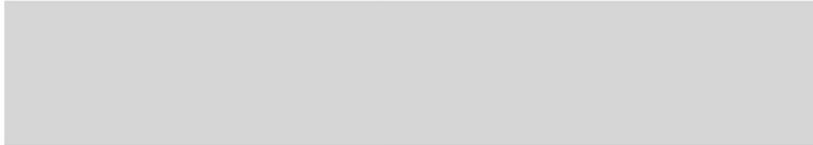




U.S. Citizenship
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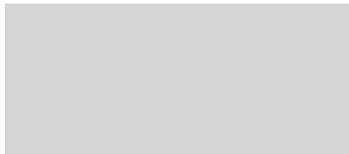


DATE: **APR 30 2015** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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 (hereinafter "director") denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a 95-employee business engaged in [REDACTED] established in [REDACTED]. In order to employ the beneficiary in what it designates as a "[Director] of Operations" position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the evidence of record did not establish that the proffered position qualifies for classification as a specialty occupation. On appeal, the petitioner asserts that the director's decision was erroneous.

The record of proceeding contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Notice of Appeal or Motion (Form I-290B), and supporting documentation. We have reviewed the record in its entirety before issuing our decision.

Upon review, we find that the evidence does not establish that the proffered position qualifies for classification as a specialty occupation. The appeal will be dismissed, and the petition will be denied.

I. FACTUAL AND PROCEDURAL HISTORY

As noted above, the petitioner describes itself as a 95-employee business engaged in [REDACTED] established in [REDACTED]. In a letter dated March 27, 2014 on the letterhead of [REDACTED], the petitioner explained that it is "a luxury boutique hotel brand, which has corporate, international and celebrity clientele."¹ The petitioner further stated: "The superior standard of the hotels means that the staff hired must also be of a superior standard. As such, the hotel only hires staffs that are professionally educated and experienced in handling such

¹ It is unclear who the petitioner is in the instant matter, i.e., whether it is [REDACTED] (an individual hotel), or [REDACTED] (a "brand" of "hotels"). The petitioner refers to itself interchangeably as both, and also explains that [REDACTED] owns and operates [REDACTED]. However, no corporate documentation has been submitted to establish ownership, and thus, that they can be considered one and the same entity.

Nevertheless, for the sake of simplicity, we will assume that East [REDACTED] and [REDACTED] are the same entity, and we will refer to them collectively as "the company."

operations." The petitioner stated that "[a]s a luxury boutique hotel chain," all [REDACTED] "are required to have specialized positions for all of our operations."²

With respect to the proffered position, the petitioner specified that the proffered position requires "at least a baccalaureate degree in the field of Hotel Management or a related field of study." The petitioner provided a breakdown of the job duties of the proffered position along with percentages of time spent on each duty. The petitioner also provided the following description of the proffered position:

The Director of Operations has overall responsibility for the daily operations of multiple Rooms Division departments within the hotel. This is a developmental position for individuals to gain experience and demonstrate competency in all facets of hotel management including Sales and Marketing, Finance, Employee Development and ownership relations. The Director of Operations is responsible for directing, implementing and maintaining a service and management philosophy which serves as a standard to respective department heads and staff and insures department's goals and hotel budgets are being met. Incumbent must utilize available resources to provide excellent guest satisfaction. The Director of Operations will meet or exceed productivity standards, taking corrective action as needed to ensure standards are maintained. The DOO works synergistically with the General Manager to uphold [REDACTED] unique corporate culture, product and brand standards, including policy and procedures outlines in the company's Policy and Procedure Manual and Human Resources Binder.

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position corresponds to Standard Occupational Classification (SOC) code and occupation title "11-1021, General and Operational Managers" from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level II position.

The petitioner submitted evidence that the beneficiary received the equivalent of a U.S. Bachelor of Business Administration Degree in the concentration of Hospitality Management.

The director issued an RFE requesting additional evidence that the proffered position qualifies as a specialty occupation.

In response to the RFE, the petitioner submitted, *inter alia*, a letter dated August 14, 2014 in which the petitioner emphasized that it is "a luxury hotel with standards higher" than other hotels and

² The petitioner listed all of the "specialized positions" within its company as follows: General Manager; Revenue Analysis Manager; Rooms Division Manager; Guest Services Manager; Director of Operations/Operation Manager; Executive Housekeeper/Director of Executive Housekeeping; Assistant Executive Housekeeper; Office Coordinator; Housemen; Room Attendants; Night Cleaners; Front Office Manager; Assistant Front Office Manager; Front Desk Agent; Bell Man; Concierge; Doormen; and Driver.

resorts. The petitioner stated: "Comparing the position of Director of Operations to an overall manager at a low-budget hotel, or a front desk clerk, highlights the essential role the Director of Operations plays in the hotel by using her academic background in hotel management." The petitioner further stated that "[t]he Director of Operations cannot effectively fulfill the role without the academic preparation" from courses taken during a bachelor's degree in hotel management such as Leadership, Human Resources in the Hospitality Industry, Hotel Operations, Leadership, Advanced Accounting Principles, Legislation and Contractual Law, and Business Ethics. The petitioner concluded: "Since its opening, the Petitioner has earned a reputation as a high-end, desirable luxury hotel. As such, the Petitioner requires only the most qualified candidates, which means the candidates for the position of Director of Operations requires at minimum, a bachelor's degree in hospitality or similar."

The petitioner submitted its organizational chart which depicts the Director of Operations as directly overseeing the following: (1) Front Office Manager (Bell, Door & FO), [REDACTED]; (2) Director of Housekeeping, [REDACTED] (3) Director of Security, [REDACTED] (4) Concierge, unnamed; and (5) Valet Parking, [REDACTED]

The petitioner submitted several vacancy announcements placed by other hotels.

The petitioner submitted a position evaluation from Dr. [REDACTED], Dean of the School of Hospitality Management at [REDACTED] concluding that the proffered position "cannot be properly performed without bachelor's-level training in hotel and restaurant management, hospitality management, or a related area." She also attests that the requirement of such a degree is "general practice within the field of hotel and restaurant management or hospitality management for a hotel of substantive size and operating scope/revenue, such as [the petitioner]."

The petitioner submitted a letter from [REDACTED] Regional People Services Director for [REDACTED] who states that she is "the person responsible for human resources in the entire region for [REDACTED]" and has fifteen years in the hotel industry.³ In addition to mirroring the statements and conclusions found in Ms. [REDACTED]'s letter, Ms. [REDACTED] also attests to the company's normal employment practices, as follows:

[The petitioner] is managed by the [REDACTED] group, known as [REDACTED]. This management group is known for its upscale service and excellence in facilities. There are now a number of hotels run by our management company. Most of these hotels cater to stylish visitors and celebrity clientele visiting for pleasure, as well as business. Our hotels are generally located in the heart of the city, and therefore many of our clients consist of corporate and business executives. Therefore our approach requires that the VIP guests be treated with extra care and

³ Ms. [REDACTED] explains that [REDACTED] "is an international hotel management company with a leading portfolio of transformative, boldly innovative boutique hotel and resort brands [including] [REDACTED]."

attention, since in our experience, these guests prefer to return frequently upon their following trips.

* * *

At [redacted] and [redacted], it has been our practice to employ management staff with bachelor's degrees. While every hotel does not have the position "Director of Operations," the staff reporting to the Director are generally the Front Office Managers. We have sponsored numerous Front Office Managers and Assistant Front Office Managers who possessed a bachelor's degree in hotel or hospitality management or the equivalent. This is normal practice for our company.

* * *

In conclusion, it is our practice at [redacted] and [redacted] to hire only professionals with a bachelor's degree for the position of "Director of Operations." This position cannot be properly performed without bachelor's-level training in hotel and restaurant management, hospitality management, or a related area. The educational requirements, calling for a minimum of a baccalaureate degree, and job duties of the proffered position clearly mark the position as a "specialty occupation." That this requirement is a matter of business necessity for us is further highlighted by the fact that, as stated above, hotel managerial-level personnel in lesser positions, and in higher positions along the intended career path, have themselves possessed bachelor's-level credentials in hospitality management and related fields. The practice of promotion from within is a critical human resources strategic decision, and necessitates hiring practices for certain positions with the expectations of individual career development.

As evidence that the company "normally requires a degree for the position," the petitioner submitted the resumes of five current or former employees it claims occupied "similar or positions which report to the Director of Operations."⁴

The director denied the petition, finding that the evidence of record did not establish that the proffered position qualifies for classification as a specialty occupation.

The petitioner filed the instant appeal. On appeal, the petitioner emphasizes the size and nature of the petitioner. Specifically, the petitioner points out that it has an annual income of \$12 million, 95 employees, 247 guest rooms, six bi-level penthouse lofts, a 10,000 square foot fitness center, a winter garden, and charges a higher rate than other chain hotels. The petitioner asserts: "While most *small* hotels *might* recruit qualified individuals without regard to their degrees, upscale large hotels

⁴ These positions are identified as: the General Manager for a sister hotel; a former Front Office Manager; two Front Office Agents; and a Bellman.

such as the Petitioner's, require degreed individuals who have obtained a baccalaureate level of education in a specific specialty."

The petitioner also asserts that in order to be employed in the proffered position, a candidate must have experience as a Front Office Manager or Assistant Front Manager, both of which "requires a bachelor's degree, as demonstrated by past hiring practices It is the general practice, in all the [REDACTED] to hire Front Office Managers with a minimum of a bachelor's degree in Hotel Management, Business Administration or similar." The petitioner states: "To imply that a managerial role requires a more general, less specific preparation than the direct reports of that person is illogical. This employer, as most in the hotel industry, requires that an individual start his or her career, in an entry level position which requires a bachelor's degree." To support the appeal, the petitioner submits additional resumes and other evidence of the educational credentials of its "current employees who hold similar positions" as well as for individuals who applied for the proffered position.

II. SPECIALTY OCCUPATION

The issue to be addressed is whether the evidence demonstrates that the proffered position qualifies for classification as a specialty occupation.

A. The Law

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. Discussion of Criteria

Upon review, we find that the evidence of record is insufficient to establish that the proffered position qualifies as a specialty occupation due to the failure to satisfy any of the supplemental, additional criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2) require the petitioner to demonstrate that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position; or a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors we consider when determining these criteria include: whether the *Handbook* on which we routinely rely for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

We will first address the requirement under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1): A baccalaureate or higher degree 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.⁵

The petitioner claims in the LCA that the proffered position corresponds to SOC code and title "11-1021, General and Operational Managers." The *Handbook* states the following about the educational requirements of such positions, which it places within the "Top Executives" occupational category:

⁵ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. Our references to the *Handbook* are to the 2014 – 2015 edition available online.

How to Become a Top Executive

Although education and training requirements vary widely by position and industry, many top executives have at least a bachelor's degree and a considerable amount of work experience.

Education

Many top executives have a bachelor's or master's degree in business administration or in an area related to their field of work. Top executives in the public sector often have a degree in business administration, public administration, law, or the liberal arts. Top executives of large corporations often have a master of business administration (MBA). College presidents and school superintendents typically have a doctoral degree in the field in which they originally taught or in education administration.

Work Experience in a Related Occupation

Many top executives advance within their own firm, moving up from lower level managerial or supervisory positions. However, other companies may prefer to hire qualified candidates from outside their organization. Top executives that are promoted from lower level positions may be able to substitute experience for education to move up in the company. For example, in industries such as retail trade or transportation, workers without a college degree may work their way up to higher levels within the company to become executives or general managers.

Chief executives typically need extensive managerial experience. Executives are also expected to have experience in the organization's area of specialty. Most general and operations managers hired from outside an organization need lower level supervisory or management experience in a related field.

Some general managers advance to higher level managerial or executive positions. Company training programs, executive development programs, and certification can often benefit managers or executives hoping to advance. Chief executive officers often become a member of the board of directors.

Id. at <http://www.bls.gov/ooh/management/top-executives.htm#tab-4> (last visited Apr. 28, 2015).

The *Handbook* does not support the conclusion that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. While "many" top executives may have a bachelor's degree or higher, the *Handbook* does not indicate that such a degree is normally the minimum requirement for entry into this occupational

category.⁶ Rather, the *Handbook* describes an array of preparatory paths to the occupational category of top executives, including the observation that in some industries, "workers without a college degree may work their way up to higher levels in the company to become executives or general managers." Here, the petitioner repeatedly emphasizes its "practice of promotion from within" and that its "managerial or director role can only be assumed through promotion or lateral hiring." Thus, it appears that the proffered position falls within the group of "[t]op executives that are promoted from lower level positions," for whom the *Handbook* states are "able to substitute experience for education to move up in the company." *Id.* at <http://www.bls.gov/ooh/management/top-executives.htm#tab-4> (last visited Apr. 28, 2015). Thus, the *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty (or its equivalent) is normally the minimum requirement for entry into this occupational category.

In response to the RFE and on appeal, the petitioner referenced "the OES/SOC Code Information from the FLC Data Center, showing that SOC Code 11-1021, General and Operational Managers requires an Education and Training Code level 4, work experience, plus a bachelor's or higher degree." However, this information is insufficient to establish that the position qualifies as a specialty occupation, as this code does not specify that a bachelor's degree in any *specific specialty* is required, and does not, therefore, demonstrate that a position so designated qualifies as a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook* (or other objective, authoritative source) indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. Thus, the petitioner did not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, we find that the petitioner has not satisfied 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 for positions that are identifiable as being (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the petitioner.

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

⁶ The petitioner has not explained how the *Handbook's* statement that "[m]any top executives have a bachelor's or master's degree" implies that "*most* employers require a bachelor's degree for such position," as claimed on appeal.

As noted above, the proffered position does not fall under an occupational category for which the *Handbook* indicates that there is a standard, minimum entry requirement of at least a bachelor's degree in a specific specialty or its equivalent. Instead, the *Handbook* states that "education and training requirements vary widely by position and industry," and does not specifically address the petitioner's industry. *Id.* at <http://www.bls.gov/ooh/management/top-executives.htm#tab-4> (last visited Apr. 28, 2015).

The petitioner asserts that it is industry standard or "general practice" for hotels of "substantive size and operating scope/revenue," such as the petitioner, to require a minimum of a bachelor's degree in hotel and restaurant management, hospitality management, or a related area. To support this assertion, the petitioner submitted letters from [REDACTED] and [REDACTED] identically attesting to same.⁷ However, the petitioner, Ms. [REDACTED], and Ms. [REDACTED] all have not explained the factual basis for their assertions. As such, these are little more than conclusory statements that are not entitled to probative weight. 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)).

Significantly, the petitioner did not provide independent, objective evidence corroborating its assertions regarding the "general practice" among hotels of substantive size and operating scope/revenue such as the petitioner. The evidence the petitioner submitted, namely, the eight vacancy announcements placed by other hotels, does not indicate that the minimum requirement of a bachelor's degree in a specific specialty is common to the petitioner's industry. For instance, the vacancy announcements posted by the ([REDACTED]) and [REDACTED] all state that a four-year bachelor's college degree (or equivalent) is necessary, but do not further specify that the degree must be in any particular field. In addition, the vacancy announcements posted by the [REDACTED] both state that an otherwise unspecified bachelor's degree is "preferred." We note that a *preference* for a degree is not a *requirement*.⁸

⁷ The use of identical language and phrasing across these letters suggests the possibility that the language in the letters is not the authors' own. *Cf. Surinder Singh v. BIA*, 438 F.3d 145, 148 (2d Cir. 2006) (upholding an adverse credibility determination in asylum proceedings based in part on the similarity of the affidavits); *Mei Chai Ye v. U.S. Dept. of Justice*, 489 F.3d 517, 519 (2d Cir. 2007) (concluding that an immigration judge may reasonably infer that when an asylum applicant submits strikingly similar affidavits, the applicant is the common source). These letters consequently hold little probative value.

⁸ The deficiencies with the submitted vacancy announcements, as discussed above, were also pointed out in the director's decision. On appeal, the petitioner confusingly attempts to distinguish these vacancy announcements from the petitioner and the proffered position by stating that some were placed by "chain hotels" with different standards from the petitioner, or were for positions that "were more similar to a general managerial position." If these advertisements are not for positions parallel to the proffered position located in

The record of proceeding contains no other evidence pertinent to this particular criterion. Thus, the evidence of record does not establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common for positions that are identifiable as being (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the petitioner. The petitioner has not, therefore, satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The evidence of record also does not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." Upon review, the evidence of record is insufficient to demonstrate that the duties that comprise the proffered position are so complex or unique that it can be performed only by a person with at least a bachelor's degree in a specific specialty.

In this matter, the petitioner asserts that the complexity and uniqueness of the proffered position are illustrated by the duties of formulating policies, managing daily operations, planning the use of materials and human resources, supervising operational departments and staff, and planning, directing, or coordinating the operations of the hotel. The petitioner states that the beneficiary will spend 100% of her time "[a]ssist[ing] in the management of the department's operation, setting direction and priorities, ensuring controls are in place. Supervises housekeeping supervisor, housekeeping staff, lead maintenance engineer, front desk staff or any other operational departments." The petitioner states that the beneficiary will also spend 100% of her time "[a]nalyz[ing] Director of Operations and Human Resources operating procedures, service issues, department organization, staff turn over rates, information flow within the department and between other departments, and integrated service and management methods." The petitioner further lists various financial duties, including analyzing accounting records to determine financial resources which accounts for 80% of the beneficiary's time.⁹

However, these duties, as so generally described, are insufficient to establish that the proffered position is significantly different from other top executive positions such that it refutes the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for such positions, including degrees not in a specific specialty. In other words, the record does not distinguish the proffered position as unique from or more complex than positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent. The proffered duties fit within the range of general duties for top executives, which the *Handbook*

organizations within the petitioner's industry that are also similar to it, as now claimed, then it is not clear what relevance these advertisements have to the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

⁹ While the petitioner explains that the beneficiary's tasks overlap and therefore the percentages of time do not add up to 100%, the petitioner's breakdown of the duties and time spent on each duty is nonetheless confusing.

summarizes as to "devise strategies and policies" and to "plan, direct, and coordinate operational activities of companies and organizations." *Id.* at <http://www.bls.gov/ooh/management/top-executives.htm#tab-2> (last visited Apr. 28, 2015). The proffered duties also fit within the typical duties of general and operations managers (a sub-set of top executives), which the *Handbook* states "may include formulating policies, managing daily operations, and planning the use of materials and human resources. They make staff schedules, assign work, and ensure that projects are completed."¹⁰ *Id.* at <http://www.bls.gov/ooh/management/top-executives.htm#tab-2> (last visited Apr. 28, 2015). The petitioner has not sufficiently distinguished the duties of the proffered position from those normally expected of top executives.

We acknowledge the petitioner's claims that it is an upscale, large luxury hotel with "higher" and "superior" standards than other hotels and resorts. The petitioner specifically asserts that the proffered position requires an "academic background in hotel management," as opposed to similar positions at "low-budget hotel[s]" or "most *small* hotels [which] *might* recruit qualified individuals without regard to their degrees." However, the petitioner has not sufficiently explained and documented the factual basis for its assertions. That is, the petitioner has not sufficiently compared and contrasted the requirements of the proffered position to those of other similar positions at different types of hotels. Merely claiming that the petitioning hotel has "higher" standards and treats guests with "extra care and attention," without more, is insufficient to establish the complexity or uniqueness of the proffered position under the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). 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.

In addition, while the petitioner has listed specific courses it claims are necessary to perform the duties of the proffered position, the petitioner has not sufficiently explained and documented what bodies of highly specialized knowledge is required to perform each particular duty, why these courses are necessary to provide such knowledge, and how these courses represent an established curriculum leading to a baccalaureate or higher degree in a specific specialty. For instance, the petitioner listed the courses of Hotel Operations, Leadership, Advanced Accounting Principles, Legislation and Contractual Law, and Business Ethics as necessary to perform the specific duty of "[c]omply with requests from the Executives of the hotel for additional budgets." However, the petitioner did not further explain and document why these courses are necessary.¹¹ As another

¹⁰ Specifically, the *Handbook* lists typical duties of top executives as including: establish and carry out departmental or organizational goals, policies, and procedures; direct and oversee an organization's financial and budgetary activities; manage general activities related to making products and providing services; analyze financial statements, sales reports, and other performance indicators; and identify places to cut costs and to improve performance, policies, and programs. *Id.* at <http://www.bls.gov/ooh/management/top-executives.htm#tab-2> (last visited Apr. 28, 2015).

¹¹ Even if these assertions were supported by the evidence of record, we note that the beneficiary's transcript was not submitted. We there cannot determine whether she took any of these specific classes and, as such, whether she meets the petitioner's requirements for the position.

example, the petitioner states that "[g]eneralized knowledge of hotel and/or hospitality management alone is not sufficient" and that a bachelor's level education in the relevant field is needed to "maintain exceptional levels of service." Again, however, the petitioner does not adequately articulate why. Overall, the record of proceeding, as presently constituted, is insufficient to demonstrate that the proffered position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty.

We will next address the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which may be satisfied if the petitioner demonstrates that it normally requires a minimum of a bachelor's degree in a specific specialty or its equivalent for the proffered position.¹²

Under this criterion, the petitioner asserts that it has been the company's "practice . . . to hire only professionals with a bachelor's degree [in or related to hotel management] for the position of 'Director of Operations.'" The petitioner also attests that "it has been [the company's] practice to employ management staff with bachelor's degrees," and in particular, it has been "normal practice" for the managerial staff reporting to the Director of Operations (e.g. Front Office Managers and Assistant Front Office Managers) to have a bachelor's degree in hotel or hospitality management or the equivalent. In addition, the petitioner states that "[a]s a luxury boutique hotel chain, we are required to have specialized positions for all of our operations," and emphasizes its practice of promoting managers and directors from within. To corroborate these assertions, the petitioner submitted resumes and other evidence of the educational credentials of its current and former employees.¹³

¹² To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

¹³ The petitioner also submitted resumes of individuals who applied for the proffered position. Without more, it is not clear what probative value the credentials of unsuccessful applicants have towards establishing the petitioner's normal employment practices.

We find the petitioner's reliance upon the educational credentials of its current and former employees to be misplaced. For instance, the petitioner has not submitted any documentation with respect to its hiring practices for the specific position of Director of Operations proffered here; none of the employees for whom the petitioner submitted resumes and other evidence appear to hold or have ever held the position of "Director of Operations" with the same duties as the proffered position.

Furthermore, the petitioner has not explained how the submitted resumes and other related documents are representative of the company's hiring practices for the numerous Front Office Manager and other managerial positions existing at its numerous hotels. The petitioner specifically states that [REDACTED] "owns and operates a myriad of similar, executive boutique hotels," and lists at least seven managerial or executive positions within each hotel. The petitioner has not demonstrated what statistically valid inferences, if any, can be drawn from the credentials of fourteen select former and current employees with regard to determining the common educational requirement for such positions at the "myriad of similar, executive boutique hotels" owned and operated by the company, all of which the petitioner claims requires a bachelor's degree or higher in hotel or hospitality management or the equivalent.¹⁴ We observe further that the petitioner did not submit evidence of the educational credentials of the managerial employees actually supervised by the beneficiary.

Moreover, the petitioner did not submit any evidence of its actual recruiting practices, such as the vacancy announcements under which the beneficiary and these other individuals were hired. In light of the above, we cannot see how the educational credentials of a few select employees are representative of the petitioner's overall, normal employment practices.

While the petitioner asserts that all of its entry-level operational positions are "specialized positions" and emphasizes its "practice of promotion from within," the petitioner did not further specify whether these positions normally require a minimum of a bachelor's degree *in a specific specialty* or its equivalent, as required by the plain language of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).¹⁵ Without

¹⁴ See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that these documents were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

We observe that [REDACTED], an Assistant Front Office Manager, possesses a Bachelor of Business Administration with a major in Marketing and a minor in Studio Art. The petitioner has not submitted evidence to establish that this degree is equivalent or closely related to the field of hotel or hospitality management.

¹⁵ We note that [REDACTED], a Front Office Agent, possesses a Bachelor of Arts in Sociology with a concentration in the Sociology of Culture, and [REDACTED] a Bellman, possesses a Bachelor of Arts in History. Regardless, it is not readily apparent why the duties of "all" of the operational positions, such as the

further specification of the required degree for these "specialized" positions, the petitioner has not established the probative value of its lateral promotion practices to this criterion. That is, since the petitioner has not established that these lower-level positions require a minimum of a bachelor's degree in a specific specialty or its equivalent, then it cannot be found that the managerial and director level positions to which these individuals are promoted also require a minimum of a bachelor's degree in a specific specialty or its equivalent.

The petitioner did not submit any other reliable evidence pertinent to this criterion. On the whole, the submitted evidence is insufficient to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, we will address the alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner establishes that the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent.

Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. The duties of the proffered position have not been shown to be of a nature so specialized and complex that they require knowledge usually associated with attainment of a minimum of a bachelor's degree in a specific specialty or its equivalent. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than the duties of similar positions located within the top executive occupational category that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent. The petitioner has submitted inadequate probative evidence to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

On appeal, counsel cites to *Tapis Int'l v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000) and states the following:

The United States District Court [in *Tapis Int'l v. INS*] has held that in positions where an employer requires a Bachelor's degree, but does not specify a field, the regulatory definition of specialty occupation may be satisfied by looking at a combination of education with experience in a specific field.

Specifically, we note that in *Tapis Int'l v. INS*, the U.S. district court found that while the former Immigration and Naturalization Service (INS) was reasonable in requiring a bachelor's degree in a specific field, it abused its discretion by ignoring the portion of the regulations that allows for the equivalent of a specialized baccalaureate degree. According to the U.S. district court, INS's interpretation was not reasonable because then H-1B visas would only be available in fields where a specific degree was offered, ignoring the statutory definition allowing for "various combinations of academic and experience based training." *Tapis Int'l v. INS*, 94 F. Supp. 2d at 176. The court

Bellman whose duties are to "[a]ssist guests with luggage and transportation," would necessarily require at least a bachelor's degree.

elaborated that "[i]n fields where no specifically tailored baccalaureate program exists, the only possible way to achieve something equivalent is by studying a related field (or fields) and then obtaining specialized experience." *Id.* at 177.

We agree with the district court judge in *Tapis Int'l v. INS*, that in satisfying the specialty occupation requirements, both the Act and the regulations require a bachelor's degree in a specific specialty or its equivalent, and that this language indicates that the degree does not have to be a degree in a single specific specialty. In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) (emphasis added).

Moreover, we also agree that, if the requirements to perform the duties and job responsibilities of a proffered position are a combination of a general bachelor's degree and experience such that the standards at both section 214(i)(1)(A) and (B) of the Act have been satisfied, then the proffered position may qualify as a specialty occupation. We do not find, however, that the U.S. district court is stating that any position can qualify as a specialty occupation based solely on the claimed requirements of a petitioner.

Instead, USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a baccalaureate or higher degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

In addition, the district court judge does not state in *Tapis Int'l v. INS* that, simply because there is no specialty degree requirement for entry into a particular position in a given occupational category, USCIS must recognize such a position as a specialty occupation if the beneficiary has the equivalent of a bachelor's degree in that field. In other words, we do not find that *Tapis Int'l v. INS* stands for either (1) that a specialty occupation is determined by the qualifications of the beneficiary being petitioned to perform it; or (2) that a position may qualify as a specialty occupation even when there is no specialty degree requirement, or its equivalent, for entry into a particular position in a given occupational category.

First, USCIS cannot determine if a particular job is a specialty occupation based on the qualifications of the beneficiary. A beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. USCIS is required instead to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

Second, in promulgating the H-1B regulations, the former INS made clear that the definition of the term "specialty occupation" could not be expanded "to include those occupations which did not require a bachelor's degree in the specific specialty." 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991). More specifically, in responding to comments that "the definition of specialty occupation was too severe and would exclude certain occupations from classification as specialty occupations," the former INS stated that "[t]he definition of specialty occupation contained in the statute contains this requirement [for a bachelor's degree in the specific specialty or its equivalent]" and, therefore, "may not be amended in the final rule." *Id.*

In any event, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Tapis Int'l v. INS*. We also note that, in contrast to the broad precedential authority of the case law of a United States circuit court, we are not bound to follow the published decision of a United States district court in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Nor are we persuaded by counsel's comments on *Unical Aviation, Inc. v. INS*, 248 F. Supp. 2d 931 (D.C. Cal 2002). The material facts of the present proceeding are distinguishable from those in *Unical*. Specifically, *Unical* involves: (1) a position for which there was a companion position held by a person with a Master's degree; (2) a record of proceedings that included an organizational chart showing that all of its employees in the marketing department held bachelor's degrees; and, in the court's words, (3) "sufficient evidence to demonstrate that there is a requirement of specialized study for [the beneficiary's] position." Also, the proffered position and related duties in the present proceeding are different from those in *Unical Aviation, Inc.*, where the beneficiary was to liaise with airline and Maintenance Repair Organization ("MRO") customers in China for supply of parts and services; analyze and forecast airline and MRO demands to generate plans to capture business; provide after-sales services to customers in China; and develop new products and services for the China market. Moreover, there is no indication in the record of proceeding that the petitioner is in the same industry or is in any way similar in size or type of business as *Unical Aviation, Inc.*

Further, in *Unical Aviation* the Court partly relied upon *Augut, Inc. v. Tabor*, 719 F. Supp. 1158 (D. Mass. 1989), for the proposition that Immigration and Naturalization Service (INS, now USCIS), had not used an absolute degree requirement in applying the "profession" standard at 8 U.S.C. § 1101(a)(32) for determining the merits of an 8 U.S.C. § 1153(a)(3) third-preference visa petition.

That proposition is not relevant here, because the H-1B specialty occupation statutes and regulations, not in existence when INS denied the *Augut, Inc.* third-preference petition, mandate not just a baccalaureate or higher degree, or its equivalent, but a degree "in the specific specialty." § 214(i)(1) of the Act; *see also* 8 C.F.R. § 214.2(h)(4)(ii). We also note again that, in contrast to the broad precedential authority of the case law of a United States circuit court, we are not bound to follow the published decision of a United States district court in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. at 715. Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Finally, counsel noted that USCIS approved other petitions that had been previously filed on behalf of the petitioner. The director's decision does not indicate whether the service center reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were 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 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).

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 the nonimmigrant petitions 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).

For the reasons above, the evidence of record is insufficient to satisfy 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 for classification as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

III. CONCLUSION

The evidence of record is insufficient to establish that the proffered position qualifies for classification as a specialty occupation.¹⁶ In visa petition proceedings, it is the petitioner's burden to

¹⁶ As this issue precludes approval of the petition we will not discuss any of the additional deficiencies we have observed on appeal.

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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.