

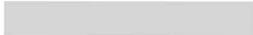


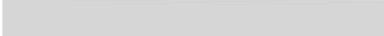
U.S. Citizenship
and Immigration
Services

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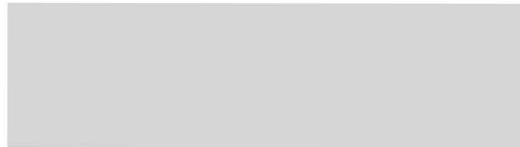
DATE: **JUL 08 2015**

PETITION RECEIPT #: 

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:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

I. PROCEDURAL BACKGROUND

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a seven-employee "Restaurant/Market" firm established in [REDACTED]. In order to employ the beneficiary in what it designates as a "Food Service Manager Hospitality Consultant" 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 the evidence insufficient to establish: (1) that the proffered position qualifies for classification as a specialty occupation position; (2) that the beneficiary is qualified to work in a specialty occupation position; and (3) that the beneficiary has maintained her nonimmigrant status. On appeal, the petitioner asserts that the Director's bases for denial were erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before us contains: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the Director's denial letter; and (5) the Form I-290B and the petitioner's other submissions on appeal.¹ We reviewed the record in its entirety before issuing our decision.²

For the reasons that will be discussed below, we agree with the Director's decision that the petitioner has not established eligibility for the benefit sought. Accordingly, the Director's decision will not be disturbed. The appeal will be dismissed.

II. THE PROFFERED POSITION

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a Food Service Manager position, and that it corresponds to Standard Occupational Classification (SOC) code and title 11-9051, Food Service Managers, from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a wage Level I, food service manager position.

The petitioner stated the following in describing the proposed duties in the Form I-129 Supplement H: "Management/consulting from years of industry experience to assist with the development and growth of a new business."

¹ The petitioner submitted documents with its appeal and in response to our notice dated April 17, 2015.

² We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

In a letter dated April 1, 2014, [REDACTED] stated the following duties of the proffered position:

Food, retail & beverage ordering, employee hiring, employee scheduling, employee training, catering & menu consulting with clients, daily menu planning in restaurant, organizing special events to promote business such as, food tastings and wine tastings, interaction with purveyors, food cost analysis and control, financial reporting to Ownership.

A one-page document that appears to be a draft and part of a longer document states that the beneficiary will be responsible for the following:³

[E]stimating food and beverage costs, dealing with suppliers and arranging for delivery of inventory, planning and approving menus and setting prices. She is required to perform these tasks while ensuring that the daily upscale offerings are made in-house, fresh, to-order and that the budgeting and profitability are aligned. At the same time, the position requires the candidate to coordinate all aspects of food and beverage management with the special events planning and personal gourmet division. Duties can include filling the gourmet shopping orders, facilitating the purchasing and coordinating with the chef for the personally crafted and prepared meals, as well as large culinary and special events planning for charities, private parties, weddings, wine tastings and other special events. In this regard, [the beneficiary] may need to perform a variety of event planning duties in concert with the management of food and beverage and subordinate staff.

For example she may need to help plan the scope of a special event (locations, food and beverage budgets,), inspect venues to ensure the services of [the petitioner] can be exercised to the requisite quality and standards, factor in party sizes to coordinate the timing and service of the culinary creations, coordinate the services for execution of the event (transportation of food, food service, etc.), instruct subordinate employees and coordinate schedules for on and off-site events, and ensure operational control at the facility while coordinating off-site events.

In addition to the above, the position requires the direct supervision of staff, reporting to owners and fiscal management. [The beneficiary] is responsible for training, team management, hiring and dismissing employees, innovation and implementation of food service policy, overseeing customer service and ensuring that the business maintains its upscale character.

³ "The services change daily, depending on the needs of the customers or type of event. Attached as Exhibit 'M' you will find examples." is crossed out with blue ink.

[Verbatim.]

The first sentence of this one-page document states that "luxury food service businesses to require a Bachelor's Degree in Management" and that "the particular position offered to [the beneficiary] is so unique that it can only be performed by an individual with a degree such as hers."

III. SPECIALTY OCCUPATION

We will first address the specialty occupation basis of denial. We find that the evidence of record does not establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

A. Legal Framework

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 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. Analysis

A baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position

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

We recognize the 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.⁴ The *Handbook* states the following with regard to the 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.

⁴ 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.

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.

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-4> (last visited June 19, 2015).

The *Handbook* makes clear that food service managers do not, as a category, require a minimum of a bachelor's degree or the equivalent, as it indicates that a high school diploma is sufficient for many positions. Further, even as to those food service manager positions that may require some post-secondary education, the *Handbook* does not indicate that they require a bachelor's degree, nor that the post-secondary studies must be in any specific specialty.

In certain instances, the *Handbook* is not determinative. When the *Handbook* does not support the proposition that a proffered position is one that meets the statutory and regulatory provisions of a specialty occupation, it is incumbent upon the petitioner to provide persuasive evidence that the proffered position more likely than not satisfies this or one of the other three criteria, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other objective, authoritative sources) that supports a finding that the particular position in question qualifies as a specialty occupation. Whenever more than one authoritative source exists, an adjudicator will consider and weigh all of the evidence presented to determine whether the particular position qualifies as a specialty occupation. However, the record of proceeding does not contain sufficient persuasive documentary evidence from any other authoritative source to establish that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

The *Handbook* does not support the claim that the occupational category of food service managers is one for which normally the minimum requirement for entry is a baccalaureate degree (or higher) in a specific specialty, or its equivalent. Even if it did (which it does not), the record lacks sufficient evidence to support a finding that the particular position proffered here, an entry-level food service manager position (as indicated on the LCA), would normally have such a minimum, specialty degree requirement or its equivalent. The duties and requirements of the position as described in the record of proceeding do not indicate that this particular position proffered by the petitioner is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The requirement of a baccalaureate or higher degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations

Next, we will review the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common for 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.

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* (or other independent, authoritative source) reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Thus, we incorporate by reference the previous discussion on the matter. Also, there are no submissions from the industry's professional association, if any, indicating that it has made a degree a minimum entry requirement. Furthermore, the petitioner did not submit any letters or affidavits from similar firms or individuals in the petitioner's industry attesting that such firms "routinely employ and recruit only degreed individuals."

The petitioner did provide vacancy announcements for positions entitled: Beverage Manager – Operations, Restaurant Manager, Fresh Food Manager, Food and Beverage Director, Food & Beverage Manager III, and Catering Manager – Healthcare. The organizations that placed those announcements include the [REDACTED]

[REDACTED] which was seeking to fill a position in a hospital. The petitioner has not sufficiently demonstrated that any of

the vacancies in those announcements are in the petitioner's industry and in organizations similar to the petitioner, and some are clearly not.

Further, none of those vacancy announcements state a requirement of a minimum of a bachelor's degree in a specific specialty, or its equivalent. One states, "Position requires a Bachelor's Degree or an Associate's Degree," which makes clear an associate's degree would be an acceptable educational preparation for the position and that it does not, therefore, require a minimum of a bachelor's degree.

One vacancy announcement states, "Associates or Bachelors Degree in related discipline *preferred*." [Emphasis added.] Another states, "Bachelor's Degree (BA) in Food & Beverage Management or related field *preferred*." [Emphasis added.] In addition to one of those vacancy announcements indicating that an associate's degree would be a sufficient educational qualification for the position it announces, both vacancy announcements only states a *preference* for a degree. A preference is not, of course, a minimum requirement. Another vacancy announcements states, "High School Diploma or equivalent preferred (additional coursework, training, or certification will be required.)" This vacancy announcement does not state a requirement of a minimum of a bachelor's degree in a specific specialty, or its equivalent.

One vacancy announcement requires, a "Bachelor's degree (BA) from four-year college or university or equivalent experience." First, that vacancy announcement does not require a minimum of a bachelor's degree *in a specific specialty* or its equivalent. Further, it indicates that the hiring authority would accept some type and amount of experience as equivalent to a bachelor's degree, but without specifying what type or amount.

Further still, the petitioner has designated the proffered position as a wage Level I position on the LCA, indicating that it is an entry-level position for an employee who has only basic understanding of the occupation.⁵ Most of the vacancy announcements provided contain a requirement of experience in food service management. The positions they announce are therefore positions for experienced food service managers and have not, therefore, been shown to be positions parallel to the proffered position, a wage Level I, entry-level, position.

Finally, even if all of the vacancy announcements were for parallel positions in the petitioner's industry, with organizations that are otherwise similar to the petitioner, and stated a requirement minimum of a bachelor's degree in a specific specialty or its equivalent, the evidence of record does not demonstrate what statistically valid inferences, if any, can be drawn from the vacancy

⁵ For an explanation of wage levels, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

announcements provided with regard to the common educational requirements for entry into parallel positions in similar organizations.⁶

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 particular position is so complex or unique that it can be performed only by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent

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." The record does not credibly demonstrate exactly what the beneficiary will do on a day-to-day basis such that complexity or uniqueness can be determined. Furthermore, the record does not sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of food service manager/hospitality consultant.

Specifically, the evidence of record does not 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 required, in performing certain duties of the proffered position, the evidence of record does not 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.

Further, as was also noted above, the LCA submitted in support of the visa petition is approved for a wage Level I employee, an indication that the proffered position is an entry-level position for an

⁶ 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 evidence of record does not establish the relevance of the job advertisements submitted to the position proffered in this case. Even if their relevance had been established, the evidence of record still fails to demonstrate what inferences, if any, could 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).

employee who has only a basic understanding of the occupation.⁷ This does not support the proposition that the proffered position is so complex or unique that it can only be performed by a person with a specific bachelor's degree, especially as the *Handbook* suggests that food service management positions typically do not require such a degree.

Therefore, the evidence of record does not establish that this position is significantly different from other positions in the occupation such that it refutes the *Handbook's* information to the effect that there is a spectrum of educational qualifications acceptable for such positions, including high school diplomas, associate's degrees, and bachelor's degrees that are not in a specific specialty. In other words, the record lacks sufficiently detailed information to 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. As the evidence of record does not demonstrate how the proffered position is so complex or unique relative to other positions within the same occupational category that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The employer normally requires a baccalaureate or higher degree in a specific specialty, or its equivalent, for the position

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.

In a letter dated April 1, 2014, [REDACTED] the petitioner's owner, stated: "[The proffered] position was not previously occupied as the ownership was extremely active in order to launch the business." The record does not indicate that any of the petitioner's owners have degrees in a subject closely related to food service management.

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To

⁷ The issue here is that the petitioner's designation of this position as a Level I, entry-level position undermines its claim that the position is particularly complex, specialized, or unique compared to other positions *within the same occupation*. Nevertheless, it is important to note that a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation. In certain occupations (doctors or lawyers, for example), an entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty or its equivalent. That is, a position's wage level designation may be a consideration but is not a substitute for a determination of whether a proffered position meets the requirements of section 214(i)(1) of the Act.

this end, we usually review the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

A first-time hiring for a position is certainly not a basis for precluding a position from recognition as a specialty occupation. However, it is unclear how an employer that has never recruited and hired for the position would be able to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a demonstration that it normally requires at least a bachelor's degree in a specific specialty or its equivalent for the position. We cannot conclude that the petitioner has satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

While a petitioner may believe or otherwise assert that a proffered position requires a specific 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 petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation"). Here, the evidence of record does not establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

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 in a specific specialty, or its equivalent

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that 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 contain insufficient indication of specialization and complexity that would require a specific bachelor's degree. Further, as was noted above, the petitioner filed the instant visa petition for a wage Level I food service manager position, a position for a beginning-level employee with only a basic understanding of food service management. This does not support the proposition that the nature of the specific duties of the proffered position is so specialized and complex that their performance is usually associated with the attainment of a minimum of a bachelor's degree in a specific specialty or its equivalent, directly related to food service

management, especially as the *Handbook* indicates that some food service management positions require no such degree.

For the reasons discussed above, the evidence of record does not satisfy the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The evidence of record does not 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.

IV. BENEFICIARY'S QUALIFICATIONS

Another basis for the decision of denial is the Director's finding that the petitioner did not demonstrate that the beneficiary is qualified to perform services in a specialty occupation. The record of proceeding contains insufficient evidence to establish that the beneficiary is qualified to perform the duties of a specialty occupation position.

A. Legal Framework

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
 - (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In implementing section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have [a] education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and [b] have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Therefore, to qualify an alien for classification as an H-1B nonimmigrant worker under the Act, the petitioner must establish that the beneficiary possesses the requisite license or, if none is required, that he or she has completed a degree in the specialty that the occupation requires. Alternatively, if a license is not required and if the beneficiary does not possess the required U.S. degree or its foreign degree equivalent, the petitioner must show that the beneficiary possesses both (1) education, specialized training, and/or progressively responsible experience in the specialty equivalent to the completion of such degree, and (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In order to equate a beneficiary's credentials to a U.S. baccalaureate or higher degree, the provisions at 8 C.F.R. § 214.2(h)(4)(iii)(D) require one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;⁸
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant

⁸ The petitioner should note that, in accordance with this provision, we will accept a credential evaluation service's evaluation of *education only*, not training and/or work experience.

certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience

In accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D)(5):

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;⁹
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

⁹ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. 8 C.F.R. § 214.2(h)(4)(ii). A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. *Id.*

B. Analysis

The record does not indicate that the beneficiary has any postsecondary education. The beneficiary may only be shown to have the equivalent of a bachelor's degree in a specific specialty pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), which is set out above. That equivalence must be shown either by the evaluation described at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) or by a USCIS finding as described at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

The record contains evidence that the beneficiary has previously worked in the food service industry. However, the record does not contain an evaluation of the beneficiary's employment experience in terms of its equivalence to a college education and degree.¹⁰ The beneficiary has not been shown to have the equivalent of a college degree pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

The remaining regulation pursuant to which the petitioner might show that the beneficiary is qualified to work in a specialty occupation position is 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). However, although the record contains evidence pertinent to the beneficiary's previous experience, it contains insufficient evidence that the beneficiary has received recognition of expertise in the specialty evidenced by any of the indices listed at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(i) through (v). Evidence in satisfaction of one or more of those indices is required for a finding pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).¹¹

¹⁰ In the appeal brief, the petitioner asserted that an evaluation was submitted with a previous Form I-129 visa petition, filed for the beneficiary by a different employer. The petitioner asserted that it was unable to obtain a copy of that evaluation during the time available, but that if accorded additional time it would either obtain a copy of that previous evaluation or commission a new evaluation.

Evidence that the beneficiary is qualified to work in the proffered position is part of the petitioner's initial evidence, to be submitted with the visa petition. Because such evidence was not submitted with the visa petition, the service center, in the January 30, 2014 RFE, requested an evaluation of the beneficiary's qualifications. No evaluation was included in the response to that RFE received by USCIS on April 29, 2014. The Form I-290B appeal in this matter was submitted on July 7, 2014, but was not accompanied by an evaluation of the beneficiary's qualifications. Subsequently, on August 7, 2014, the petitioner submitted the appeal brief and some additional evidence, but not the required evaluation. We issued a notice to the petitioner on April 17, 2015 regarding signature discrepancies in the file and provided the petitioner an opportunity to "supplement the appellate brief with respect to any issue in this proceeding." As of the date of this decision, the evidence of record does not contain an evaluation of the beneficiary's qualifications.

¹¹ The interpretation of 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) is a matter strictly for USCIS determination, and by the clear terms of the rule, experience will merit a positive determination only to the extent that the record of proceeding establishes all of the qualifying elements at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) – including, but not limited to, a type of recognition of expertise in the specialty occupation.

The petitioner has not shown, pursuant to the requirements of the salient regulations, that the beneficiary is qualified to work in any specialty occupation. The appeal will be dismissed and the visa petition denied for this additional reason.

V. MAINTENANCE OF NONIMMIGRANT STATUS

The remaining basis of the decision of denial is the Director's determination that the beneficiary failed to maintain her nonimmigrant status and that this failure precludes an extension of stay or a change of nonimmigrant status. As issues surrounding the beneficiary's maintenance of nonimmigrant status are within the sole discretion of the Director, we do not have jurisdiction over this matter. Accordingly, we will not address this issue.

VI. CONCLUSION

As set forth above, we find that the evidence of record does not sufficiently establish that the proffered position qualifies for classification as a specialty occupation. We also find that the evidence of record is insufficient to establish the beneficiary's qualifications for the proffered position. Accordingly, the appeal will be dismissed and the petition denied.

An application or petition that does not comply with the technical requirements of the law may be denied by us even if the service center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that we conduct appellate review on a *de novo* basis).

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of the enumerated grounds. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1037, *aff'd*, 345 F.3d 683; see also *BDPCS, Inc. v. Fed. Communications Comm'n*, 351 F.3d 1177, 1183 (D.C. Cir. 2003) ("When an agency offers multiple grounds for a decision, we will affirm the agency so long as any one of the grounds is valid, unless it is demonstrated that the agency would not have acted on that basis if the alternative grounds were unavailable.").

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.