Thus, based upon our complete and independent 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 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 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 four individuals in the position of Manager, Restaurant and Catering, and that it previously employed three 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 four of these employees work in the position of "Manager, Restaurant and Catering." Moreover, we note that none of these alleged managerial employees appear on the petitioner's organizational chart submitted on appeal. Specifically, the petitioner has submitted two organizational charts on appeal, which outline the organizational structure of the petitioning entity and its "sister company," [REDACTED] dba [REDACTED]. The four individuals noted above appear on the sister company's chart, and the W-2 forms indicate that they are employees of [REDACTED], not the petitioner. We further note that the evidence pertaining to the three former managerial employees is similarly without probative value. The W-2 form for [REDACTED] indicates that he was also an employee of [REDACTED]. While the companies may be related, they are separate legal entities with unique Federal Employer Identification Numbers, and therefore the evidence submitted cannot be accepted as substantive evidence of a routine hiring history by the petitioner. In addition, the evidence pertaining to the other two former managerial employees consists only of educational

evaluations, and no supporting evidence is submitted to establish that they were actually employees of the petitioner.

Although the petitioner lists several managerial employees on its own organizational chart, it does not provide any supporting documentation to establish their actual employment with the petitioner. Moreover, there is no additional evidence, such as employment contracts or educational credentials, to support the petitioner's claim that it routinely hires specialty-degreed individuals for the proffered position. 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 omission of such supporting evidence is critical, since it raises questions regarding the nature of the petitioner's restaurant and 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, and its staffing levels as set forth on the organizational chart are correct, it would suggest that nearly one-half of its staff (6 out of the 14 employees listed by name on the organizational chart) hold managerial or executive positions. For example, the chart indicates that the petitioner employs a president and CEO, a COO, and managerial employees, including the beneficiary. The remaining eight employees are identified as six kitchen employees (chefs and kitchen helpers); a cashier; and a restaurant service employee. There are no named individuals in the server positions, which would appear as critical to the very nature of the petitioner's business. As it stands, only these eight individuals provide the essential services of the restaurant and catering business such as food preparation and chef/cook duties, but no one is specifically identified as wait-service staff. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Further still, 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 even above 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. Yet we note that the petitioner claims that the proffered position is even more complex and demanding than "a lesser skilled position of 'Food Service[s] Manager,' as reflected in the following quote from the petitioner's brief on appeal:

[A]t the outset we note that at page 4 of [the director's] Decision, USCIS concludes that "the position of a restaurant and catering manager is normally considered professional, and that most of these positions require prospective employees to hold at least a bachelor's degree."⁴

However, USCIS made a significant factual error by categorizing the job position at Petitioner as a lesser-skilled position of "Food Service[s] Manager" which does not always require a bachelor's degree. . . .

In the same vein, we provide this additional representative example of the petitioner's claim that the proffered position should be regarded in a class above Food Services Managers. Referring to the petitioner's organizational charts, page 11 of the brief on the appeal states:

Thus, Beneficiary does not serve as a Food Service manager, but as the higher level Restaurant and Catering Manager who is in a supervisory role above the Food Services Managers. . . . If Beneficiary's position were merely a Food Service Manager, there would be an additional layer of managerial supervision above her in the organization. This is not the case.

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.

We also note that, 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).

⁴ Please note that we disagree with and withdraw this finding, as we see no probative evidence anywhere in the record that even "most" of such positions "require prospective employees to hold at least a bachelor's degree."

In any event, and 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 same position that is the subject of this petition. 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.

For the reasons discussed above, 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, so as to satisfy 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.

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.

We note the assertion on appeal that Professor [REDACTED] submission "firmly establishes that the job duties of the job position, Restaurant and Catering Manager, offered to the beneficiary" are sufficiently complex and specialized "to require a Bachelor's degree." In this regard we refer the petitioner back to our discussion as to why we accord no probative weight to Professor [REDACTED] "Expert Opinion Letter," which we here incorporate by reference.

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 Supervisors of Food Preparation and Serving Workers. In particular, we here find that the LCA's specified occupational group (First-Line Supervisors of Food Preparation and Serving Workers) and also the LCA's 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. A Level II prevailing-wage designation is appropriate for a position where the employee would have a good understanding of the occupation but would 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 not established 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.

III. 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.

IV. 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 petitioner claims 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)(1). 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 October 4, 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, throughout the petition the petitioner characterizes the proffered position as comporting with and even exceeding the responsibilities and duties of the Food Services Managers occupational group, which is separate and distinct occupational group from, and which commands higher prevailing-wage levels than, the First-Line Supervisor of Food Preparation and Serving Workers occupational group 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) at least 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.

V. PRIOR APPROVAL

On appeal, the petitioner emphasizes that the proffered position is the same position in job title and duties as the previously approved H-1B petition filed by the petitioner on behalf of the beneficiary. Counsel also references an April 23, 2004 memorandum authored by William R. Yates (hereinafter Yates memo) as establishing that USCIS must give deference to those prior approvals or provide detailed explanations why deference is not warranted. Memorandum from William R. Yates, Associate Director for Operations, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, HQOPRD 72/11.3, (Apr. 23, 2004).

First, it must be noted that the Yates memo specifically states as follows:

[A]djudicators are not bound to approve subsequent petitions or applications seeking immigration benefits where eligibility has not been demonstrated, merely because of a prior approval which may have been erroneous. *Matter of Church Scientology International*, 19 I&N 593, 597 (Comm. 1988). Each matter must be decided according to the evidence of record on a case-by-case basis. See 8 C.F.R. § 103.8(d). . . . Material error, changed circumstances, or new material information must be clearly articulated in the resulting request for evidence or decision denying the benefit sought, as appropriate.

Thus, the Yates memo does not advise adjudicators to approve an extension petition when the facts of the record do not demonstrate eligibility for the benefit sought. On the contrary, the memorandum's language quoted immediately above acknowledges that a petition should not be approved, where, as here, the petitioner has not demonstrated that the petition should be granted.

Counsel asserts on appeal that there is no evidence of material error, changed circumstances, or new material information that supports the denial of the extension petition. Counsel states that, absent evidence of one of these three criteria, the director's "tainted denial" is "arbitrary, capricious, and an abuse of discretion." While counsel's assertions are noted, we emphasize again that 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). While counsel correctly points out that the director made "no mention at all" of any of the Yates memo's criteria for consideration, we conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d at 145. If the previous nonimmigrant petition was approved based on the same description of duties and assertions that is

contained in the current record, it would constitute material and gross error on the part of the director. Also, as pointed out by counsel, material error is one of the three criteria articulated in the Yates memo.

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). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). 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 nonimmigrant petitions on behalf of a 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).

VI. CONCLUSION

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.