



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

Date: **SEP 04 2013** 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,


for
Ron Rosenberg
Chief, Administrative Appeals Office

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

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner describes itself as a limited liability company established in 2011 to provide "management" services. In order to employ the beneficiary in what it designates as a "nutritionist (food consultant)" position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, determining: (1) the petitioner failed to demonstrate that the position qualifies for classification as a specialty occupation; (2) the beneficiary is qualified to perform the duties of the proffered position; and (3) the Commonwealth of Pennsylvania may require a license to perform the duties of the proffered position.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter dated July 16, 2012; (5) the petitioner's motion to reopen; (6) the director's decision granting the motion and affirming the July 16, 2012 decision; and (7) the Form I-290B, Notice of Appeal or Motion, and counsel's supplemental brief. The AAO reviewed the record in its entirety before issuing its decision.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's grounds for denying this petition.¹ Accordingly, the appeal will be dismissed, and the petition will remain denied.

The Law

The first issue before the AAO is whether the 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 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.

¹ The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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 providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the

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

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

Facts and Procedural History

In a letter submitted in support of the petition, the petitioner indicated that it owns and operates [REDACTED] restaurants in the city of Philadelphia and its suburbs. The petitioner indicated further that it is offering "the professional position of Nutritionist at [its] corporate headquarters." The petitioner noted that the minimum requirement for the proffered position is at least a bachelor's degree in nutrition or food sciences or any equivalent education. In an attached statement of job duties, the petitioner stated its goal to enter into the school and nursing homes cafeteria business in addition to operating fast food and other food outlets. The petitioner stated further: "[w]e need a nutritionist on staff to monitor food service operations in all our food outlets and to ensure conformance to nutritional, safety, sanitation and quality standards." The petitioner indicated that the beneficiary "[w]ill be expected to coordinate recipe development and standardization and develop new menus for efficient food service operations." The petitioner listed the beneficiary's proposed responsibilities as follows:

- Develop curriculum and prepare manuals for teaching food service workers appropriate hygiene and health standards to meet local and state guidelines;
- Prepare and administer budgets for food, equipment, and supplies;
- Purchase food in accordance with health and safety codes;
- Select, train, and supervise workers who plan, prepare, and serve meals;
- Manage food service departments in consultation with local food service managers;
- Advise food service managers and organizations on sanitation, safety procedures, menu development, budgeting, and planning to assist with the establishment, operation, and evaluation of food service facilities and nutrition programs;

- Organize, develop, analyze, test, and prepare special meals such as low-fat, low-cholesterol and chemical-free meals;
- Plan, conduct, and evaluate dietary and nutritional research on food which is being served;
- Test new food products and equipment; and
- Confer with design, building, and equipment personnel to plan for construction and remodeling of food service units as required.

On the attached statement of job duties, the petitioner listed a bachelor's of arts or science degree in food sciences, culinary arts or related field as one of the requirements to perform the responsibilities of the proffered position. The petitioner provided the required certified Labor Condition Application (LCA) which indicates that the occupational classification for the position is "Dietitians and Nutritionists," SOC (ONET/OES) Code 29-1031.00, at a Level I (entry-level) wage.²

Upon review, the director notified the petitioner that the proffered position as described did not qualify as a specialty occupation. The director requested a detailed description of the proffered position, including the approximate percentages of time for each duty the beneficiary will perform. The director further requested other evidence demonstrating that the proffered position is a specialty occupation including evidence of the petitioner's prior employment of individuals in the proffered position and evidence that a baccalaureate degree in a specific field of study is a standard minimum requirement for the job offered.

In response, the petitioner noted that a law promulgated by the city of Philadelphia effective January 1, 2010 required every Philadelphia food establishment to label the nutrition content of the food that they serve. The petitioner provided a copy of the Philadelphia law and claimed that it had an obligation to hire a professional specialty worker to fill this critical position.³ The petitioner also provided several articles and guides regarding nutrition labeling at fast food and other chain restaurants. The petitioner further provided a letter on the letterhead of [REDACTED] in which the letter-writer indicated that it is a management company which operates several food services businesses and is similar in size to the petitioner. The letter-writer stated that the position of nutritionist within its company is a professional position which requires specialized education and experience. The letter-writer stated further that this position usually requires individuals with specialized education in nutrition and dietetics and that the position requires at least a college degree in the specialized field.

² 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.

³ The Philadelphia City Code at Title 6 (Health) section 6-308 – Menu Labeling Requirements for Chain Establishments provided the parameters for presenting nutrition information to the public. At 6-308(6) the law stated: "[n]utrition information must be based upon analytic methods and express nutrient content in a manner consistent with U.S. Food and Drug Administration regulations." The section did not include a requirement for the employment of specific personnel to obtain this information.

Upon review of the evidence in the record, the director denied the petition, determining that the record did not establish the proffered position as a specialty occupation. The director also noted that the Commonwealth of Pennsylvania may require a license to practice the profession of nutritionist and the petitioner had not provided evidence that the beneficiary is a licensed nutritionist in Pennsylvania.

Previous counsel for the petitioner filed a motion to reopen the director's decision and submitted additional documentation in support of the motion. The director reopened the matter to consider counsel's argument and the additional evidence submitted.

In a letter submitted on motion, the petitioner noted that it had adopted a business strategy that is "dedicated to providing food, nutrition and dining services to the citizens through its operating division, that is, [REDACTED] currently, with plans to develop 10 additional locations by 2018." The petitioner added that the responsibilities of its nutrition consultant centers around the training of employees and the management team regarding "nutrition basics; nutrition aspects specific to [its] products; Philadelphia's Labeling Law regulations (and ensuring compliance of the same); and [its] nutrition-education-based business platform, an important aspect being proper communication to [its] targeted market of nutrition education and [its] nutrition-focused foodservice, including those who utilize [its] catering service."

The petitioner provided a supplemental job description for the general responsibilities/duties of its position of nutrition consultant, which repeated a portion of the initial description. The revised job description listed the beneficiary's general responsibilities/duties as follows:

- Work with the marketing team to ensure communication of our emphasis on healthy eating habits;
- Conduct classes and sessions for employees on nutritional issues and how to respond to customer queries on nutritional content;
- Advise management team on compliance with the Philadelphia Labeling Law;
- Analyze menus for nutritional content and make improvement recommendations to management team;
- Develop curriculum and prepare manuals for teaching employees appropriate hygiene and health standards;
- Prepare and administer budgets for food, equipment, and supplies related to integration of our nutrition-based business platform;
- Purchase food in accordance with health codes, safety codes, and our nutrition-based business platform;
- Hold specific training sessions [for] those who prepare, and supervise the preparation of, meals;
- Advise management team on overall compliance with sanitation, safety procedures, menu development, budgeting, and progression of our food service facilities as to our nutrition-focused business platform;
- Organize, develop, analyze, test, and prepare meals in line with our nutrition-focused business platform, such as low-fat, low-cholesterol and chemical-free meals;

- Plan, conduct, and evaluate dietary and nutritional research on current and new products;
- Evaluate current and new equipment; and
- Consult design, building, and equipment personnel in the planning, construction, and/or remodeling of our facilities to ensure efficient and accurate communication of our nutrition-focused business platform.

Previous counsel advised that as the director did not provide evidence that a license is required for the proffered position, the petitioner did not offer any additional evidence on this point.

Upon review of the additional evidence, the director again denied the petition determining that the petitioner had not provided evidence of its planned future growth and that USCIS must make its decision on the present circumstances. The director noted that Philadelphia's Labeling Law applied only to chain restaurants and as such it would be the responsibility of the chain restaurant headquarters to provide the nutritional information for its menu items. The director determined that it is the petitioner's burden of proof to establish that the proffered position does not require the licensing of the beneficiary. The director determined that the petitioner had not overcome the grounds of denial on motion.

On appeal, counsel for the petitioner asserts that the director erred when evaluating the duties of the proffered position. Counsel avers that the director did not consider the following duties as relating to the duties of a nutritionist:

- Develop curriculum and prepare manuals for teaching food service workers appropriate hygiene and health standards to meet local and state guidelines;
- Prepare and administer budgets for food, equipment, and supplies;
- Select, train, and supervise workers who plan, prepare, and serve meals;
- Advise food service managers and organizations on sanitation, safety procedures, menu development, budgeting, and planning to assist with the establishment, operation, and evaluation of food service facilities and nutrition programs; and
- Test new food products and equipment

Counsel contends when considering all the above duties the proffered petition is a specialized occupation which requires a bachelor's degree. Counsel asserts further that the nature of the petitioner's management business must be taken into consideration and provides additional documentation regarding the petitioner's growth. The petitioner submits a development agreement with [REDACTED] and the petitioner's business plan for June 2009 to May 2013 in support of its claim of continued growth. Counsel also asserts that the type of food consultation required by the job offer is not the type of traditional "nutritionist" work that typically requires licensure when an individual has more of a counseling duty for individual or group patients. Accordingly, counsel contends that the type of consultation required of the position is not the type that requires licensure in Pennsylvania.

Analysis

The overarching reason for the AAO's dismissal of this appeal is that the proposed duties as described in the record do not establish that performance of the proffered position requires the theoretical and practical application of at least a bachelor's degree level of highly specialized knowledge in a specific specialty, as required by the H-1B specialty occupation provisions of the Act and their implementing regulations. The petitioner's descriptions of the proposed duties, although providing an overview of general tasks that the beneficiary will perform, when read in the context of the evidence submitted in support of the petition, do not convey the educational level of any body of highly specialized knowledge that the beneficiary would apply theoretically and practically.

Preliminarily, however, we observe that the petitioner provides an LCA for the proffered position which identifies the occupational classification for the position as "Dietitians and Nutritionists," SOC (ONET/OES) Code 29-1031.00, at a Level I (entry-level) wage. The petitioner also adopts several of the generally described duties associated with the duties of a dietitian and nutritionist described by the Department of Labor's O*NET Online.⁴ For example, the petitioner indicates the individual in the proffered position will:

- Develop curriculum and prepare manuals for teaching food service workers appropriate hygiene and health standards to meet local and state guidelines;
- Purchase food in accordance with health and safety codes;
- Organize, develop, analyze, test, and prepare special meals such as low-fat, low-cholesterol and chemical-free meals; and
- Plan, conduct, and evaluate dietary and nutritional research on food which is being served.

These duties appear in the overview of the occupation of dietitian/nutritionist on DOL's O*NET Online. Thus, a portion of the petitioner's job descriptions and the related LCA submitted initially identify the proffered position as a "nutritionist," an occupation that requires a license to practice in the Commonwealth of Pennsylvania.⁵ As such, and aside from the issue of whether it would otherwise qualify as a specialty occupation position, the proffered position is precluded from qualification as a specialty occupation position because it lacks a material element required

⁴ National Center for O*NET Development. 29-1031.00. *O*NET OnLine*. Retrieved August 23, 2013, from <http://www.onetonline.org/link/summary/29-1031.00>.

⁵ The Pennsylvania State Board of Nursing in the first paragraph of instructions for its application for a dietitian-nutritionist license states: "The Board of Nursing insures safe dietetic-nutrition services for the citizens of Pennsylvania by licensing qualified Dietitian-Nutritionists. To practice as a Licensed Dietitian-Nutritionist in Pennsylvania you must have a current Pennsylvania Dietitian-Nutritionist license." The requirements for licensing dietitian-nutritionists are found at Subchapter G which is issued under sections 2.1(k) and 11(c) of the Professional Nursing Law. Moreover, the DOL's *Occupational Outlook Handbook* which also provides an overview of the duties of a nutritionist occupation reports: "[m]ost states require licensure of dietitians and nutritionists." See <http://www.bls.gov/ooh/healthcare/dietitians-and-nutritionists.htm>.

by Pennsylvania law, namely, inclusion of a requirement for certification as a licensed dietitian – nutritionist. Counsel's contention on appeal that the proffered position is not a position that requires licensing because the proffered position does not contemplate counseling individuals is noted. However, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, the petitioner initially stated that its plans included expanding into food services for schools and nursing facilities, a nutritionist position for such facilities falls under the scope of Pennsylvania law for licensed nutritionists. Although the petitioner has not provided evidence that such plans developed, 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).

Further confusing in this matter is the significant discrepancy in the record of proceeding with regard to the petitioner's occupational classification of the proffered position and the duties and responsibilities of the proffered position. For example, on the Form I-129 H-1B Data Collection Supplement, the petitioner identified the proffered position as falling under the occupational code 187, which, the AAO notes, is assigned by the U.S. Department of Labor (DOL) to the category "Service Industry Managers and Officials."⁶ If, in fact, the petitioner intended to employ the beneficiary in the occupational classification of nutritionist-dietitian the correct occupational code would be 077 (dietitian) or 079 (other occupations in medicine and health). The petitioner's representative signed the Form I-129 under penalty of perjury that the information supplied to USCIS on the petition and the evidence submitted with it is true and correct.

In this matter, it appears that the petitioner is either attempting to employ someone in the claimed proffered position in violation of Pennsylvania's laws or the proffered position is not what the petitioner claims it to be. We find that the position of "nutritionist" in the Commonwealth of Pennsylvania requires licensure for the individual who practices the occupation. Upon review of the broadly stated duties and the petitioner's specification of the DOL's three-digit occupation code of service industry managers and officials, we find that the duties of the actual position being offered by the petitioner is that of a food service manager over the food division of the petitioner's management company. Moreover, if the petitioner truly does not require a license for the individual to perform the duties of the proffered position, the petitioner cannot claim that the duties of the proffered position incorporate primarily the duties of a "nutritionist" as set out in the DOL's O*NET Online.

We have also considered the petitioner's claim that it is expanding its management business by adding more [REDACTED] restaurants under its management. In that regard, on appeal, the petitioner submitted a development agreement with [REDACTED] dated February 10,

⁶ See U.S. Department of Labor, Employment and Training Administration, *Form ETA 9035CP, Appendix 1*, which provides a list of the "Three-Digit Occupational Groups." The form is accessible on the Internet at http://www.lca.doleta.gov/h1bcl_oc.pdf (last visited August 23, 2013).

2011. The development agreement indicates that one [REDACTED] restaurant will open May 30, 2011, a date prior to filing the instant petition. The second [REDACTED] restaurant is not set for opening until May 30, 2012, a date subsequent to filing the instant petition. An amendment to the development agreement pushes the opening date for the second [REDACTED] restaurant to November 30, 2012 with additional [REDACTED] restaurants not set to open until November 2013 and November 2014. Accordingly, when the petition was filed, the petitioner had opened one [REDACTED] restaurant under its management. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Turning to the specific position proffered by the petitioner, the AAO will first review the record of proceeding in relation to 8 C.F.R. § 214.2(h)(4)(iii)(A)(I). To satisfy this criterion, the evidence must establish that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition. The AAO recognizes the Department of Labor's *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁷ As will now be discussed, the *Handbook* reports that food service managers typically do the following:

- Interview, hire, train, oversee, and sometimes fire employees
- Oversee the inventory and ordering of food and beverage, equipment, and supplies
- Monitor food preparation methods, portion sizes, and the overall presentation of food
- Comply with health and food safety standards and regulations
- Monitor the actions of employees and patrons to ensure everyone's personal safety
- Investigate and resolve complaints regarding food quality or service
- Schedule staff hours and assign duties
- Keep budgets and payroll records and review financial transactions
- Establish standards for personnel performance and customer service

See <http://www.bls.gov/ooh/management/food-service-managers.htm>. (last visited August 23, 2013).

A portion of these duties correspond generally to the petitioner's broad description: of selecting, training and supervising workers who plan, prepare, and serve meals; teaching food service workers appropriate hygiene and health standards; administering budgets for food, equipment, and supplies; and purchasing food.⁸ As the petitioner failed to provide an allocation of the time the individual in the proposed position would spend performing each duty, despite the director's

⁷ All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/oco/>.

⁸ The *Handbook* reports "most food service managers have less than a bachelor's degree," although recognizing that some postsecondary education is increasingly preferred for many manager positions. The *Handbook* also reports: "[m]any food service management 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." Accordingly, the educational requirement to perform the duties of a food service manager is not a bachelor's degree in a specific specialty.

specific request to do so, it is not possible to ascertain whether these duties will constitute a majority of the beneficiary's time.

In addition, the petitioner did not provide a substantive description of the beneficiary's role in: working with its marketing team; analyzing menus for nutritional content; testing new food products and equipment; organizing, developing, analyzing, testing and preparing special meals; planning, conducting, and evaluating dietary and nutritional research on food which is being served; evaluating equipment; and conferring with personnel to plan for construction and remodeling of food service units. For example, the petitioner did not indicate it had access to and used research facilities to test or research the nutrition of food served in its restaurants or other facilities. The petitioner did not indicate that the beneficiary had access to or will perform tasks actually deciphering the nutritional content of the food the petitioner planned to serve. The petitioner has not provided information regarding the beneficiary's actual role in the construction and remodeling of the petitioner's food facilities. The petitioner has not established that the duties of the position as generally described are duties that normally require at least a bachelor's degree, or its equivalent, in a specific specialty to perform. There is no evidence that the beneficiary would be relieved from performing the company's general food service managerial function such as purchasing food, equipment, and supplies, overseeing food preparation, monitoring compliance with health and food safety standards and regulations, monitoring and training personnel on hygiene and health standards, and preparing food budgets, duties which may include managerial elements but are not duties that require a bachelor's degree in a specific discipline. Again, the petitioner has failed to definitively detail the actual daily duties of the proffered position and to allocate the amount of time the beneficiary would spend performing the actual duties.

As the record is deficient in this regard, the AAO finds that the petitioner has failed to provide sufficient consistent probative evidence to demonstrate that the proffered position normally requires the incumbent to possess a high level of specialized knowledge that may be obtained only through at least a baccalaureate degree in a specific discipline or its equivalent for entry into that particular position. Accordingly, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the petitioner has not satisfied the first of the two alternative prongs at 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, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proposed position; and (2) 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 discussed *supra*, the petitioner has not established that the proposed position encompasses actual duties for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Nor has the petitioner submitted evidence that the industry's professional associations have made a degree in a specific specialty a minimum requirement for entry.

The letter signed by a representative of [REDACTED] also does not satisfy the first alternative prong described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). One letter is insufficient to establish an industry standard. Additionally, the letter does not provide probative information that the company routinely employs and recruits only individuals with bachelor's degrees in a specific discipline. The letter-writer noted only generally that it required its position of nutritionist to have specialized education in nutrition and dietetics and experience. However, there is no evidence that the petitioner's proffered position of "nutritionist" corresponds to [REDACTED] Management's position of "nutritionist." The letter-writer does not state that its "nutritionist" is licensed and does not indicate that it required a bachelor's degree in nutrition and dietetics, as opposed to attendance of only a few entry-level courses, in order to perform the duties of its position.

Thus, based upon a complete review of the record, the petitioner has not established that at least a bachelor's degree in a specific specialty is the norm for entry into positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." In this matter, the petitioner failed to credibly demonstrate exactly what tasks the beneficiary will perform on a day-to-day basis that encompass such complexity or uniqueness. The petitioner does not explain or clarify at any time in the record which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, we consider whether the petitioner's prior history of recruiting and hiring for the proffered position establishes the proffered position as a specialty occupation. The petitioner offered no evidence that it previously employed personnel in the proffered position. Moreover, 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, supra*. 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"). Here, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. Here, the AAO incorporates by reference and reiterates its earlier discussions about the generalized nature of the petitioner's descriptions of the proposed duties. The petitioner has failed to establish that the duties of the proffered position are sufficiently specialized and complex that their performance would require knowledge at a level usually associated with at least a bachelor's degree, or the equivalent, in a specific discipline. Insufficient evidence was provided to demonstrate that the proffered position reflects a higher degree of knowledge and skill than other types of employees, including those bearing the title "food service manager" or even a generic unlicensed "nutritionist." In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent.⁹

The record does not support that the proffered position is one with specialized and complex duties when the petition was filed. The AAO, therefore, concludes that the proffered position fails to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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 will remain denied for this reason.

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

⁹ In this regard, the petitioner has designated the proffered position as a Level I position on the submitted Labor Condition Application (LCA), indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. 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. Therefore, it is 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. 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 appeal will be dismissed for the above stated reason. 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 remains denied.