

(b)(6)



U.S. Citizenship  
and Immigration  
Services

DATE: **JAN 22 2015**

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner:  
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:

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 initially approved the nonimmigrant visa petition. In response to new evidence and a review of the record, the director issued a notice of intent to revoke (NOIR), and ultimately did revoke the approval of the petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. Approval of the petition will remain revoked.

## I. PROCEDURAL AND FACTUAL BACKGROUND

On the Form I-129 visa petition, the petitioner describes itself as a six-employee "Full service restaurant" established in [REDACTED]. In order to continue to employ the beneficiary in what it designates as an "Operations Manager" 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 approved the visa petition on January 10, 2013. However, on June 17, 2013 the service center director issued an NOIR in this matter. The petitioner's response was received on July 19, 2013. Subsequently, on April 28, 2014, the director revoked approval of the visa petition. The petitioner filed a timely appeal on May 30, 2014.

The director's revocation of approval of the petition was based on her finding that the evidence available indicates that the petitioner has violated the terms and conditions of H-1B employment.

We have further determined that the director did not err in her decision to revoke approval of the petition. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and approval of the petition will remain revoked.

We base our decision upon our review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's NOIR; (3) the response to the NOIR; (4) the director's revocation letter; and (5) the Form I-290B and counsel's submissions on appeal.

## II. THE LAW

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

- (A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:
  - (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition . . . ; or

- (2) The statement of facts contained in the petition . . . was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
- (3) The petitioner violated terms and conditions of the approved petition; or
- (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
- (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

(B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part . . . .

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.

### III. EVIDENCE

On the Form I-129 visa petition, the petitioner stated that it would employ the beneficiary as an operations manager. The Labor Condition Application (LCA) submitted to support the visa petition also states that the proffered position is an Operations Manager position.



anticipated number of guests, nutritional value, palatability, popularity, and costs. Estimate food, and other beverage [sic] consumption to anticipate amounts to be purchased or requisitioned. Establish and enforce nutrition standards for dining establishment based on accepted industry standards. Organize and direct worker training programs, resolve personnel problems, hire new staff, and evaluate employee performance in dining facilities. Coordinate assignments of cooking personnel to ensure economical use of food and timely preparation. Investigate and resolve complaints regarding food quality, service, or staff accommodations. Analyze and review current performance, identify structures and organizational problems and suggest, develop and implement revenue and performance optimizing systems and policies.

On June 17, 2013 the director issued an NOIR in this matter. The NOIR observed that the H-1B visa in this matter was approved for specialty occupation employment of the beneficiary as an operations manager at an annual salary of \$49,340. It further stated:

An Administrative Site Visit was conducted on March 13, 2013 at the [REDACTED], Florida address listed as the petitioner's location in the initial petition. The site inspector was able to speak with the signatory and vice president, [REDACTED].<sup>2</sup> [REDACTED] indicated the beneficiary's job duties included performing food quality and quantity management, food production and service management, consumer relations marketing, management of accounting, payroll, and business affairs, including inventory control, and overseeing and directing management of all operational aspects of the restaurant marketing and finance. [REDACTED] indicated that the beneficiary also provides operational assistance to two other restaurants, the [REDACTED]. The site inspector spoke to the beneficiary who confirmed her duties were similar to those described by [REDACTED].

The NOIR stated that the beneficiary is working as a restaurant manager, rather than an operations manager, and not in a specialty occupation. The director offered the petitioner an opportunity to respond to the NOIR.

In response, counsel submitted, *inter alia*: (1) the petitioner's 2012 Form 1120S, tax return; and (2) a letter, dated June 8, 2013, from the petitioner's president. The letter from the petitioner's president reiterated the previously provided duty description.

The director revoked approval of the visa petition on April 28, 2014, finding that the petitioner had violated terms and conditions of the approved petition. Specifically, the director found that the

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<sup>2</sup> Although [REDACTED] is identified as the petitioner's vice president in that report, he identified himself as the petitioner's president in correspondence in the record. This decision will refer to him as the petitioner's president.

petitioner was not employing the beneficiary as an operations manager and was not employing the beneficiary in a specialty occupation position.

On appeal, counsel submitted, *inter alia*: (1) four vacancy announcements; (2) a copy of the petitioner's 2013 Form 1120S tax return; (3) a letter, dated June 26, 2014, from the petitioner's president; and (4) a letter, also dated June 26, 2014, from counsel.

In his June 26, 2014 letter, the petitioner's president stated that the petitioner now employs seven full-time workers and described the following as the duties of the proffered position:

- 1. Standardize food quality and quantity management.....25%
- 2. Human resources duties, including employee training.....15%
- 3. Supply chain management.....15%
- 4. Food production and service management and consumer relations.....15%
- 5. Marketing.....15%
- 6. Management of all accounting, payroll and business affairs, inventory control....15%

Elsewhere in that letter, the petitioner's president provided considerable detail pertinent to those duties. The detailed duty description is consistent with the duty description previously provided. As to the educational requirements of the proffered position, the petitioner's president stated that the proffered position requires "at last [sic] a Bachelor's degree in Business Administration, Hospitality Management, Hotel and Restaurant Management, or a related field."

In his June 26, 2014 letter from counsel observed that the burden of proof in this matter is the "preponderance of the evidence" standard.

#### IV. ANALYSIS

In order to demonstrate that it has not violated the terms and conditions of H-1B employment, the petitioner must demonstrate both that it is employing the beneficiary in the position specified, that is, as an operations manager, and that the proffered position is a specialty occupation position, that is, that it requires a minimum of a bachelor's degree in a specific specialty or its equivalent.

We recognize the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>3</sup> The *Handbook* describes the occupation of "Top Executives" as follows:

#### **What Top Executives Do**

<sup>3</sup> 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.

Top executives devise strategies and policies to ensure that an organization meets its goals. They plan, direct, and coordinate operational activities of companies and organizations.

### **Duties**

Top executives typically do the following:

- 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
- Consult with other executives, staff, and board members about general operations
- Negotiate or approve contracts and agreements
- Appoint department heads and managers
- Analyze financial statements, sales reports, and other performance indicators
- Identify places to cut costs and to improve performance, policies, and programs

The responsibilities of top executives largely depend on an organization's size. For example, an owner or manager of a small organization, such as an independent retail store, often is responsible for purchasing, hiring, training, quality control, and day-to-day supervisory duties. In large organizations, however, top executives typically focus more on formulating policies and strategic planning, while general and operations managers direct day-to-day operations.

The following are examples of types of top executives:

**Chief executive officers (CEOs)**, who are also known by titles such as **executive director**, **president**, and **vice president**, provide overall direction for companies and organizations. CEOs manage company operations, formulate policies, and ensure goals are met. They collaborate with and direct the work of other top executives and typically report to a board of directors.

Companies may also have chief officers who lead various departments or focus on specific areas of work:

- **Chief financial officers (CFOs)** are accountable for the accuracy of a company's or organization's financial reporting, especially among publicly traded companies. They direct the organization's financial

goals, objectives, and budgets. For example, they may oversee the investment of funds and manage associated risks.

- **Chief information officers (CIOs)** are responsible for the overall technological direction of an organization, which includes managing information technology and computer systems. They organize and supervise information-technology-related workers, projects, and policies.
- **Chief operating officers (COOs)** oversee other executives who direct the activities of various departments, such as human resources and sales. They also carry out the organization's guidelines on a day-to-day basis.
- **Chief sustainability officers** oversee a corporation's environmental programs. For instance, they may manage programs and policies to ensure that the organization complies with environmental or other government regulations.

**Mayors**, along with **governors**, **city managers**, and **county administrators**, are chief executive officers of governments. They typically oversee budgets, programs, and the use of resources. Mayors and governors must be elected to office, whereas managers and administrators are typically appointed.

**School superintendents** and **college** or **university presidents** are chief executive officers of school districts and postsecondary schools. They manage issues such as student achievement, budgets and resources, general operations, and relations with government agencies and other stakeholders.

**General and operations managers** oversee operations that are too diverse and general to be classified into one area of management or administration. Responsibilities 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. In some organizations, the tasks of chief executive officers may overlap with those of general and operations managers.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Top Executives," <http://www.bls.gov/ooh/management/top-executives.htm#tab-2> (last visited Jan. 21, 2015).

The *Handbook* includes operations manager positions in its discussion of Top Executives. In discussing operations manager positions, the *Handbook* states that they oversee operations too diverse and general to be classified otherwise. As demonstrated by the duty descriptions provided, however, the proffered position entails managing a restaurant. Further, the visa petition states that the petitioner employs only six people, and the petitioner's president later stated that it now employs seven people. As such, it is clearly not a large restaurant. Further, nothing in the record suggests that it is an unusually complex restaurant to manage.

In any event, the proffered position is classified elsewhere in the *Handbook*. Specifically, the *Handbook* describes the occupation of "Food Service Managers" as follows:

### **What Food Service Managers Do**

Food service managers are responsible for the daily operation of restaurants and other establishments that prepare and serve food and beverages. They direct staff to ensure that customers are satisfied with their dining experience and the business is profitable.

### **Duties**

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

Besides coordinating activities of the kitchen and dining room staff, managers ensure that customers are served properly and in a timely manner. They monitor orders in the kitchen and, if needed, they work with the chef to remedy any delays in service.

Some food service managers, including those who manage their own business, deal with suppliers and arrange for delivery of food and beverages and other supplies. Some also plan or approve menus and set prices for food and beverage items.

Food service managers are responsible for all functions of the business, related to employees. For example, most managers interview, hire, train, and sometimes fire employees. Managers also schedule work hours, making sure that enough workers are present to cover each shift. During busy periods, they may expedite the service by helping to serve customers, cashiering, or cleaning tables.

Food service managers also plan and arrange for cleaning and maintenance services of the equipment and facility. For example, they arrange for linen service, heavy

cleaning when the dining room and kitchen are not in use, trash removal, and pest control when needed.

In addition, managers perform many administrative tasks, such as keeping employee records; preparing the payroll; and completing paperwork to comply with licensing, tax and wage, unemployment compensation, and Social Security laws. Although they sometimes assign these tasks to an assistant manager or bookkeeper, most managers are responsible for the accuracy of business records.

Full-service restaurants (those with table service) may have a management team that includes a general manager, one or more assistant managers, and an executive chef. Managers add up the cash and charge slips and secure them in a safe place. Many managers also lock up the establishment; check that ovens, grills, and lights are off; and switch on the alarm system.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Food Service Managers," <http://www.bls.gov/ooh/management/food-service-managers.htm#tab-2> (last visited Jan. 21, 2015).

The duties the petitioner's president attributed to the proffered position are consistent with the duties of food service managers as described in the *Handbook*. On the balance, we find that the proffered position is a food service manager position as described in the *Handbook*. As such, it is not an operational manager position, as it was represented to be in the visa petition and the LCA. As the petitioner was not employing the beneficiary in the position for which the visa petition was approved, the petitioner violated the terms and conditions of H-1B employment.

Further, in order for the proffered position to qualify as a specialty occupation position, the petitioner must show that it satisfies at least one of the alternative criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A), which are set out above.

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.

The *Handbook* states the following about the educational requirements of Food Service Manager positions:

### **How to Become a Food Service Manager**

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.

## **Training**

Managers who work for restaurant chains and food service management companies may undergo programs that combine classroom instruction and on-the-job training. Topics may include food preparation, nutrition, sanitation, security, company policies, personnel management, and recordkeeping. Some include training on the use of the restaurant's computer system.

## **Licenses, Certifications, and Registrations**

Although not required, voluntary certification shows professional competence, particularly for managers who learned their skills on the job. The National Restaurant Association Educational Foundation awards the Foodservice Management Professional designation to managers who meet several criteria, including passing a written exam, completing coursework, and meeting experience requirements.

### **Important Qualities**

***Business skills.*** Food service managers, especially those who run their own restaurant, must understand all aspects of the restaurant business. They should know how to budget for supplies, set prices, and manage workers to ensure that the restaurant is profitable.

***Customer-service skills.*** Food service managers must be courteous and attentive when dealing with patrons. Satisfying customers' dining needs is critical for success and ensures customer loyalty.

***Detail oriented.*** Managers deal with many different types of activities. They interact with suppliers, workers, and customers; they make sure there is enough food to serve to customers; they take care of financial records; and they ensure health and food safety.

***Leadership skills.*** Managers must establish good working relationships to ensure a productive work environment. This may involve motivating workers, resolving conflicts, or actively listening to complaints or criticism from customers.

***Organizational skills.*** Food service managers keep track of many different schedules, budgets, and people. This becomes more complex as the size of the restaurant or food service facility increases.

***Physical stamina.*** Food service managers, especially managers working in small establishments or those who run their own business, often work long hours and sometimes spend entire evenings on their feet helping to serve customers.

***Problem-solving skills.*** The ability to resolve personnel issues and customer-related problems is imperative to the work of managers.

***Speaking skills.*** Food service managers must give clear orders to staff and be able to explain information to employees and customers.

*Id.* at <http://www.bls.gov/ooh/management/food-service-managers.htm#tab-4> (last visited Jan. 21 2015).

The *Handbook* states explicitly that a bachelor's degree is not required for Food Service Manager positions. As such, it does not support the assertion that the proffered position is a specialty occupation position.<sup>4</sup>

Where, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies this criterion by a preponderance of the evidence standard, notwithstanding the absence of the *Handbook's* support on the issue. In such a case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." 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 this case, the *Handbook* does not support the proposition that the proffered position satisfies 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), and the record of proceeding does not contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion in this occupational category would be sufficient in and of itself to establish that a bachelor's or higher degree in a specific specialty or its equivalent "is normally the minimum requirement for entry into [this] particular position."

Further, we find that the numerous duties that the petitioner ascribes to the proffered position indicate a need for a range of knowledge of food service management, but do not establish any particular level of formal, postsecondary education leading to a bachelor's or higher degree in a specific specialty as minimally necessary to attain such knowledge.

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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<sup>4</sup> We observe that if the proffered position had been shown to be an operations manager position, as represented, that would have been insufficient to demonstrate that the proffered position is a specialty occupation position, as the *Handbook* does not support the proposition that such positions normally require a minimum of a bachelor's degree in a specific specialty or its equivalent. That is, the *Handbook* discussed operations manager positions in its chapter pertinent to Top Executives. As to those positions, it states that many top executives have at least a bachelor's degree. It does not state that all, or even most, top executives have a bachelor's degree, let alone that a bachelor's degree is normally a minimum requirement for such positions. Further, it indicates that even for those top executive positions that may require a bachelor's or higher degree, a degree in business administration or liberal arts may suffice. For myriad reasons, the *Handbook* does not indicate that operations manager positions necessarily qualify as specialty occupation positions by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent.

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).

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other reliable and authoritative source, indicates that there is a standard, minimum entry requirement of at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

As was stated above, counsel did provide four vacancy announcements, apparently to support the proposition that a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent is common for positions parallel to the proffered position with organizations similar to the petitioner in the petitioner's industry.

All of the vacancy announcements were placed by companies in the food service industry. However, one describes itself as "a food service contractor with locations across North America." Although it is in the food service industry, that organization does not appear to be otherwise similar to the petitioner. Further, one vacancy announcement is for a position that is accorded the job title [REDACTED]. The evidence does not demonstrate that the position announced in that vacancy announcement is a position parallel to the proffered position.

Some of the vacancy announcements state a requirement of a college degree, but do not state that the degree must be in any specific specialty. As such, they do not state a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent.

Some of the vacancy announcements state a requirement of a college degree, but indicate that an otherwise unspecified degree in business administration would be a sufficient educational qualification for the position announced. A degree with a generalized title, such as business administration, without further specification, is not a degree in a specific specialty. Cf. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). As such, an educational requirement

that may be satisfied by an otherwise undifferentiated bachelor's degree in business administration is not a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent. Those vacancy announcements do not state a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent.

Some of the vacancy announcements provided indicate that a college degree, or even a specific college degree, is *preferred* for the position. Obviously, a preference is not a minimum requirement. Those vacancy announcements do not state a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent.

Finally, even if all of the vacancy announcements were for parallel positions with organizations similar to the petitioner and in the petitioner's industry and required a minimum of a bachelor's degree in a specific specialty or its equivalent, the petitioner has failed to demonstrate what statistically valid inferences, if any, can be drawn from four announcements with regard to the common educational requirements for entry into parallel positions in similar organizations.<sup>5</sup>

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 to positions that are (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 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." A review of the record indicates that the petitioner has failed to credibly demonstrate that the duties that comprise the proffered position entail such complexity or uniqueness as to constitute a position so complex or unique that it can be performed only by a person with at least a bachelor's degree in a specific specialty.

Specifically, the petitioner failed to demonstrate how the duties that collectively constitute the proffered position require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While a few related courses may be beneficial, or even

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<sup>5</sup> USCIS "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." *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). As just discussed, the petitioner has failed to establish the relevance of the job advertisements submitted to the position proffered in this case. Even if their relevance had been established, the petitioner still fails to demonstrate what inferences, if any, can be drawn from these few job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the same industry. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995).

required, in performing certain duties of the proffered position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here.

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.<sup>6</sup>

The petitioner states that it was established in 2004. However, the record contains no evidence pertinent to anyone who held the proffered position before the petitioner began to employ the beneficiary. The petitioner has not, therefore, demonstrated that it normally requires a minimum of a bachelor's degree in a specific specialty or its equivalent for the proffered position and has not satisfied the criterion of 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, such as establishing and carrying out company goals, policies, and procedures; directing and overseeing the petitioner's financial and budgetary activities; managing general activities related to making products and providing services, etc., contain no indication of a nature so specialized and complex they require knowledge usually associated attainment of a minimum of a bachelor's degree in a specific specialty or its equivalent. The evidence of record does not, therefore, satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. That the petitioner has not been employing the beneficiary in a specialty

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<sup>6</sup> While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in a specific specialty or its equivalent. See *Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and 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").

occupation position is an additional basis for finding that the petitioner has violated the terms and conditions of H-1B employment.

Further, the evidence shows that the petitioner's president stated that the beneficiary provides operational assistance to two other restaurants, the [REDACTED]. The petitioner has not demonstrated that it, rather than some other entity, owns those two restaurants. The evidence indicates, therefore, that the beneficiary may have been working for companies other than the petitioner. This appears to be another violation of the terms and conditions of H-1B status.

Additionally, on the visa petition, the petitioner stated that it employs six workers. More recently, in his June 26, 2014 letter, the petitioner's president stated that it now employs seven full-time workers. We observe that the petitioner filed a previous visa petition, [REDACTED] to employ the beneficiary in the proffered position. That petition was approved for employment from October 1, 2009 to September 30, 2012 at a salary of \$46,000 per year.

The petitioner's 2011 tax return indicates that the petitioner paid Line 8, Salaries and wages of \$92,082 during that year.<sup>7</sup> That amount appears to be insufficient to pay six or seven workers, especially as the petitioner was obliged to pay the beneficiary \$46,000 during that year.

The petitioner's 2012 tax return indicates that the petitioner paid Line 8, Salaries and wages of \$45,311 during that year. That amount appears to be insufficient to pay six or seven full-time workers, especially as the petitioner was obliged to pay the beneficiary approximately \$34,500 out of that amount during that year.<sup>8</sup>

The petitioner's 2013 tax return indicates that the petitioner paid Line 8, Salaries and wages of \$64,944 during that year. That amount appears to be insufficient to pay six or seven workers.

The amount the petitioner claimed on its tax returns to have paid in wages appears to conflict with the number of workers the petitioner claims to employ. 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, 591-92 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record with independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* At 591-592.

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<sup>7</sup> All of the petitioner's tax returns indicate that it reports taxes pursuant to the calendar year.

<sup>8</sup> The previous visa petition was approved for employment through September 30, 2012 at \$46,000 per year. Pursuant to her employment during those first nine months of 2012, the petitioner was obliged to pay the beneficiary approximately \$34,500. ( $\$46,000 \times \frac{3}{4}$ .)

Further, the figures on the petitioner's tax returns suggest that the petitioner has not been paying the beneficiary the full amount of the wages proffered in the H-1B visa petitions. This, too, appears to be a violation of the terms and conditions of H-1B visa employment.

Upon review of the record, we find that the NOIR placed the petitioner on notice that revocation of the approval of the petition was contemplated within the scope of the revocation-on-notice provisions, specifically, that the approval of the petition violated the regulatory requirements regarding the proffered position at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

We find that, fully considered in the context of the entire record of proceedings, the petitioner's response to the NOIR failed to overcome the grounds specified in the NOIR for revoking the petition. The appeal will be dismissed and approval of the visa petition will remain revoked on that basis.

#### V. CONCLUSION

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. Approval of the visa petition remains revoked.