

(b)(6)

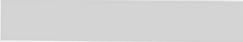
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

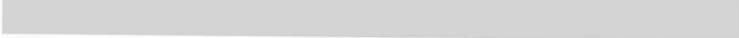


U.S. Citizenship
and Immigration
Services



DATE: **MAY 26 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,

A large, stylized handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition. The petitioner filed a combined motion to reopen and motion to reconsider. Upon review, the Director affirmed her decision denying the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

I. FACTUAL AND PROCEDURAL BACKGROUND

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center. In the Form I-129 visa petition, the petitioner describes itself as a hotel that was established in [REDACTED]. In order to employ the beneficiary in what it designates as a food service manager position, 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 reviewed the information and determined that the petitioner had not established eligibility for the benefit sought. The Director denied the petition, concluding that the petitioner did not establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. The petitioner submitted a combined motion to reopen and motion to reconsider, and the Director affirmed her decision denying the petition. Thereafter, the petitioner submitted an appeal.

The record of proceeding contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the Director's decision dated February 11, 2013; (5) the Notice of Appeal or Motion (Form I-290B) ([REDACTED]); (6) the Director's decision dated September 8, 2014; and (7) the Form I-290B ([REDACTED]) and supporting documentation.¹ We reviewed the record in its entirety before issuing our decision.²

For the reasons that will be discussed below, we find that the petitioner has not established eligibility for the benefit sought. The appeal is dismissed and the petition remains denied.

II. SPECIALTY OCCUPATION

The primary issue is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position.

¹ We observe that on motion and on appeal the petitioner repeatedly references the proffered position as "housekeeping manager." No explanation for this discrepancy was provided. Thus, we must question the accuracy of the documents and whether the information provided is correctly attributed to this particular petitioner, position, and beneficiary.

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

A. Legal Framework

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must 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.

In ascertaining the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a



petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

B. Proffered Position

In the letter of support, the petitioner states that the beneficiary will perform the following job duties in the proffered position:³

In the position of Food Service Manager, the beneficiary will need to be able to perform all housekeeping functions and ensure that all associates are adhering to hotel policies, standards, procedures and regulations. In this position, the beneficiary will have to assist the resident manager or general manager in all areas to ensure smooth operations. The beneficiary will assist training and development of all associates working for the Food and Beverage department.

In the position of Food Service Manager, [the beneficiary] will be responsible for a variety of tasks in coordinating, supervising, and directing all aspects of the food and beverage outlets' operations of the dining facilities at [the petitioner], while maintaining profitable food and beverage outlets and high quality products and service levels.

* * *

- 30% of total work time – Oversee all aspects of the daily operation of the hotel's food and beverage outlets; Be involved in and/or conduct departmental and hotel training.
- 20% of total work time – Monitor quality of service in food and beverage outlets by judging appearance and taste of products and checking preparation methods to determine quality; Ensure the training of department heads and employees on SOP's, report preparation and technical job tasks.
- 20% of total work time – Ensure preparation of required reports in a timely manner including, but not limited to, Wage Progress, payroll, revenue, employee

³ It must be noted for the record that the petitioner references the food service manager's functions as housekeeping functions. The record provides no explanation for this inconsistency. Thus, we must question the accuracy of the document and whether the information provided is correctly attributed to this particular petitioner, position, and beneficiary.

schedules, quarterly action plans; Ensure compliance with all local liquor laws, and health and sanitation regulations; Understand, implement and monitor corporate promotions in outlets, including buffet and three-meal concept standards; Interview candidates for front-of-house food and beverage positions and follow standards for hiring approvals; Organize, coordinate and assist in marketing special events in the dining facilities such as receptions, parties and large corporate functions;

- 15% of total work time – Work with other food and beverage managers and keep them informed of food and beverage issues as they arise.
- 10% of total work time – Comply with weekly and monthly forecasting procedures; Attend company management meetings and training as required by management; Participate in required M.O.D. program as scheduled.
- 5% of total work time – Conduct staff performance reviews in accordance with [the petitioner's] standards; Keep immediate supervisor fully informed of all problems or matters requiring his/her attention; Coordinate and monitor all phases of Loss Prevention in the food and beverage outlets; and Perform other duties as requested by management.

In addition, the petitioner provides additional information regarding the supervisory functions, human resources functions, quality of food and service functions, administrative functions, and general functions of the proffered position.⁴

The petitioner also claims that the "Food Service Manager's duties and level of responsibilities are sufficiently complex that the minimum of a baccalaureate degree in Hospitality Management or a related field is required."

C. Material Findings

The primary issue in this matter is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, we will make some preliminary findings that are material to the determination of the merits of this appeal.

⁴ We note that under the heading "Human Resources functions," the petitioner states that "Food Service Managers also conduct staff performance reviews in accordance with [redacted] standards." The petitioner mistakenly references [redacted]. No explanation for this discrepancy was provided. We must therefore question the accuracy of the document and whether the information provided is correctly attributed to this particular petitioner, position, and beneficiary.

Requirements for the Proffered Position

Upon review, we find that the record contains inconsistent information regarding the academic requirements of the proffered position.

- Specifically, in the letter of support, the petitioner stated that the proffered position's "duties and level of responsibilities are sufficiently complex that the minimum of a baccalaureate degree in Hospitality Management or a related field is required."
- However, further in the same letter, the petitioner stated that the proffered position "requires a minimum of a Bachelor's degree or an equivalent Diploma, together with work experience in fine dining. A degree in Hospitality Management is desired."
- In addition, in the same letter, the petitioner stated that "[t]his position requires a minimum of a Bachelor's degree in Hotel and Restaurant Management, Hospitality Management or an equivalent Diploma, together with professional work experience in the field."
- In response to the Director's RFE, the petitioner stated (through counsel) "[t]his position requires a minimum of a Bachelor's degree or an equivalent Diploma, together with work experience in fine dining. A degree in Hospitality Management or Business Administration is desired."
- Further, the petitioner provided a letter from [REDACTED] which states that the proffered position requires "at least a baccalaureate level of education in Restaurant Management or its equivalent."
- The petitioner also submitted a copy of its internet job vacancy announcement for the proffered position that states that a successful candidate "[m]ust have culinary experience and a bachelors [sic] degree."
- On motion and on appeal, the petitioner claimed (through counsel) that it "requires its candidates for the position of Food Service Manager to have a bachelor's in hotel management or a related field, or its equivalent."

No explanation for the variances in the petitioner's claimed requirements was provided. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In addition, it must be noted that the petitioner's *desire* for a degree in hospitality management or business administration is not an indication of a *requirement* of a degree in one of these disciplines. Furthermore, even assuming for the sake of argument that the petitioner required a bachelor's degree

in business administration for the proffered position, the statement is inadequate to establish that the proposed position qualifies as a specialty occupation. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, 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).

To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study, or its equivalent. As discussed above, 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 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).⁵

D. Labor Condition Application

In support of the petition, the petitioner submitted a Labor Condition Application (LCA) stating that the proffered position falls under the occupational category "Food Service Managers" - SOC (ONET/OES) code 11-9051, at a Level I (entry) wage.

When completing the LCA, wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge,

⁵ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. *See, e.g., Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; *cf. Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.

skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.⁶

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.⁷ DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

The "Prevailing Wage Determination Policy Guidance" issued by the U.S. Department of Labor (DOL) provides a description of the wage levels. A Level I wage rate is described by DOL as follows:

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.

⁶ For additional information on wage levels, see DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

⁷ A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

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.

DOL guidance further indicates that a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones would be an indication that a wage determination at Level II would be proper classification for a position.⁸

The occupational category "Food Service Managers," has been assigned an O*NET Job Zone 3, which groups it among occupations for which medium preparation is needed. More specifically, most occupations in this zone "require training in vocational schools, related on-the-job experience, or an associate's degree." See O*NET OnLine Help Center, available at <http://www.onetonline.org/help/online/zones>, for a discussion of Job Zone 3.

In the instant case, the petitioner designated the proffered position as a Level I position. This suggests that the petitioner's academic and/or professional experience requirements for the position would be *less than* "training in vocational schools, related on-the-job experience, or an associate's degree" as stated for occupations designated as O*NET Job Zone 3. Accordingly, the designation of the proffered position as a Level I (entry) position (relative to others within the occupational category) suggests that an educational credential falling short of a bachelor's degree would be sufficient to perform the tasks of the proffered position.

E. Analysis

We will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

We recognize DOL's *Occupational Outlook Handbook* (hereafter the *Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it

⁸ A Level II wage rate is described by DOL 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.

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.

addresses. As previously discussed, the petitioner attested in the LCA that the proffered position falls under the occupational category "Food Service Managers."

We reviewed the chapter of the *Handbook* entitled "Food Service Managers," including the sections regarding the typical duties and requirements for this occupational category.⁹ However, the *Handbook* does not indicate that "Food Service Managers" comprise an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry.

The subchapter of the *Handbook* entitled "How to Become a Food Service Manager" states the following about this occupational category:

Most applicants qualify with a high school diploma and long-term work experience in the food service industry as a cook, waiter or waitress, or counter attendant. However, some receive training at a community college, technical or vocational school, culinary school, or at a 4-year college.

Education

Although a bachelor's degree is not required, some postsecondary education is increasingly preferred for many manager positions, especially at upscale restaurants and hotels. Some food service companies and national or regional restaurant chains recruit management trainees from college hospitality or food service management programs, which require internships and real-life experience to graduate.

Many colleges and universities offer bachelor's degree programs in restaurant and hospitality management or institutional food service management. In addition, numerous community and junior colleges, technical institutes, and other institutions offer programs in the field leading to an associate's degree. Some culinary schools offer programs in restaurant management with courses designed for those who want to start and run their own restaurant.

Regardless of length, nearly all programs provide instruction in nutrition, sanitation, and food planning and preparation, as well as courses in accounting, business law, and management. Some programs combine classroom and practical study with internships.

⁹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. Our references to the *Handbook* are to the 2014 – 2015 edition available online. We hereby incorporate into the record of proceeding the chapter of the *Handbook* regarding "Food Service Managers."

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Food Service Managers, available at <http://www.bls.gov/ooh/management/food-service-managers.htm#tab-4> (last visited May 20, 2015).

The *Handbook* does not indicate that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupation. The *Handbook* specifically states that a bachelor's degree is not required for food service managers. The narrative of the *Handbook* also states that some postsecondary education is increasingly "preferred" for "many" (but not necessarily all, or even most) manager positions, especially at upscale restaurants and hotels, but it does not report that "some postsecondary education" necessarily consists of a bachelor's degree or equivalent, let alone one in a specific specialty. Further, the text of the *Handbook* indicates that there are many colleges and universities that offer bachelor's degree programs in restaurant and hospitality management or institutional food service management, but for those that are not interested in a bachelor's degree, there are opportunities to attend community and junior colleges, technical institutes, and other institutions that offer programs in the field leading to an associate's degree. According to the *Handbook*, an associate's degree in restaurant and hospitality management or institutional food service management may qualify for jobs as food service managers.

Upon review, we find that the *Handbook* does not support the claim that the occupational category here 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 – which the petitioner has indicated on the LCA is a Level I (entry) position in relation to others within the occupation) – would normally have such a minimum, specialty degree requirement or its equivalent.

In the instant case, 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).

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 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 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook* (or other independent, authoritative source) reports a standard 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.

The petitioner submitted copies of job advertisements in support of the assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations. However, upon review of the documents, we find that the petitioner's reliance on the job announcements is misplaced.

In the Form I-129, the petitioner stated that it is a hotel with 40 employees. The petitioner also reported its gross annual income as \$3 million, but did not provide its net annual income. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 721110.¹⁰ This NAICS code is designated for "Hotels (except Casino Hotels) and Motels." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This industry comprises establishments primarily engaged in providing short-term lodging in facilities known as hotels, motor hotels, resort hotels, and motels. The establishments in this industry may offer food and beverage services, recreational services, conference rooms and convention services, laundry services, parking, and other services.

U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 721110 – Hotels (except Casino Hotels) and Motels, available at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited May 20, 2015).

For the petitioner to establish that an organization is similar under this criterion of the regulations, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such information, evidence submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner.

We will briefly note that, without more, the job postings do not appear to be from organizations similar to the petitioner.¹¹ When determining whether the petitioner and the organization share the

¹⁰ According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and, each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited May 20, 2015).

¹¹ The postings include the following: (1) several providers of healthcare; (2) a provider of food services,

same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

We further observe that some of the advertisements do not appear to be for parallel positions. For example, the posting from [REDACTED] states that the position is for a food and beverage manager and requires a degree, a minimum of 5 years of experience in the hospitality industry, and at least 2 years of experience as a food and beverage director or assistant food and beverage director. The advertisement for the assistant food service director in [REDACTED] New Jersey also requires a degree, along with "3+ year's successful, similar experience in LTC and or Sub Acute setting and 2+ year successful supervisory experience." In addition, the announcement from [REDACTED] states that the position is for a retail food service manager that requires a degree, a minimum of 8 years of food service experience, and at least 3 to 5 years of retail operational, food service management experience. Similarly, an advertisement for the [REDACTED] for the position of assistant director, food and beverage requires a degree, "plus 4+ years related experience, including management experience" As previously discussed, the petitioner designated its proffered position as a wage level I (entry level) on the LCA. The advertised positions appear to be for more senior positions than the proffered position. More importantly, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to those of the proffered position.

In addition, some postings do not indicate that at least a bachelor's degree in a directly related specific specialty (or its equivalent) is required.¹² For instance, the postings from the following

facilities management, and uniform and career apparel to healthcare institutions, universities and school districts, stadiums and arenas; (3) a not-for-profit, human service agency; and (4) a university. It does not appear that the advertisements are from companies primarily engaged in providing lodging.

¹² As discussed, the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but a bachelor's degree in a specific specialty that is directly related to the duties of the position. See Section 214(i)(1)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

To reiterate, although a general-purpose bachelor's degree, such as a degree in business administration, 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.

In addition, a *preference* for a degree in a field is not an indication of a minimum *requirement*.

In addition, the petitioner submitted a letter from [REDACTED] Executive Human Resource Director for the [REDACTED]. We reviewed the letter from [REDACTED] (the writer) and find that it is almost identical to the petitioner's letter dated November 5, 2012 submitted in response to the RFE. More specifically, the wording of the letters matches virtually verbatim, including grammatical and punctuation errors, as well as the same font type and size, margins, date, etc. When affidavits are worded the same (and include identical errors), it indicates that the words are not necessarily those of the affiant and may cast some doubt on the affidavits' validity.¹⁵

Further, we note that the writer states that the company is a hotel company with three properties. In addition, the writer states that "[t]he job duties of a Food Service Manager are so complex and unique that they may not be performed by an individual who has not attained at least a baccalaureate level of education in Restaurant Management or its equivalent." The writer further states that "we have hired employees for the [food service manager] position with a minimum qualification of a bachelor's degree." We observe that the writer did not provide any documentary evidence to corroborate that she currently or in the past employed individuals in parallel positions to the proffered position, nor did she provide any documentation to substantiate the claimed academic requirements. The writer has not submitted any probative evidence of her organization's recruitment and hiring practices. Thus, the letter is insufficient to establish that a degree requirement in a specific specialty, or its equivalent, is common to the petitioner's industry in parallel positions among similar organizations.

The petitioner also submitted a printout from the Association of Nutrition and Foodservice Professionals website. The printout states that there are four ways to become a certified dietary manager and a certified food protection professional. Specifically, the petitioner references "Pathway II," which states the following:

particular advertising employers' recruiting history for the type of job advertised. As the advertisements are only solicitations for hire, they are not evidence of the actual hiring practices of these employers.

¹⁵ The use of identical language and phrasing across the various letters suggest that the language in the letters is not the authors' own. Cf. *Surinder Singh v. BIA*, 438 F.3d 145, 148 (2d Cir. 2006) (upholding an adverse credibility determination in asylum proceedings based in part on the similarity of the affidavits); *Mei Chai Ye v. U.S. Dept. of Justice*, 489 F.3d 517, 519 (2d Cir. 2007) (concluding that an immigration judge may reasonably infer that when an asylum applicant submits strikingly similar affidavits, the applicant is the common source).

Because the letters appear to have been drafted by someone other than the purported authors, the letters possess little credibility or probative value. In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. See *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

Pathway II: for candidates who hold a two-year or four-year college degree in foodservice management or nutrition, two-year culinary arts degree, or two-year hotel-restaurant management degree.

The printout indicates that an associate's degree or a bachelor's degree would be acceptable for candidates applying for certification. The evidence does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is required.

On motion, the petitioner submitted a letter by [REDACTED] from [REDACTED]. The letter is dated March 1, 2013. We have reviewed the documentation and find that it would not be probative in this matter.

Specifically, [REDACTED] has not adequately established his expertise to render the opinion made in this matter. In his opinion letter and professional summary, [REDACTED] describes his professional credentials in the hospitality industry. However, based upon a complete review of [REDACTED] letter and professional summary, he has not provided sufficient information regarding the basis of his claimed expertise on this particular issue. [REDACTED] claims that he is qualified to comment on the position of food service manager because of his experience in the hospitality industry. Without further clarification, it is unclear how his experience would translate to expertise or specialized knowledge regarding the current recruiting and hiring practices of hotel companies similar to the petitioner for food service manager positions (or parallel positions).

[REDACTED] does not cite specific instances in which his past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication that he has published any work or conducted any research or studies pertinent to the educational requirements for *food service managers* (or parallel positions) in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that he is an authority on those specific requirements. The opinion letter contains no evidence that it was based on scholarly research conducted by [REDACTED] in the specific area upon which he is opining. For instance, in reaching his determination, [REDACTED] provides no documentary support for his ultimate conclusion regarding the education required for the position (e.g., statistical surveys, authoritative industry or government publications, or professional studies). [REDACTED] asserts a general industry educational standard for organizations similar to the petitioner, without referencing any supporting authority or any empirical basis for the pronouncement.

Upon review of the opinion letter, there is no indication that [REDACTED] possesses any knowledge of the petitioner's proffered position. The fact that he attributes a degree requirement to such a generalized treatment of the proffered position undermines the credibility of the opinion letter. [REDACTED] does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. His opinion does not relate his conclusion to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. For example, there is no evidence that [REDACTED] has visited the petitioner's business, observed the petitioner's

employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. [REDACTED] provides general conclusory statements regarding the proffered position, but he does not provide a substantive, analytical basis for his opinion and ultimate conclusions.

Further, there is no indication that the petitioner advised [REDACTED] that it characterized the proffered position as a low, entry-level position relative to other positions falling under the occupational category "Food Service Managers" (as indicated by the wage-level on the LCA). It appears that [REDACTED] would have found this information relevant for his opinion letter. Moreover, without this information, the petitioner has not demonstrated that [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine what would constitute similar positions based upon the job duties and responsibilities.

In summary, and for each and all of the reasons discussed above, we conclude that the advisory opinion rendered by [REDACTED] is not probative evidence to establish the proffered position qualifies as a specialty occupation. The conclusions reached by [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which he reached such conclusions. There is an inadequate factual foundation established to support the opinion and we find that the opinion is not in accord with other information in the record.

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). As a reasonable exercise of its discretion we discount the advisory opinion letter as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, we hereby incorporate the above discussion and analysis regarding the opinion letter into each of the bases in this decision for dismissing the appeal.

On appeal, the petitioner submitted a copy of an H-1B approval notice, LCA and credential evaluation of an individual relating to another petition. The petitioner does not provide any information regarding the petitioning organization in that matter to conduct a meaningfully substantive comparison of its business operations to the petitioner. Thus, the petitioner has not established that the organizations are similar.

Further, the petitioner claims that the individual from that petition is working in a food service manager position. However, the petitioner does not provide any specific information regarding the job duties and day-to-day responsibilities for this food service manager position. There is also no information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, there is insufficient information regarding the duties and responsibilities of this position to determine whether it is the same or parallel to the proffered position. Moreover, we observe that the petitioner did not provide

any documentary evidence to corroborate that the organization currently or in the past employed individuals in parallel positions to the proffered position.

The petitioner also submitted the resumes of individuals from other organizations.¹⁶ Notably, the petitioner did not submit the academic credentials of these individuals, e.g. copies of diplomas, transcripts. Upon review, we find that these individuals are not employed in the proffered position. Thus, the petitioner has not established the relevancy of the documentation to this matter. That is, the educational level of individuals who hold dissimilar positions is not relevant to the instant issue of whether the proffered position qualifies as a specialty occupation.

Thus, based upon a complete review of the record, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in 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. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

We will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner described the proffered position and its business operations. Upon review, we find that the petitioner has not sufficiently developed relative complexity or uniqueness as an aspect of the proffered position. 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 it may believe are so complex and unique. While a few related courses may be beneficial in performing certain duties of the position, the petitioner has not demonstrated 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 proffered position. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record does not establish which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. The LCA indicates a wage level at a Level I (entry) wage, which is the lowest of four assignable wage levels. As previously mentioned, the wage-level of the proffered position indicates that

¹⁶ We note that a resume represents a claim by the individual regarding his/her credentials, rather than evidence to support that claim.

(relative to other positions falling under this occupational category) the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require 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.

Without further evidence, it is not credible that the petitioner's proffered position is complex or unique as such a position falling under this occupational category would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."¹⁷ The evidence of record does not establish that this position is significantly different from other positions in the occupational category such that it refutes the *Handbook's* information that a bachelor's degree in a specific specialty, or its equivalent, is not required for the proffered position.

The petitioner claims that the beneficiary is well qualified for the position, and references his qualifications. However, the test to establish a position as a specialty occupation is not the education or experience of a proposed beneficiary, but whether the position itself requires at least a bachelor's degree in a specific specialty, or its equivalent. The petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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 this end, we review the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position, and any other documentation submitted by a petitioner in support of this criterion of the regulations.

To merit approval of the petition under this criterion, 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 performance requirements of the position. While a petitioner may assert that a proffered position requires a specific degree, that statement alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty, or its equivalent. *See Defensor v. Meissner*,

¹⁷ For additional information regarding wage levels as defined by DOL, 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.

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").

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

In response to the RFE, the petitioner submitted its internet job vacancy announcement for the proffered position.¹⁸ The announcement is dated November 7, 2012. Thus, the job posting was posted after the Director's RFE and does not pre-date the filing of the petition. We note that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). Evidence that the petitioner creates after the director issues an RFE is not considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice. Therefore, the posting is not probative evidence establishing that the petitioner has satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner also provided an organizational chart, along with a list of the employees' educational credentials and brief job duties. Notably, the proffered position is not listed on the organizational chart. In addition, the petitioner provided the H-1B approval notices, LCAs, and credential

¹⁸ It must be noted for the record that the announcement indicates that the candidate "[m]ust have culinary experience and a bachelors [*sic*] degree." To reiterate, the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the duties and responsibilities of the position.

evaluations of its housekeeping manager and front office manager. We find that the documentation is irrelevant to this matter as the employees are not employed in the proffered position.

We observe that the petitioner states that since opening it has employed three individuals in the proffered position. However, on appeal, the petitioner states that [REDACTED] "was the only one ever hired as [a] Food Service Manager by [the petitioner] since its opening in [REDACTED]". No explanation for this inconsistency was provided. The petitioner submitted the resume and pay statement of [REDACTED]. Notably, the pay statement indicates [REDACTED] as the employer and her position as "F&B Director." In addition, the petitioner submitted several documents prepared by [REDACTED] which indicate her position as food and beverage manager and/or catering manager. The petitioner did not provide information regarding [REDACTED] job duties and responsibilities. Based upon the information provided, [REDACTED] does not serve in the proffered position of food service manager.

Moreover, the petitioner stated in the Form I-129 petition that it has 40 employees and that it was established in [REDACTED] (approximately [REDACTED] years prior to the filing of the H-1B petition). The petitioner did not provide any further information or evidence regarding its recruiting history for the position advertised. Consequently, it cannot be determined how representative *one job posting over a [REDACTED] year period* is of the petitioner's normal recruiting and hiring practices for the proffered position. Without further information, the submission is not persuasive in establishing that the petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the position.

Upon review of the record, the petitioner did not provide sufficient documentary evidence to support the assertion that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, directly related to the duties of the position. The petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

The petitioner claims that the nature of the specific duties of the position in the context of its business operations is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. We reviewed the petitioner's statements regarding the proffered position and its business operations. However, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.

We further incorporate our earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a Level I position (of the lowest of four assignable wage-levels) relative to others within the occupational category. Without more, the position is one not likely distinguishable by relatively specialized and complex duties. That is, without further evidence, the petitioner has not demonstrated that its proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a substantially higher prevailing wage.¹⁹

Although the petitioner asserts that the nature of the specific duties is specialized and complex, the record lacks sufficient evidence to support this claim. Thus, the petitioner has submitted inadequate probative evidence to satisfy the criterion of the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied.

III. CONCLUSION AND ORDER

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 the AAO conducts 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.²⁰ In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of

¹⁹ As previously discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems" and requires a significantly higher wage.

²⁰ As the identified grounds for denial are dispositive of the petitioner's eligibility, we need not address the additional issues in the record of proceeding.



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.