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



U.S. Citizenship  
and Immigration  
Services

[REDACTED]

DATE: **MAY 26 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 ("the director") denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a 17-employee "Restaurant" established in [REDACTED]. In order to employ the beneficiary in a position in what it designates as a "Restaurant General 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 denied the petition determining that the evidence of record did not establish that the duties of the proffered position comprise the duties of a specialty occupation.

The record of proceeding before this office includes the following: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Notice of Appeal or Motion (Form I-290B), counsel's brief, and additional documentation.

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

## I. FACTUAL AND PROCEDURAL HISTORY

In a letter, dated May 10, 2014, the petitioner stated that it "is one of the top gourmet experiences in the Washington metro area" as "an upscale gourmet Indian Restaurant that specializes in preparation of authentic Indian food." The petitioner noted that the beneficiary as its restaurant manager "will have complete charge of [the restaurant]," "will coordinate the daily activities of the restaurant including oversight of the kitchen, dining room and special events," and "will be responsible for the management and profitability of [the restaurant]." The petitioner indicated that the beneficiary's duties will include the following:

- Oversight of the budgetary management of \$332,534 and \$300,465 in salaries;
- Develop, implement and manage the Restaurant's budget as well as analyze, forecast, monitor and control the labor and food costs through various methods to meet/exceed the budget objectives;
- Evaluate financial statements and balance cash/charge receipts against the record of sales;
- Train and direct 15-17 kitchen and wait staff in the art of Indian Cuisine;
- Stay abreast of new market trends and the industry changes and amend the restaurant's policy and operations to maintain the petitioner's standards;
- Provide input into the pricing of menu items as they relate to the cost of ingredients used to assess pricing in the U.S. market;
- Review menu items in detail and analyze recipes to determine the food, labor and overhead cost expended in order to price menu items;

- Will introduce new recipes and modify the existing ones; and,
- Will interview, hire, train, schedule, and fire employees;

[Bullet points added and paraphrased for clarity.]

The petitioner asserted that the complexity of the proffered position's job duties are associated with the attainment of at least a bachelor's degree or the equivalent and "the level of responsibility, authority and remuneration involved in the position is associated with professional standing." The petitioner noted that the beneficiary has over 20 years of experience in the fine dining restaurant business and that his experience has been evaluated to be the equivalent of a Bachelor of Culinary Design degree from an accredited university in the United States.

The petitioner identified the beneficiary's proffered wage on the Form I-129 as \$48,000 annually. The petitioner also submitted the required Labor Condition Application (LCA) in support of the instant H-1B petition, designating the proffered position as the occupational classification "Food Service Managers" - SOC (ONET/OES) code 11-9051 at a Level I (entry) wage. The LCA was certified on May 28, 2014 for a validity period beginning June 16, 2014 to June 15, 2017 at a \$48,000 annual salary in the Washington, DC metropolitan area.<sup>1</sup>

The petitioner also included news releases regarding the restaurant, evidence of the beneficiary's prior H-1B and Immigrant Petition (Form I-140) approvals, and an evaluation of the beneficiary's work experience.

Upon review of the initial record, the director requested additional information to establish the proffered position as a specialty occupation. The director outlined the type of evidence that could be submitted.

In an undated letter in response to the director's RFE, the petitioner stated that the restaurant manager position is the senior level position in [the] restaurant. The petitioner listed the restaurant manager's responsibilities and allocated a percentage of time associated with each of the responsibilities as follows:

1. Hire, train, supervise and organize all front of the house personnel (5%)
2. Develop and create cocktail menus and wine lists that complimenting [sic] the food served. Also develop wine programs and pairing with food (5%)
3. Develop in conjunction with the chef, the menus for the restaurant, considering factors such as product availability, service cost, marketing conditions and number to be served (12%)
4. Ensure the correct preparation and presentation at a consistent level for all food items served (5%)

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<sup>1</sup> The petitioner attested on the LCA that the prevailing wage for a Level I food service manager in the Washington, DC metropolitan area based on DOL's Office of Foreign Labor Certification Online Data Center is \$40,394.

5. Assign prices for the food and beverage items that result in net profit of the food and beverage cost areas and participate in decision making process regarding printing, layout, posting and distribution of menus (10%)
6. Prepare and post employee schedules to reflect operating forecast while keeping within budgeted figures (3%)
7. Coordinate with the wine and spirits vendors, food suppliers and other purveyors, to meet quality standards, keeping costs down and lead the responsibilities of the restaurant operations (3%)
8. Serve as a liaison between the guests, the serving staff and kitchen staff, communicating special needs and supervising changes in standard practice (3%)
9. Complete and provide evaluations for all front of the house staff and make recommendations for back of the house staff for salary increases based on performance (10%)
10. Hold daily meetings/briefings with the front of the house staff as well as attend and participate in all required meetings (3%)
11. Set up control systems to curtail pilferage, and assure quality and portion consistency in the bar and kitchen (5%)
12. Ensure restaurant sanitation meets the standards as set forth by [the petitioner], and government regulations are in compliances [sic] well as the cleanliness of all areas including the dining room and kitchen (3%)
13. Train dining room employees in handling queries about the spices and the culinary specialties of different regions in India (3%)
14. Be responsible for the daily, monthly sales reports and evaluate the business trends and forecast revenues quarterly (10%)
15. Monitor and review the comments from the customers and share them with staff on daily basis to ensure the best dining experience is provided to the guest (10%) and
16. Communicate with the President on a regular basis the activities and results of the dining area and the kitchen (10%)

The petitioner stated that it is looking for an individual with enough work experience in the business and that the beneficiary's 20 years of work experience is equivalent to a bachelor's degree.

The petitioner also submitted a letter, dated July 1, 2014, prepared by [redacted] for the National Restaurant Association. [redacted] indicates that the National Restaurant Association believes that "some employers require that restaurant managers hold a bachelor's degree or its equivalent." [redacted] explains that a restaurant manager at a fine dining restaurant, like the petitioner, requires not only basic hospitality and managerial skills critical to a restaurant management position, but also requires knowledge of human resources, business, finance, and government regulations. [redacted] opines that "[s]ince such skills may be obtained at the undergraduate level, [the petitioner's president] is justified in his request that his restaurant manager hold a bachelor's degree."

The record in response to the director's RFE also included: copies of seven job advertisements for restaurant manager or restaurant general manager for positions at various types of businesses in the food industry; reviews and general information about the petitioner's restaurant; and the beneficiary's corrected 2013 Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, and earning statements for the first seven months of 2014.

Upon review of the record, the director denied the petition, determining that the record did not include sufficient evidence to establish that the proffered position is a specialty occupation.

On appeal, the petitioner asserts that the director did not give sufficient probative weight to the opinion letter prepared by [REDACTED] or the advertisements submitted which it claims establish that a degree in culinary arts or a related specialty is normally required for parallel positions in the industry. The petitioner also contends that the duties of the position are complex and can only be performed by an individual with a bachelor's degree in the specialty. The petitioner also reports that the beneficiary was previously granted H-1B status for a similar restaurant manager position at a restaurant that is comparable to the petitioner and avers the instant petition is no different than the petitions previously approved. The petitioner claims that a position is considered to require a bachelor's degree in a specific specialty if it requires both a general bachelor's degree and work experience in a specific specialty and cites *Tapis Int'l v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000), in support of the claim.

The petitioner re-submits the previously provided documentation and also submits an excerpt from the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, several additional job postings, and overviews of the curricula and objectives of several organizations and universities that have degree programs in the culinary arts.

## II. LAW

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

To meet its burden of proof on this issue, 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 Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

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

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

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner, supra*. To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing 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.

### III. MATERIAL FINDINGS

#### A. The LCA Does Not Correspond to the Petition

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from the DOL in the occupational specialty in which the H-1B worker will be employed. See 8 C.F.R. §§ 214.2(h)(4)(i)(B) and 214.2(h)(4)(iii)(B)(I). The instructions that accompany the Form I-129 also specify that an H-1B petition must be filed with evidence that an LCA has been certified by DOL.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the U.S. Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. See 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

The regulation at 20 C.F.R. § 655.705(b) therefore requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. In the instant matter, the LCA provided in support of the instant petition lists a Level I prevailing wage level for Food Service Managers in the Washington DC metro area.<sup>2</sup> The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance."<sup>3</sup> A Level I wage rate is described 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.

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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

Thus, in designating the proffered position at a Level I wage, the petitioner has indicated that the proffered position is a comparatively low, entry-level position relative to others within the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results. Based upon the petitioner's designation of the proffered

<sup>2</sup> Wage levels should be determined only after selecting the most relevant 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, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

<sup>3</sup> 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. 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.

position as a Level I (entry) position, it does not appear that the beneficiary will be expected to serve in a senior or leadership role.

That is, the petitioner's attestation on the LCA, which is certified for an entry-level position, is at odds with the petitioner's initial claim that the beneficiary "will have complete charge of [the restaurant]," "will coordinate the daily activities of the restaurant including oversight of the kitchen, dining room and special events," and "will be responsible for the . . . profitability of [the restaurant]," as well as the petitioner's response to the RFE that the restaurant manager position is "the senior level position" in the restaurant. Referencing the DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, for example, a position requiring this level of responsibility would appear to indicate at least a Level III wage level ("experienced") or more likely a Level IV ("fully competent") wage level.<sup>4</sup> 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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

Given that the LCA submitted in support of the petition is for a Level I (entry) wage on the LCA while the petitioner claims that the proffered position requires a much higher level of responsibility, it must be concluded that the LCA does not correspond to the petition.<sup>5</sup> In other words, even if it were determined that the proffered position requires at least a bachelor's degree in a specific specialty or its equivalent, such that it would qualify as a specialty occupation, the petition could still not be approved due to the petitioner's failure to submit an LCA that corresponds to that Level III or IV position.

#### B. *Tapis Int'l v. INS*

On appeal, the petitioner asserts that a "proffered position is considered to require a Bachelor's degree in a specific specialty if it requires both a general Bachelor's degree and work experience in a specific specialty" and cites to *Tapis Int'l v. INS*, 94 F. Supp. 2d at 172 in support of the assertion.

We first specifically note that in *Tapis Int'l v. INS*, the U.S. district court found that while the former Immigration and Naturalization Service (INS) was reasonable in requiring a bachelor's degree in a specific field, it abused its discretion by ignoring the portion of the regulations that

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<sup>4</sup> We also note the petitioner's repeated claims regarding the beneficiary's work experience, and how that breadth of experience is directly relevant to the position. These claims are not consistent with a job offer for a "research fellow, a "worker in training," or an individual participating in an "internship" which, according to the DOL wage-level guidance, are "indicators that a Level I wage should be considered."

<sup>5</sup> Notably, the petitioner would have been required to offer a significantly higher wage to the beneficiary in order to employ him at a Level II (qualified), a Level III (experienced), or a Level IV (fully competent) level. U.S. Dep't of Labor, Foreign Labor Certification Data Center, Online Wage Library, FLC Quick Search, "Food Service Managers," <http://www.flcdatacenter.com/OesQuickResults.aspx?code=11-9051&area=47894&year=14&source=1> (last visited May 20, 2015).

allows for the equivalent of a specialized baccalaureate degree. According to the U.S. district court, INS's interpretation was not reasonable because then H-1B visas would only be available in fields where a specific degree was offered, ignoring the statutory definition allowing for "various combinations of academic and experience based training." *Tapis Int'l v. INS*, 94 F. Supp. 2d at 176. The court elaborated that "[i]n fields where no specifically tailored baccalaureate program exists, the only possible way to achieve something equivalent is by studying a related field (or fields) and then obtaining specialized experience." *Id.* at 177.

In this matter, it appears that baccalaureate programs in culinary arts and in restaurant and hospitality management or institutional food service management do exist. The petitioner on appeal provides the curricula of several universities and other institutions that offer bachelor's degree in such programs. Moreover, the DOL's *Handbook's* chapter on food service managers also references such programs.<sup>6</sup> Thus, the availability of such programs negates the necessity of this petitioner or any other to establish the proffered position of food service manager as a specialty occupation by the requirement of a general bachelor's degree and also the attainment of specialized experience in the particular specialty of restaurant and hospitality management.

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

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

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

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<sup>6</sup> Our references to the *Handbook*, are references to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. The subchapter on the education of food service managers is found at U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-2015 ed., "Food Service Managers," <http://www.bls.gov/ooh/management/food-service-managers.htm#tab-4> (last visited May 20, 2015).

qualifications of the beneficiary being petitioned to perform it; or (2) that a position may qualify as a specialty occupation even when there is no specialty degree requirement, or its equivalent, for entry into a particular position in a given occupational category.

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

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

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

#### IV. SPECIALTY OCCUPATION

The primary issue in this matter is whether the petitioner has established the proffered position is a specialty occupation. To ascertain the intent of a petitioner, USCIS must look 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."

Turning to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), to determine whether the employment described above qualifies as a specialty occupation, we first examine the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position. We recognize the DOL's *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.

In this matter, the petitioner identifies the proffered position as a restaurant manager and designates the occupational classification on the LCA as a food service manager. Upon review of the *Handbook's* description of a food service manager, we find that the petitioner's description of duties closely tracks the description of this occupation as set out in the *Handbook*. In the chapter on food service managers, the *Handbook* reports the following regarding the education and training of a food service manager:

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

### **Education**

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

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

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

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

Here, the *Handbook* indicates several paths are available to individuals entering into the occupation of a food service manager. Additionally, the *Handbook* reports that "[m]ost 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." The *Handbook* specifically notes that bachelor's degrees are not required to perform the duties of this occupation and that while "some" postsecondary education is "preferred" by upscale restaurants and hotels, numerous colleges, technical institutes, and institutions offer programs leading to an associate's degree.<sup>7</sup> Upon review of the *Handbook's* report on this occupation, the *Handbook* does not support a claim that food service managers are required to possess a bachelor's degree, let alone a bachelor's degree in a specific specialty or its equivalent.

As the *Handbook* does not support the proposition that the proffered position is one that normally requires a minimum of a bachelor's degree in a specific specialty, or the equivalent, to satisfy this first alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise qualifies as a specialty occupation under this criterion, notwithstanding the absence of *Handbook* support on the issue. The petitioner has not provided such evidence.

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

Next, we find that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common for positions that are identifiable as being (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the petitioner.

In determining whether there is 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

<sup>7</sup> The petitioner's statements regarding its upscale nature are acknowledged. However, the *Handbook* indicates only that "some" upscale restaurants "prefer" "some postsecondary education." First, that "some" upscale restaurants prefer a given educational credential does not mean that most, or even a majority, of upscale restaurants share the preference. Second, a hiring "preference" does not necessarily equate to a minimum hiring requirement. Third, the *Handbook* does not indicate that the term "some postsecondary education" is necessarily synonymous with a bachelor's degree in a specific specialty, or the equivalent. As such, the *Handbook's* statements with regard to "upscale restaurants" do not establish eligibility under this criterion.

which the *Handbook*, or other authoritative source, reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter.

On the Form I-129, the petitioner stated that it is a restaurant established in [REDACTED] with 17 employees. The petitioner stated its gross annual income as \$1,119,564 and its net annual income as \$149,721. In response to the RFE, the petitioner provided printouts of seven online job announcements and on appeal provided an additional five job advertisements. However, this documentation does not establish that the proffered position qualifies as specialty occupation. As a preliminary matter, we note that the petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

For the petitioner to establish that an organization is similar, it must demonstrate that it shares the same general characteristics with the advertising organization. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the advertising organization share the 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.

Upon review, we find that the advertising companies range from well-known chain restaurants to smaller independent restaurants. Although all of the advertisers appear to be in the food service industry, none of the advertisements or supplementary material provided on appeal includes sufficient information regarding the advertising organizations to establish that the advertising organizations are "similar" to the petitioner. For example, the advertisements do not provide the advertisers' revenue or level of staffing supported by documentary evidence. Moreover, contrary to the purpose for which the advertisements were submitted, the postings do not establish that at least a bachelor's degree in a *specific specialty*, or its equivalent, is required for the positions. Again, 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 degree (such as a "business" 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 139, 147 (1st Cir. 2007).<sup>8</sup> Thus, advertisements that request a

<sup>8</sup> 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*

general-purpose degree are not probative to the issue of whether the petitioner's proffered position requires a bachelor's degree in a *specific specialty*, or the equivalent.

In this matter, the advertisements varied from a requirement of six to eight years of experience only to advertisements requiring only a general bachelor's degree and varying degrees of experience to advertisements requiring a bachelor's degree in hospitality or restaurant management and varying degrees of experience. The advertisements submitted reinforce the *Handbook's* report that there are a wide variety of methods available to enter into the occupation of a restaurant manager. Contrary to the petitioner's assertion, the limited number of advertisements submitted does not establish that a bachelor's degree in restaurant management, hospitality management, or a closely related field such as culinary arts, is the minimum requirement for comparable restaurant manager positions in the country. Even if all of the job postings indicated that a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner does not demonstrate what statistically valid inferences, if any, can be drawn from these advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.<sup>9</sup>

We have also reviewed the opinion of [REDACTED] a representative of the National Restaurant Association, one of the restaurant industry's associations. [REDACTED] writes regarding his perspective on restaurants and in particular fine dining restaurants like the petitioner. He observes that restaurant managers at such restaurants perform a number of duties and opines that "[s]ince such skills may be obtained at the undergraduate level, [the petitioner's president] is justified in his request that his restaurant manager hold a bachelor's degree."

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*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.*

<sup>9</sup> See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position (for organizations similar to the petitioner) required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

First, we observe that the pertinent question in this matter is not whether the petitioner is justified in requesting that its restaurant manager hold a bachelor's degree, but whether the proffered position, as described by the petitioner, requires a bachelor's degree in a specific specialty, or the equivalent, to perform the duties of the position. In that regard, [REDACTED] does not discuss the duties of the proffered position in any substantive detail. As a result, the degree to which [REDACTED] is aware of the actual duties the beneficiary will perform is not evident.

Additionally, [REDACTED] does not expressly state the full content of, whatever documentation and/or oral transmissions upon which he based his opinion. For instance, [REDACTED] does not indicate whether he visited the petitioner's business premises or communicated with anyone affiliated with the petitioner as to the performance of the general list of responsibilities the beneficiary would perform. Nor does [REDACTED] reference and discuss any studies, surveys, industry publications, other authoritative publications, or other sources of empirical information which he may have consulted in the course of whatever evaluative process he may have followed.

Further, [REDACTED] does not indicate that he considered, or was even aware of, the fact that the petitioner submitted an LCA that was certified for a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation which, as noted *infra*, signifies that the beneficiary is only expected to possess a basic understanding of the occupation. This is a significant omission, in that it suggests an incomplete review of the position in question and a faulty factual basis for [REDACTED] ultimate conclusion as to the educational requirements of the petitioner's proffered position.

Moreover, if [REDACTED] is offering his opinion as it relates to a general industry standard, he 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 for organizations that are similar to the petitioner who employ individuals in positions parallel to the proffered position. We observe that [REDACTED] states the belief of his association that "some employers require that restaurant managers hold a bachelor's degree or its equivalent." However, "some" is not indicative of a "common" requirement. Rather, [REDACTED] observation coincides with the *Handbook's* report that there are many avenues to attain a position as a restaurant manager, including a high school diploma up to and including a bachelor's degree.<sup>10</sup> [REDACTED] letter does not suggest, let alone establish, that a bachelor's degree in a specific discipline is common to the petitioner's industry or is required to perform the duties of the proffered position.

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

<sup>10</sup> In this matter, it is clear from [REDACTED] letter that he does not believe that a bachelor's degree *in a specific specialty* is required to perform the duties of a restaurant manager. Rather, [REDACTED] refers only to a general bachelor's degree or its equivalent as the degree that some employers may require.

decline to regard the advisory opinion letter as 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 the analysis of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Thus, based upon a complete review of the record of proceeding, the petitioner has not established 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. Thus, 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 submitted various documents, including reviews of its business. However, a review of the record of proceeding indicates that the petitioner has not demonstrated that the duties the beneficiary will be responsible for or 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. Furthermore, the petitioner has not established why a few related courses or industry experience alone would be insufficient preparation for 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, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the 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 lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition, which is certified for only a Level I (entry) wage. Fundamentally, it appears that (1) the petitioner previously claimed to DOL that the proffered position is a Level I, entry-level position to obtain a lower required wage; and (2) the petitioner is now claiming to USCIS that the position is a higher-level and more complex position in order to support its claim that the position qualifies as a specialty occupation. The petitioner cannot have it both ways. Either the position is more senior and complex (based on a comparison of the employer's job requirements to the standard occupational requirements) and thereby necessitates a higher required wage or it is an entry-level position for which the lower wage offered to the beneficiary in this petition is

acceptable. To permit otherwise would be directly contrary to the U.S. worker protection provisions contained in section 212(n)(1)(A) of the Act and its implementing regulations.<sup>11</sup>

Consequently, as the petitioner does not demonstrate how the proffered position is so complex or unique relative to other restaurant manager positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The 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, USCIS reviews the petitioner's past recruiting and hiring practices, information regarding employees who hold or have previously held the position, as well as 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. 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. According to the Court in *Defensor*, "To interpret the regulations any other way would lead to an absurd result." *Id.* at 388. 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.*

Upon review of the record, the petitioner has not submitted sufficient probative evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A),

<sup>11</sup> *See also Caremax v. Holder*, ---F Supp. 2d---, 2014 WL 1493621 (N.D. Cal. 2014)("An entry-level position with entry-level pay is hardly so complex or unique that it requires an applicant with a bachelor's degree in a specific specialty").

which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent. Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. Again the petitioner has not established why a few related courses or industry experience alone is insufficient preparation for the proffered position. In other words, the petitioner has failed to demonstrate that the position proffered here requires the theoretical and practical application of a body of highly specialized knowledge usually associated with the attainment of a baccalaureate or higher degree.

In addition, we again point out that the petitioner has designated the proffered position as a Level I position on the submitted LCA, indicating that it is an entry-level position for an employee who has only basic understanding of the occupation.<sup>12</sup> Thus, the petitioner's assertions that the beneficiary will operate at the senior level within the restaurant are materially inconsistent with its designation of the proffered position as Level I (entry-level) wage. The record does not include sufficient consistent and probative evidence to establish that the position proffered here encompasses the performance of specialized and complex duties the nature of which require knowledge usually associated with at least a bachelor's degree in a specific specialty.

#### V. PRIOR APPROVALS

The petitioner noted that USCIS approved other petitions that had been previously filed by other petitioners on behalf of beneficiary. The director's decision does not indicate whether she reviewed the prior approvals of the other nonimmigrant petitions. However, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals constituted 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).

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<sup>12</sup> 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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

## VI. THE BENEFICIARY'S QUALIFICATIONS

We do not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation. In other words, the 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 petitioner did not submit sufficient evidence regarding the proffered position to determine whether it will require a baccalaureate or higher degree in a specific specialty or its equivalent. Absent this determination that a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position, it also cannot be determined whether the beneficiary possesses that degree or its equivalent. Therefore, we need not and will not address the beneficiary's qualifications further, except to note that, in any event, the evaluation of the beneficiary's work experience submitted by the petitioner is insufficient to establish that the beneficiary possesses the equivalent of a U.S. bachelor's degree in any specific specialty. Specifically, the claimed equivalency was based on experience, and there is insufficient probative evidence that the evaluator has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience and that the beneficiary also has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty. *See* 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) and (D)(1). As such, since evidence was not presented that the beneficiary has at least a U.S. bachelor's degree in any specific specialty, or its equivalent, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

## VII. CONCLUSION

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.<sup>13</sup> 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.

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<sup>13</sup> As these issues preclude approval of the petition, we will not address any of the additional issues we have observed on appeal.