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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**

D2

[Redacted]

Date: **JUL 23 2012** Office: CALIFORNIA 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 in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a "Non-Profit Religious School" with 99 employees. To employ the beneficiary in what it designates as a "Chief Chef" position, the petitioner endeavors 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, 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition on the grounds that the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains: (1) 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 Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

The primary issue for consideration is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements:

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as 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*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd 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.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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. 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, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

The petitioner submitted the following documents, *inter alia*, with the Form I-129: (1) a copy of a certified Labor Condition Application (LCA); (2) an evaluation of the beneficiary's foreign degree and experience equivalency; (3) a copy of an unsigned letter from Kfar Maccabiah Hotel Convention and Sport Center indicating the beneficiary's employment as a chef; (4) a copy of a letter from Wizo Vocational School for Gardening and Landscape Technology, signed by [REDACTED] indicating the beneficiary's employment as "Head Chef from November 2, 1997 until September 13, 2004"; (5) a copy of the beneficiary's foreign diploma issued by Bukhara

Enterprise Technical School of Uzbekbrayshu; (6) a copy of the beneficiary's "Employment History Book"; (7) a copy of the beneficiary's certificate of employment in the cafeteria of Consumers Union of Lenin; (8) a copy of the beneficiary's pay stubs; (9) a copy of the beneficiary's 2008 W-2 statement; and (10) copies of the beneficiary's 2007 and 2008 1040A income tax returns.

Relying on the petitioner's description of the proffered position's duties, counsel states that the beneficiary will be responsible for the following:

- *Supervise and coordinate activities of cooks and other workers engaged in food preparation;*
- *Plan and develop recipes and menus, according to product availability;*
- *Prepare and cook foods of all type[s];*
- *Determine how food should be presented; create decorative food displays as needed;*
- *Check and ensure the quantity and quality of raw and cooked food products, as well as other received products;*
- *Demonstrate innovative cooking techniques, as well as new equipment to personnel;*
- *Ensure timely delivery of services by establishing production schedules and staff requirements;*
- *Estimate amounts and costs of food, ingredients and other supplies; [and]*
- *Check supplies, equipment, and work areas to ensure that the standards are met.*

The petitioner states in its support letter that it is a non-profit school providing Jewish religious education to "immigrant children with Bukharian background." The petitioner states that it requires the services of an individual with "a minimum of Bachelor's degree majoring in Culinary Management" and that the beneficiary is qualified for the proffered position as he possesses "the equivalent of a Bachelor's Degree in Culinary Management from a regionally accredited academic institution in the United States." The petitioner further states that the beneficiary holds "three Certificates of Profession as a Cook in Israel and Uzbekistan" and "has over thirty five years of particular, relevant experience in this specialized field, including working as a Chief Cook in several enterprises in Bukhara, Uzbekistan, as a Chef's Assistant with Kfar Maccabiah Hotel, and as the Chief Cook of the Women's International Zionist Organization (WIZO)." The petitioner also states that the beneficiary is "a native of Bukhara and an outstanding culinary professional," thus, he "has a unique familiarity with Bukharian cuisine."

On November 10, 2009, the director issued an RFE requesting the following, *inter alia*: (1) a detailed description of the work to be performed by the beneficiary; (2) an explanation of why the work to be performed requires the services of a person who has a college degree or its equivalent in the occupational field; (3) evidence that the position of chef is a common position required by similarly sized entities with similar annual incomes; (4) evidence that the petitioner's competitors normally require degrees in a specific specialty for closely related positions to that

of chef; (5) evidence to establish that a specialty degree requirement is common to the industry in parallel positions; (6) letters or affidavits from firms or individuals in the industry that attest that such firms routinely employ and recruit only degreed individuals in a specific specialty or copies of job announcements from similar organizations as the petitioner; (7) qualifications pertaining to the evaluator of the beneficiary's foreign degree and experience equivalency; (8) copies of the petitioner's present and past job vacancy announcements to support the contention that the proffered position is a specialty occupation; (9) evidence establishing that the petitioner has a past practice of hiring persons with a bachelor's degree, or higher, in a specific specialty; (10) evidence showing the number of persons employed in similar positions and documentation establishing how many of those persons have a bachelor's degree or higher and the particular field of study in which the degree was attained; and (11) a clear explanation of what differentiates the proffered position from other related "non-specialty occupation" positions.

On December 23, 2009, in response to the director's RFE, the petitioner submitted, *inter alia*, the following documents: (1) a letter from the petitioner's counsel dated December 21, 2009; (2) a letter from the petitioner dated December 18, 2009; (3) an organizational chart indicating that there are 15 positions in the Feeding Department and Kitchen; (4) five job vacancy announcements; (5) information regarding the "Bachelor of Arts program in Le Cordon Bleu Culinary Management Online Program" printed from <http://www.chefs.com>; (6) information regarding the Art Institute of Pittsburgh's "Culinary & Hotel Management Bachelor of Science Degree Online Program" printed from <http://lp.aionline.edu>; and (7) information regarding the Institute of Culinary Education's "Culinary Management Diploma."

The petitioner's counsel states in its letter that the submitted information regarding the Le Cordon Bleu, the Art Institute of Pittsburgh, and the Institute of Culinary Education demonstrates that "many colleges offer bachelor's level programs for Culinary Management specialists." The petitioner's counsel also contends that the "Chief Chef position is a common position reasonably required by similarly sized businesses with a necessity to feed almost one thousand people on a daily basis." The petitioner's counsel also notes that the submitted job vacancy announcements demonstrate that the industry commonly requires a bachelor's degree, "and in most of the cases, exceptional experience in the specialty occupation."

The petitioner provided the following description of the duties of the proffered position in response to the director's RFE:

- ***Supervise and coordinate activities of cooks and other workers engaged in food preparation – 30%;***

The Beneficiary will demonstrate knowledge of business and management principles involved in strategic planning, resource allocation, human resources modeling, leadership technique, production methods, and coordination of people and resources. The Chief Chef has to possess knowledge of principles and procedures for *personnel recruitment, selection, training, compensation and benefits, labor relations, and personnel information systems*. The Beneficiary has to be able to monitor performance of other workers to make improvements or to take corrective actions, apply general rules to

specific problems to produce correct answers.

- ***Plan and develop recipes and menus, according to product availability – 25%;***

The Beneficiary will be responsible for considering the relative costs and benefits of potential actions and choosing the most appropriate ones, arranging things and actions in a certain order, monitoring and controlling resources and overseeing the spending of money, making decisions without supervision.

- ***Prepare and cook foods of all type[s] – 10%;***

The Beneficiary has to be able to prepare the most complex kind of food such sauces, meet [sic], food for special occasions, as well as control the kosher methods of the food prepared. This occupation involves starting up and carrying the projects, making decisions and taking a sole responsibility dealing with food business.

- ***Determine how food should be presented; create decorative food displays as needed – 5%;***

The Beneficiary has to identify the information by categorizing, recognizing differences, see details at close range, come with unusual and clever ideas, develop creative ways to present and decorate a food while keeping it in the health condition.

- ***Check and ensure the quantity and quality of raw and cooked food products, as well as other received products – 5%;***

The Beneficiary has to demonstrate knowledge of techniques and equipment for planning, growing, harvesting food products (both plant and animal) for consumption, including storage / handling techniques. Chie [sic] Chef has to possess knowledge of row [sic] materials, production processes, quality control and other techniques for maximizing the effective manufacture and distribution of food.

- ***Demonstrate innovative cooking techniques, as well as new equipment to personnel – 5%;***

The Beneficiary has to possess knowledge of principles and methods for curriculum and training design, teaching and instruction for individuals and groups, and the measurement of training effects.

- ***Ensure timely delivery of services by establishing production schedules and staff requirements – 5%;***

- ***Estimate amounts and costs of food, ingredients and other supplies – 10%; [and]***

- ***Check supplies, equipment, and work areas to ensure that the standards are me[t] – 5%.***

The director denied the petition on January 20, 2010, finding that the proffered position is not a specialty occupation. Citing to the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*), the director noted that the position of Chef does not require a bachelor's degree in a specific specialty as a normal, minimum for entry into the occupation. The director found that the petitioner failed to establish any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, the petitioner's counsel contends that the proffered position is a specialty occupation. The petitioner's counsel contends that USCIS "did not consider the nature of the [petitioner's] operations and the specific duties of the proffered position when determining whether the job was a specialty occupation." The petitioner's counsel also states that the petitioner "is a large religious and general education school with a feeding department that has a complex operational and delivery structure" and that the "duties of the proffered position are more complex than those described in the Handbook for a typical chef's position." The petitioner's counsel also contends that the duties are "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 preliminary matter, the AAO will address the unpublished AAO decisions, *Matter of [name not provided]*, Case No. [REDACTED], and *Matter of [name not provided]*, Case No. [REDACTED] cited by counsel. Counsel has neither furnished copies of the unpublished decisions nor has it submitted evidence establishing that the facts of the instant petition are analogous to those in the unpublished decisions. When any person makes an application for a "visa or any other document required for entry, or makes an application for admission [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such relief. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm'r 1972). Furthermore, any suggestion that USCIS must review unpublished decisions and possibly request and review each case file relevant to those decisions, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361. Accordingly, neither the director nor the AAO was required to request and/or obtain a copy of the unpublished decisions cited by counsel.

If a petitioner wishes to have unpublished decisions considered by USCIS in its adjudication of a petition, the petitioner is permitted to submit copies of such evidence that it either obtained itself through its own legal research and/or received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. Part 5. Otherwise, "[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility." 8 C.F.R. § 103.2(b)(2)(i). In the instant case, the petitioner failed to submit copies of the unpublished decisions. As the record of proceeding does not contain any evidence of the unpublished decisions, there were no underlying facts to be analyzed and, therefore, no prior, substantive determinations could have been made to determine what facts, if any, were analogous to those in this proceeding. Regardless, even if the facts in this matter were established as being analogous to those in the unpublished decisions, the AAO would not be bound by the reasoning or legal analyses in those decisions. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO turns next to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific

specialty. Factors considered by the AAO when determining these criteria include: whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ The AAO finds that the record evidence most closely reflects the duties of a chef. The *Handbook* section on "Chefs and Head Cooks," states the following:

Chefs and head cooks oversee the daily food preparation at restaurants or other places where food is served. They direct kitchen staff and handle any food-related concerns.

Duties

Chefs and head cooks typically do the following:

- Check freshness of food and ingredients
- Supervise and coordinate activities of cooks and other food preparation workers
- Develop recipes and determine how to present the food
- Plan menus and ensure uniform serving sizes and quality of meals
- Inspect supplies, equipment, and work areas for cleanliness and functionality
- Hire, train, and supervise cooks and other food preparation workers
- Order and maintain inventory of food and supplies needed to ensure efficient operations
- Monitor sanitation practices and ensure that kitchen safety standards are followed

Chefs use a variety of kitchen and cooking equipment, including step-in coolers, high-quality knives, meat slicers, and grinders. They also have access to large quantities of meats, spices, and produce. Some chefs use scheduling and purchasing software to help them in their administrative duties.

Chefs might also be a restaurant's owner. Some may be busy with kitchen and office work and not have time to interact with diners.

The following are types of chefs and head cooks:

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/ooh/>. The AAO's references to the *Handbook* are to the 2012-2013 edition available online.

Executive chefs, head cooks, and chefs de cuisine are primarily responsible for overseeing the operation of a kitchen. They coordinate the work of sous chefs and other cooks, who prepare most of the meals. Executive chefs also have many duties beyond the kitchen. They design the menu, review food and beverage purchases, and often train employees. Some executive chefs are primarily occupied by administrative tasks and spend little time in the kitchen.

Sous chefs are a kitchen's second-in-command. They supervise the restaurant's cooks, do some meal preparation tasks, and report results to the head chefs. In the absence of the head chef, sous chefs run the kitchen.

Personal chefs plan and prepare meals in private homes. They also may order groceries and supplies, serve meals, and wash dishes and utensils. Personal chefs are often self-employed or employed by a private cooking company, preparing food for a variety of customers.

Private household chefs typically work full time for one client, such as a corporate executive, university president, or diplomat, who regularly entertains as part of his or her official duties.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Chefs and Head Cooks," <http://www.bls.gov/ooh/Food-Preparation-and-Serving/Chefs-and-head-cooks.htm#tab-2> (last visited July 11, 2012).

While the *Handbook* reports that "[a] growing number of chefs and head cooks receive formal training at community colleges, technical schools, culinary arts schools, and 2-year or 4-year institutions," it does not indicate that a bachelor's degree is a minimum entry requirement or, more importantly, that the degrees held by such workers must be baccalaureate degrees in a specific specialty that is directly related to culinary arts, as would be required for the occupational category to qualify as a specialty occupation as that term is defined by section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). *See id.* at <http://www.bls.gov/ooh/Food-Preparation-and-Serving/Chefs-and-head-cooks.htm#tab-4> (last visited July 11, 2012).

That the *Handbook* does not indicate that chef and head cook positions normally require at least a bachelor's degree in a specific specialty is also evident in the following discussion in the "How to Become a Chef or Head Cook" section of its chapter "Chefs and Head Cooks," which does not specify a requirement of a bachelor's degree in a particular major or academic concentration as a minimum entry requirement for this occupation:

Most chefs acquire their skills through work experience. Many others, however, receive formal training at a community college, technical school, culinary arts school, or a 2-year or 4-year college. A few learn through apprenticeship programs or in the armed forces.

Work Experience

Most chefs and head cooks start working in kitchens in other positions, such as line cooks or dishwashers, learning cooking skills from the chefs they work for. Many spend years working in kitchens before learning enough to get promoted to chef or head cook positions.

Education

A growing number of chefs and head cooks receive formal training at community colleges, technical schools, culinary arts schools, and 2-year or 4-year institutions. Students in culinary programs spend most of their time in kitchens practicing their cooking skills. These programs cover all aspects of kitchen work, including menu planning, food sanitation procedures, and purchasing and inventory methods. Most formal training programs also require students to get experience in a commercial kitchen through an internship, apprenticeship, or out-placement program.

Apprenticeship

Formal apprenticeship programs sponsored by professional culinary institutes, industry associations, and trade unions in coordination with the U.S. Department of Labor, also are common. Apprenticeship programs generally last about 2 years and combine classroom training and work experience. The American Culinary Federation accredits more than 200 formal academic training programs at post-secondary schools and sponsors apprenticeships around the country.

Training

Some chefs and head cooks train in mentorship programs, where they work under the direction of experienced chefs. Executive chefs, head cooks, and sous chefs who work in fine-dining restaurants have many years of training and experience. Some chefs receive formal training through the armed forces or from individual hotel or restaurant chains.

Certification

Although not required, certification can show competence and lead to advancement and higher paying positions. The American Culinary Federation certifies pastry professionals, personal chefs, and culinary educators in addition to various levels of chefs. Certification standards are based primarily on work-related experience and formal training. The minimum work experience for certification can range from 6 months to 5 years, depending on the level of certification.

Id. Because the *Handbook* indicates that entry into the chef and head cook occupation does not normally require a bachelor's or higher degree in a specific specialty, the *Handbook* does not support the proffered position as being a specialty occupation.

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

Next, the AAO finds 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 requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

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

Here, and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions. Finally, for the reasons discussed below, the petitioner's reliance upon the job vacancy advertisements is misplaced.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner submitted copies of five advertisements as evidence that its degree requirement is standard amongst its peer organizations for parallel positions.² None of the five advertisements provided, however, establish that at least a bachelor's degree or the equivalent in a specific specialty is required. For example, the first advertisement lists "Bachelor's degree," in a long narrative pertaining to the advertised position; however, it does not state that a bachelor's degree, or even one in a specific specialty, is required. The second job advertisement states that the "ideal candidate will possess a bachelor's degree or

² Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from just five job advertisements with regard to determining the common educational requirements for entry into parallel positions in similar companies. 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 of chief chef in a school feeding department with 15 employees 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.

related culinary degree (preferably a CEC)."³ The third advertisement is incomplete and states that "[i]deal candidates will possess a bachelor's degree or related culinary degree with 2+ years of industry &." The fourth advertisement states that it requires only a two-year degree and specifically states that it prefers a "culinary degree or equivalent years of experience and three (3) to five (5) years of culinary experience." The fifth advertisement only states that a "culinary arts degree or equivalent in experience" is required. In addition, even if all of the job postings indicated that a bachelor's or higher degree in a specific specialty or its equivalent were required, the petitioner fails to establish that the submitted advertisements are relevant in that the posted job announcements are not for parallel positions in similar organizations in the same industry. Consequently, the petitioner has failed to establish the first prong of the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner also has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." The petitioner and counsel claim that the duties of the proffered position are complex. However, the record does not demonstrate any complexity or unique nature of the proffered position that distinguishes it from similar but non-degreed or non-specialty degreed employment under the second prong of the criterion. A review of the record indicates that the petitioner has failed to credibly demonstrate that the duties the beneficiary will be responsible for or perform on a day-to-day basis entail such complexity or uniqueness as to constitute a position so complex or unique that it can be performed only by a person with at least a bachelor's degree in a specific specialty.

Specifically, the petitioner failed to demonstrate how the chief chef duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them.⁴ 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 claims are so complex and unique. While some culinary courses may be beneficial in performing certain duties of a chief chef, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate degree in a specific specialty, or its equivalent are required to perform the duties of the particular position here proffered.

³ The AAO notes that "CEC" is a designation by the American Culinary Federation and refers to a "Certified Executive Chef" which does not require a bachelor's degree or higher in a specific specialty or its equivalent. See American Culinary Federation, Certification Designations, http://www.acfchefs.org/download/documents/certify/Certification_Requirements.pdf (last visited July 11, 2012).

⁴ The AAO notes that while the petitioner states that knowledge of Bukharian culinary traditions and unique familiarity with Bukharian cuisine make the beneficiary the ideal candidate, the petitioner did not submit any documentary evidence indicating that such knowledge and experience are required and how the duties of the proffered position relate to such knowledge and experience. The petitioner further failed to submit documentary evidence indicating why a bachelor's or higher degree in a specific specialty or its equivalent is required or would even suffice to perform those duties. The AAO also notes that the lunch menu currently posted on the petitioner's website does not appear to offer Bukharian meal choices, rather, the menu offers the following meal choices: pizza, hot dogs, fish sticks, grilled cheese, French toast, tuna salad, burgers, macaroni and cheese, etc.

Consequently, as the petitioner fails to demonstrate how the proffered position of chief chef is so complex or unique relative to other chef 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).

Next, the record of proceeding does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).⁵

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent. Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than chef positions that are not usually associated with a degree in a specific specialty.⁶

⁵ While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

⁶ Counsel argues on appeal that the proffered position qualifies as a specialty occupation on the basis that its duties are so specialized and complex. However, the duties as described lack sufficient specificity to distinguish the proffered position from other chef positions for which a bachelor's or higher degree in a specific specialty, or its equivalent, is not required to perform their duties.

Moreover, while the petitioner has designated the proffered position as a Level IV position on the submitted Labor Condition Application (LCA), a review of the same OES wage data survey reveals that the proffered wage at that time in Elmhurst, New York, was in fact lower than the Level I prevailing wage, indicating that the proffered position is at most an entry-level position for an employee who has only basic understanding of the occupation. *See* Employment and Training Administration (ETA), *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009). Therefore, it is simply not credible that the position is one with specialized and complex duties, as such a higher-level position would be classified as a Level IV position, requiring a significantly higher prevailing wage of \$77,355 per year. 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).

The petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient documentation to demonstrate that the 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 that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. However, the AAO notes that in any event, the combined evaluation of the beneficiary's education and 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, as the claimed equivalency was based in part on experience, there is no evidence that the evaluator, [REDACTED] 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).

The AAO also notes that there is no evidence that the evaluator has any expertise or background related to the culinary arts field. Thus, 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'r 1988). As a reasonable exercise of its discretion the AAO discounts the evaluator's opinion as not probative with respect to the beneficiary's qualifications. 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.

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. § 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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