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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

[Redacted]

DATE: **MAY 01 2015** OFFICE: VERMONT SERVICE CENTER FILE: [Redacted]

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

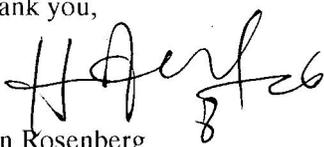
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:
[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

I. INTRODUCTION

On the Form I-129 visa petition, the petitioner describes itself as a seven-employee¹ Italian market, bakery and restaurant² established in [REDACTED]. In order to employ the beneficiary in what it designates as a full-time operations manager position at a salary of \$68,751.54 per year³ the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, concluding that the evidence of record does not demonstrate: (1) that the proffered position qualifies for classification as a specialty occupation; and (2) that the beneficiary is qualified to perform the duties of a specialty occupation.

The record of proceeding before us contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, we find that the evidence of record does not overcome the director's grounds for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

II. SPECIALTY OCCUPATION

We will first address the director's finding that the proffered position is not a specialty occupation. Based upon a complete review of the record of proceeding, we find that the evidence of record does not establish that the position as described constitutes a specialty occupation.

¹ On the Form I-129, the petitioner indicates that it has between 10 and 16 employees during the month of July.

² The petitioner provided a North American Industry Classification System (NAICS) Code of 722511, "Full-Service Restaurants." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "722511 Full-Service Restaurants," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited Apr. 28, 2015).

³ The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the "General and Operations Managers" occupational classification, SOC (O*NET/OES) Code 11-1021, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels.

A. Law

To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [(1)] 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 requires [(2)] 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, the position must also meet one of the following criteria:

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute

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

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

B. The Proffered Position

In the petitioner's letter dated March 27, 2014 and its July 25, 2014 response to the director's RFE, the petitioner stated that the duties of the proffered position would include the following tasks:

In this capacity, [the beneficiary] will be responsible for the operations of the business and he will ensure that all reporting and control procedures relating to the

operations, customer service, product quality, hygiene and cleanliness standards, maintenance and general administration are implemented and in place according to company's policy. Specifically his duties will be as follows:

- Maintain high quality products by ensuring compliance with all operations procedures.
- Meet financial objectives by forecasting requirements; preparing an annual budget; scheduling expenditures; analyzing variances and initiating corrective actions.
- Achieves operational objectives by contributing information and recommendations to strategic plans and reviews; preparing and completing action plans; implementing productivity, quality and customer-service standards; resolving problems; completing audits; identifying trends; determining system improvements; and implementing change as necessary.
- Develop relationships with vendors to ensure we maintain the provision of high quality Italian products, food and beverages.
- Analyze and plan sales levels and profitability.
- Ensure that the food and beverage team can deliver the highest quality food product, with the highest financial return.
- Ensure correct stock and inventory levels are maintained for both the market, bakery and café operations.
- Ensure strict compliance with all relevant hygiene and safety requirements to ensure company complies with government and industry standards.
- Plan and implement new ideas and menu specifications to ensure they fit with guidelines and are to the high quality our customers demand.
- Keep current with latest trends in food nutrition and contribute to the ongoing nutritional developments.
- Consistently review the product range to ensure that all key quality standards are maintained.
- Maintain the food and beverage invoices and manage and monitor expenditures to ensure that costs are kept within allocated budget.
- Develop marketing and promotional strategies to encourage new customers.

- Develop and manage incentive schemes to encourage customer loyalty.
- Review reports on stock and sales, highlighting and acting on any anomalies.
- Enforce and support all training and development plans for all staff under his supervision as per company's policy.
- Encourage a training culture within the food and beverage team to develop loyalty and a culture that exceeds the very best the industry has to offer.
- Monitor employees by analyzing store reports, employee scheduling and productivity.
- Create and operate within efficient labor budget, tracking labor spending and providing input regarding capital projects and initiatives.
- Ensure understanding of security procedures by all employees.
- Provide constant leadership, counselling, advice and feedback to employees and provide an environment of openness and trust, with constant feedback and performance coaching.

The bullet-pointed duties listed above were also mentioned in counsel's September 3, 2014 brief submitted in support of the appeal.

C. The Letter From Assistant Professor [REDACTED] Submitted As Expert Testimony

Before reviewing the director's decision, we will first discuss why we will accord no probative value to the letter submitted from Professor [REDACTED] an Assistant Professor in the Hospitality and Tourism Management Department at the [REDACTED]

In his July 29, 2014 letter, Professor [REDACTED] (1) describes the credentials that he asserts qualify him to assess the nature of the proffered position, (2) briefly lists the duties proposed for the beneficiary, and (3) states his belief that the performance of the duties he lists requires "a Bachelor's program in Food and Service Management or a closely related field."

Upon review, we find that Professor [REDACTED] letter does not constitute probative evidence of the proffered position satisfying any criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A).

First, Professor [REDACTED] does not provide any information with regard to studies, treatises, statistical surveys, authoritative industry sources, U.S. Department of Labor resources, or any other relevant and authoritative sources of which he may have specialized knowledge that would merit deference or special weight to the particular opinion that he offers in this case.

Moreover, the letter is not accompanied by, and does not expressly state the full content of, whatever documentation and/or oral transmissions upon which it may have been based. For instance, Professor [REDACTED] does not indicate whether he visited the petitioner's business premises or communicated with anyone affiliated with the petitioner as to what the performance of the general list of duties he cites would actually require. Nor does Professor [REDACTED] articulate whatever familiarity he may have obtained regarding the particular content of the work products that the petitioner would require of the beneficiary. To the contrary, he simply lists the duties of the position in the same bullet-pointed fashion as provided in the petitioner's support letter, and does not discuss them in any meaningful detail. While there is no standard formula or "bright line" rule for producing a persuasive opinion regarding the educational requirements of a particular position, a person purporting to provide an expert evaluation of a particular position should establish greater knowledge of the particular position in question than Professor [REDACTED] has done here.

Furthermore, Professor [REDACTED] description of the position does not indicate that he considered, or was even aware of, the fact that the petitioner submitted an LCA certified for a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation which, as discussed below, signifies that the beneficiary is only expected to possess a basic understanding of the occupation. In any event, he nowhere discusses this aspect of the proffered position. We consider this a significant omission, in that it suggests an incomplete review of the position in question and a faulty factual basis for his ultimate conclusion as to the educational requirements of the position at issue.

As noted earlier, the LCA submitted by the petitioner in support of the instant position was certified for use with a job prospect located within the "General and Operations Managers" occupational category, SOC (O*NET/OES) Code 11-1021, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels. The *Prevailing Wage Determination Policy Guidance* issued by DOL states the following with regard to Level I wage rates:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.⁴

The proposed duties' level of complexity, uniqueness, and specialization, as well as the level of independent judgment and occupational understanding required to perform them, are therefore

⁴ 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 (last visited Apr. 28, 2015).

questionable, as the petitioner submitted an LCA certified for a Level I, entry-level position. A Level I wage is only appropriate for a position requiring only "a basic understanding of the occupation" expected of a "worker in training" or an individual performing an "internship." That designation indicates further that the beneficiary will only be expected to "perform routine tasks that require limited, if any, exercise of judgment."⁵ The LCA's wage-level indicates that the proffered position is actually a low-level, entry position relative to others within the same occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to possess a basic understanding of the occupation; that he will be expected to perform routine tasks requiring limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

Professor [REDACTED] omission of such an important factor as the LCA wage-level significantly diminishes the evidentiary value of his assertions.

We may, in our discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

For all of these reasons, we find that Professor [REDACTED] letter is not probative evidence towards satisfying any criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). For the sake of economy, we hereby incorporate the above discussion and findings into our analysis of each of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

D. Review of the Director's August 14, 2014 Decision Denying the Petition

We will now discuss the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

We will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which is satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition.

We recognize the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.⁶ The LCA that the petitioner submitted in support of this petition was

⁵ *Id.*

⁶ The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. Our references to the *Handbook* are from the 2014-15 edition available online.

certified for a job offer located within the "General and Operations Managers" occupational category.

As noted above, the LCA that the petitioner submitted in support of this petition was certified for a job offer located within the "General and Operations Managers" occupational category. This occupational category from the SOC is listed in the *Handbook* under the "Top Executives" occupational category. The *Handbook* states the following with regard to the duties of positions falling within the "Top Executives" occupational category:

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.

Id. at <http://www.bls.gov/ooh/management/top-executives.htm#tab-2> (last visited Apr. 28, 2015).

The *Handbook* states the following with regard to the educational requirements necessary for entrance into positions located within the "Top Executives" occupational category:

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

Education

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

Work Experience in a Related Occupation

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

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

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

Licenses, Certifications, and Registrations

Top executives may complete a certification program through the Institute of Certified Professional Managers to earn the Certified Manager (CM) credential. To become a CM, candidates must meet education and experience requirements and pass three exams.

Although not mandatory, certification can show management competency and potential leadership skills. Certification can also help those seeking advancement or can give jobseekers a competitive edge.

Important Qualities

Communication skills. Top executives must be able to communicate clearly and persuasively. They must effectively discuss issues and negotiate with others, direct subordinates, and explain their policies and decisions to those within and outside the organization.

Decision-making skills. Top executives need decision-making skills when setting policies and managing an organization. They must assess different options and choose the best course of action, often daily.

Leadership skills. Top executives must be able to lead an organization successfully by coordinating policies, people, and resources.

Management skills. Top executives must organize and direct the operations of an organization. For example, they must manage business plans, employees, and budgets.

Problem-solving skills. Top executives need problem-solving skills after identifying issues within an organization. They must be able to recognize shortcomings and effectively carry out solutions.

Time-management skills. Top executives must be able to do many tasks at the same time, typically under their own direction, to ensure that their work gets done and that they meet their goals.

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-4> (last visited Apr. 28, 2015).

These statements from the *Handbook* do not indicate that a bachelor's degree in a specific specialty, or the equivalent, is normally required for entry into positions located within this occupational category. Instead, the *Handbook's* information indicates that these positions generally impose no specific degree requirement on individuals seeking employment. The statement that "many" top executives have college degrees is not synonymous with the "normally required" standard imposed by this criterion. To the contrary, that statement does not even necessarily indicate that a majority of top executives possess such a degree. While the *Handbook* indicates that top management positions may be filled by individuals with a broad range of degrees, its subsequent discussion of the training and education necessary for such employment clearly states that companies also hire executives based on lower-level experience within their own organizations or management experience with another business. Moreover, the *Handbook* does not state that those positions which do require a bachelor's degree or the equivalent require that the degree be in a specific specialty.

A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. There must be a close correlation between the required specialized studies and the position; thus, the mere requirement of a degree, without further

specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988) ("The mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility."). Thus, while a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147 (1st Cir. 2007).

Accordingly, as the *Handbook* indicates that entry into positions located within the Top Executives occupational category does not normally require at least a bachelor's degree or the equivalent in a specific specialty or its equivalent, it does not support the proffered position as being a specialty occupation.

Accordingly, inclusion of the proffered position within this occupational category is not in itself sufficient to establish the position as one for which the normal minimum entry requirement is at least a bachelor's or higher degree, or the equivalent, in a specific specialty. Accordingly, as the *Handbook* indicates that entry for positions within the Top Executives occupational category does not normally require at least a bachelor's degree or the equivalent in a specific specialty or its equivalent, it does not support the proffered position as being a specialty occupation.

The materials from O*NET OnLine do not establish that the proffered position satisfies the first criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A), either. O*NET OnLine is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a requirement for a given position, as O*NET OnLine's Job Zone designations make no mention of the specific field of study from which a degree must come. As was noted previously, we interpret 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. The Specialized Vocational Preparation (SVP) rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. For all of these reasons, the information from O*NET OnLine is of little evidentiary value to the issue presented on appeal.

Nor does the record of proceeding contain any persuasive⁸ documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion within any of these

⁸ Counsel submitted information from www.careerinfonet.org for General and Operations Managers in Florida, which states that a bachelor's degree is the typical education needed for entry. However, it does not state that a baccalaureate degree *in a specific specialty*, or its equivalent, is normally the minimum requirement for entry into the particular position. Counsel also submitted an online article from *U.S. News and World Report* which states that many operations managers have a bachelor's or master's degree in business administration, but the specific degree required depends on the hiring organization. The article does not mention the specific degrees. In addition, business administration is a general purpose degree. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a

occupational categories is sufficient in and of itself to establish the proffered position as, in the words of this criterion, a "particular position" for which "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

Finally, it is noted once again that the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation, which signifies that the beneficiary is only expected to possess a basic understanding of the occupation.⁹

As the evidence in the record of proceeding does not establish that at least a baccalaureate degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, we find that the evidence of record does not satisfy 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

particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

We therefore find none of these resources persuasive.

⁹ Again, the *Prevailing Wage Determination Policy Guidance* (available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf (last visited Apr. 28, 2015)) issued by DOL states the following with regard to Level I wage rates:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered [emphasis in original].

The proposed duties' level of complexity, uniqueness, and specialization, as well as the level of independent judgment and occupational understanding required to perform them, are questionable, as the petitioner submitted an LCA certified for a Level I, entry-level position. The LCA's wage-level is appropriate for a proffered position that is actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, by submitting an LCA with a Level I wage rate, the petitioner effectively attests that the beneficiary is only required to possess a basic understanding of the occupation; that she will be expected to perform routine tasks requiring limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

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

The petitioner has provided job postings from a restaurant group, a restaurant franchisor, a pizza shop and a coffee shop. The advertisements submitted by the petitioner do not establish that these employers are both (1) in the petitioner's industry and (2) "similar" to the petitioner in size, scope, and scale of operations, business efforts, expenditures, or any other relevant extent. Furthermore, all of the advertisements require experience, ranging from two to five years. However, as noted above the petitioner submitted an LCA certified for a Level I, entry-level position, therefore indicating that the positions are not parallel to one another. The advertisements do not establish that the positions are parallel to the proffered position and that they are located in organizations that are similar to the petitioner; and they do not satisfy this prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).¹⁰

More importantly, some of these advertisements fail to state a requirement for a bachelor's degree in a specific specialty, or the equivalent. For instance, they accept solely a bachelor's degree, or a bachelor's degree in business, which is a general purpose degree.

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.

Therefore, the evidence of record does not satisfy the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at

¹⁰ 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 record of evidence 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 does not 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).

least a bachelor's degree in a specific specialty or its equivalent that 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.

Next, we find that the evidence of record 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."

In this particular case, the evidence of record does not credibly demonstrate that the duties the beneficiary will perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty or its equivalent.

The record of proceeding does not contain evidence establishing relative complexity or uniqueness as aspects of the proffered position, let alone that the position is so complex or unique as to require the theoretical and practical application of a body of highly specialized knowledge such that a person with a bachelor's or higher degree in a specific specialty or its equivalent is required to perform the duties of that position. Rather, we find, that, as reflected in this decision's earlier quotation of duty descriptions from the record of proceeding, the evidence of record does not distinguish the proffered position from other positions located within the "Top Executives" occupational category, which, the *Handbook* indicates, do not necessarily require a person with at least a bachelor's degree in a specific specialty or its equivalent to enter those positions.

The statements of counsel and the petitioner with regard to the claimed complex and unique nature of the proffered position are acknowledged. However, those assertions are undermined by the fact that the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation. We incorporate here by reference and reiterate our earlier discussion regarding the LCA and its indication that the petitioner would be paying a wage-rate that is only appropriate for a low-level, entry position relative to others within the occupation, as this factor is inconsistent with the relative complexity and uniqueness required to satisfy this criterion. Based upon the wage rate selected by the petitioner, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate indicates that the beneficiary will perform routine tasks requiring limited, if any, exercise of independent judgment; that the beneficiary's work will be closely supervised and monitored; that he will receive specific instructions on required tasks and expected results; and that his work will be reviewed for accuracy.

Accordingly, given the *Handbook's* indication that not all positions located within the "Top Executives" occupational category require at least a bachelor's degree in a specific specialty, or the equivalent, for entry, it is not credible that a position involving limited, if any, exercise of independent judgment, close supervision and monitoring, receipt of specific instructions on required tasks and expected results, and close review *would* contain such a requirement.

The evidence of record therefore does not establish that the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with at least a bachelor's degree in a specific specialty or its equivalent.

Consequently, as it has not been shown that the particular position for which this petition was filed is so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty or its equivalent, the evidence of record does not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

We turn next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty or its equivalent for the position.

Our review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and employees who previously held the position in question.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. Additionally, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position.¹¹

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 the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

The director's May 6, 2014 RFE specifically requested the petitioner to document its past recruiting and hiring history with regard to the proffered position. The director stated:

If you have previously employed individuals in the position of Operations Manager, submit documentary evidence such as W-2 Forms and copies of degrees and transcripts to verify:

¹¹ Any such assertion would be undermined in this particular case by the fact that the petitioner indicated in the LCA that its proffered position is a comparatively low, entry-level position relative to others within the same occupation.

- The number of individuals you have employed in this position in the past;
- The level of education held by each individual; and
- The field of study in which the degree was earned.

The record does not include any of the types of evidence mentioned in the RFE. While a first-time hiring for a position is certainly not a basis for precluding a position from recognition as a specialty occupation, 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.¹²

As the record of proceeding does not demonstrate that the petitioner normally requires at least a bachelor's degree in a specific specialty or its equivalent for the proffered position, it does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next, we find that the evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specific specialty or its equivalent.

In reviewing the record of proceeding under this criterion, we reiterate our earlier discussion regarding the *Handbook's* entries for positions falling within the "Top Executives" occupational category. Again, the *Handbook* does not indicate that a bachelor's degree in a specific specialty, or the equivalent, is a standard, minimum requirement to perform the duties of such positions (to the contrary, it indicates precisely the opposite). With regard to the specific duties of the position proffered here, we find that the record of proceeding lacks sufficient, credible evidence establishing that they are so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a bachelor's degree in a specific specialty, or the equivalent.

Finally, we find that both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, by the submission of an LCA certified for a Level I wage-level, the petitioner effectively attests that the proposed duties are of relatively low complexity as compared to others within the same occupational category. This fact is materially inconsistent with the level of complexity required by this criterion.

As earlier noted, the *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

Level I (entry) wage rates are assigned to job offers for beginning level employees who

¹² See also *Caremax Inc. v. Holder*, ___ F.Supp. 2d ___, 2014 WL 1493621 (N.D. Cal. 2014) ("If this is [the petitioner's] first-ever public relations specialist position, then the company cannot claim that it typically requires a bachelor's degree in English.")

have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered [emphasis in original].

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 (last visited Apr. 28, 2015).

The pertinent guidance from DOL, at page 7 of its *Prevailing Wage Determination Policy Guidance* describes the next higher wage-level as follows:

Level II (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

Id.

The above descriptive summary indicates that even this higher-than-designated wage level is appropriate for only "moderately complex tasks that require limited judgment." The fact that this higher-than-here-assigned, Level II wage-rate itself indicates performance of only "moderately complex tasks that require limited judgment," is very telling with regard to the relatively low level of complexity imputed to the proffered position by virtue of the petitioner's Level I wage-rate designation.

Further, we note the relatively low level of complexity that even this Level II wage-level reflects when compared with the two still-higher LCA wage levels, neither of which was designated on the LCA submitted to support this petition.

The aforementioned *Prevailing Wage Determination Policy Guidance* describes the Level III wage designation as follows:

Level III (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained,

either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years

of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. . . .

Id.

The *Prevailing Wage Determination Policy Guidance* describes the Level IV wage designation as follows:

Level IV (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

Id.

Here we again incorporate our earlier discussion and analysis regarding the implications of the petitioner's submission of an LCA certified for the lowest assignable wage-level. As already noted, by virtue of this submission, the petitioner effectively attested to DOL that the proffered position is a low-level, entry position relative to others within the same occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II).

For all of these reasons, the evidence in the record of proceeding does not establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As the evidence of record does not satisfy at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation.

III. BENEFICIARY QUALIFICATIONS

The director also found that the beneficiary would not be qualified to perform the duties of the proffered position if the job had been determined to be a specialty occupation. However, a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the proffered position does not require a baccalaureate or higher degree in a specific specialty or its equivalent. Therefore, we need not and will not address the beneficiary's qualifications further, except to note for the record that we agree

with the director's determination that the evidence of record does not demonstrate that the beneficiary qualifies to perform the duties of a specialty occupation.

IV. PREVIOUS H-1B APPROVAL

The petitioner submitted evidence that USCIS approved a petition counsel filed on behalf of one of his other clients for an operations manager in 1997. The director's decision does not indicate whether she reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, we would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

V. CONCLUSION AND ORDER

For the reasons discussed above, we conclude (1) that the evidence of record does not demonstrate that the duties of the proffered position comprise a specialty occupation; and (2) that the beneficiary is qualified to perform the duties of a specialty occupation.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.