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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
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Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



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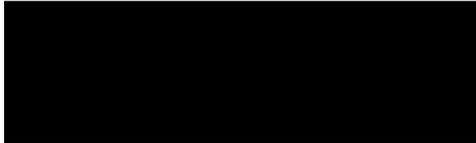


IN RE: Petitioner:  
Beneficiary:



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

ON BEHALF OF PETITIONER:



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 director of the California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a "High-end Restaurant" with "2 (current); 29 estimated on full staffing)" employees. It seeks to employ the beneficiary as a full-time "Executive Sous Chef" and 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 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) 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 decision; and (5) the Form I-290B. The AAO reviewed the record in its entirety before issuing its decision.

The primary 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 one that requires:

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

The 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), 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. 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.

In this matter, the petitioner seeks the beneficiary's services as an executive sous chef. In the petitioner's support letter dated December 17, 2009, the petitioner states that the executive sous chef, like the executive chef, "will be a key manager because he will be responsible for

operations and financial management and decision-making, budgeting, cost control, and human resources management duties." The petitioner further states that both the executive chef and executive sous chef "will manage, train, and supervise chefs, line cooks, and pastry chefs . . . ." The petitioner also states that the beneficiary will "make decisions about budgets, procurement, planning, and strategy for food, menus, and food preparation techniques that are integral to the restaurant's operations and continued success at the highest level." The petitioner also provides a description of duties for the executive sous chef as follows:

**Culinary Management (20% of time):** Creation of menus and recipes (including keeping abreast of the latest food trends, knowledge of specialty ingredients), oversight of meal preparation, health and safety assurance, design of attractive presentation for plated items.

**Kitchen Operations Management (20% of time):** Ensure that the kitchen is fully prepared for all scheduled meals and events including coordination of staff, physical facilities, and food service. Coordinate with Restaurant Manager regarding the restaurant's food and beverage needs as well as food service operational issues such as scheduling and training of staff members.

**Ordering & Inventory Control (20% of time):** Develop and implement inventory control system for supplies of foodstuffs, organize food procurement, review and authorize supply purchases, ensure that inventory is maintained in keeping with principles of sanitation and inventory control.

**Human Resources Management (20% of time):** Responsible for employee training and promotion. Create work schedules, establish performance standards, organize training on "Standard Operating Procedures" (i.e., nutrition and sanitation, culinary operations) and special product information sessions for staff, edit and update staff manual. Develop team goals and implement staff motivation programs.

**Financial Management/Budgeting (20% of time):** Prepare financial plan, budget and revenue goals for culinary operations, update same on weekly and monthly basis, and devise operational plan to meet budget revenue goals. Authorize kitchen expenditures, and prepare budget reports.

The petitioner also states that the executive sous chef will be responsible for "continuous quality assurance oversight, and will be accountable for ensuring that all culinary operations are carried out in accordance with established quality control and customer service standards for a high-end gourmet restaurant such as [the petitioner]." The support letter goes on to state that because the petitioner will be a high-end gourmet restaurant with a "highly-skilled, professionally trained staff," the key managers of the restaurant "must be professionals with university degrees in hospitality management or a related field."

The petitioner submitted the following education and experience evaluation reports: (1) an evaluation dated December 16, 2009, by [REDACTED] and (2) an evaluation dated December 16, 2009, by [REDACTED]

Both evaluators conclude that the beneficiary has achieved the equivalent of a bachelor's degree in culinary management based on his studies in the field of culinary management at [REDACTED] and his years of experience in the culinary management and hospitality management fields.

The petitioner also submitted letters from [REDACTED] an association of small luxury inns, hotels, and restaurants, as evidence that it is the industry standard in the United States that culinary management positions at high-end hotels and restaurants require a bachelor's degree in culinary management or culinary arts, or formal academic training and experience equivalent to a bachelor's degree. The petitioner also submitted letters from the following hotels and inns stating the claim that high-end hotels and restaurants require a minimum of a bachelor's degree or formal training in culinary management for culinary management positions: [REDACTED]

[REDACTED]. None of the eight letters that generically refer to high-end hotels and restaurants specifically reference the petitioner, and all are dated over one year before the petitioner's restaurant was opened and at least nine to eleven months before the petition was filed.

The submitted LCA was certified for an "Executive Sous Chef" under SOC code 35-1011.00 Chefs and Head Cooks, to work full time at the petitioner's planned restaurant located at 22 Hawthorne Street in San Francisco at an annual salary in the range of \$45,000 - \$55,000. The LCA also indicates the Level I prevailing wage of Chefs and Head Cooks is \$33,738.00 per year, and the Form I-129 indicates that the beneficiary will be paid an annual salary of \$45,000 per year.

In a letter submitted with the Form I-129, counsel for the petitioner contends that USCIS "has long recognized that the position of Executive Chef at the finest, most well known, establishments qualifies as a specialty occupation." Counsel also contends that due to the petitioner's kitchen size and "the extraordinarily sophisticated and complex nature of the culinary operations, both the Executive Chef and the Executive Sous Chef will be 'suits' working in management jobs."

On January 14, 2010, the director issued an RFE requesting that the petitioner provide additional evidence to establish that the proffered position qualifies as a specialty occupation, as well as evidence substantiating the information on the Form I-129 with respect to the petitioner's annual income, current number of employees, and type of business. On February 25, 2010, in response to the director's RFE, the petitioner, through counsel, submitted a memorandum dated February 24, 2010, as well as additional evidence. The petitioner states in the memorandum that the restaurant is not yet open to the public, and the petitioner is occupying and renovating the business premises. The petitioner also states that it is their "hope" that the beneficiary can join

the petitioner in the U.S. "as of June 1."<sup>1</sup>

The petitioner also reiterated the duties described by the petitioner for the executive sous chef position submitted with the initial filing. The petitioner states that the proffered position "falls directly under the Executive Chef/Owner and is thus responsible for managing approximately 8 other cooks and kitchen workers and overseeing culinary operations including financial management, planning, and strategic operations consistent with the elite standards of [the petitioner]." The petitioner goes on to state that, "While working alongside other culinary professionals who themselves possess a baccalaureate degree or equivalent experience, Beneficiary will be required to demonstrate theoretical and practical knowledge and skills that surpass that which would be expected of a graduate of a bachelor's degree program from an accredited educational institution in the United States."

The petitioner resubmitted the letters from [REDACTED] and the hotels and inns referenced above as evidence that it is the industry standard in the United States that culinary management positions at high-end hotels and restaurants require a bachelor's degree in culinary management or culinary arts, or formal academic training and experience equivalent to a bachelor's degree. The petitioner also submitted a letter dated February 22, 2010, from [REDACTED] for Menu Research and Development, [REDACTED]. In his letter, [REDACTED] opines that the position of executive sous chef for the petitioner "would normally be filled by a graduate with a minimum of a Bachelor's Degree in hospitality (culinary or restaurant) management, or the equivalent."

In response to the director's RFE, the petitioner also submitted the following, *inter alia*: (1) the petitioner's organizational chart; (2) a letter verifying the petitioner's Federal Employer Identification Number; (3) bank statements; (4) evidence that the petitioner is a limited liability company established on August 6, 2009, under the laws of California; (5) photographs of the petitioner's site under renovation; and (6) a copy of the petitioner's Certificate of Liability Insurance indicating an effective date of February 2, 2010.

The director denied the petition, finding that the evidence of record does not establish that the job offered qualifies as a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Act. Specifically, the director determined that while the 2010-11 edition of the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)* indicates that an increasing number of chefs and cooks obtain their training through high school, post-high school vocational programs, or 2- or 4-year colleges, a baccalaureate level of training is not a normal, industry-wide minimum requirement for entry into the occupation. The director also stated that although the petitioner submitted voluminous information about the occupation as an executive sous chef, the submitted information does not indicate that the petitioner normally requires applicants for the position to possess a baccalaureate or higher level degree in the field. Finally, the director found that the proposed duties and stated level of responsibility do not indicate complexity or

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<sup>1</sup> It is noted, however, that this June 1<sup>st</sup> start date contradicts the May 1, 2010 start date on the petition. This contradiction raises the additional issue of the speculative nature of the employment, as it appears the petitioner is unsure when it is capable of employing the beneficiary in the position proffered.

authority that is beyond what is normally encountered in the occupational field. The director therefore concluded that the position does not meet any of the preceding criteria for classification as a specialty occupation.

On appeal, counsel for the petitioner did not submit any brief or additional evidence but contends on the Form I-290B that voluminous evidence and expert testimony establish that the proffered position qualifies as a specialty occupation because (1) the degree requirement is common to the industry in parallel positions among similar organizations, and (2) the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with attainment of a baccalaureate degree.

To make its determination whether the proffered position, as described in the initial petition and in the petitioner's response to the RFE, qualifies as a specialty occupation, the AAO turns first 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*,<sup>2</sup> 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. The AAO agrees with the director and the petitioner and finds that the duties as described by the petitioner most closely reflect the duties of a sous chef as listed under the *Handbook* section on "Chefs and Head Cooks." The *Handbook*'s description of Chefs and Head Cooks provides in pertinent part:

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

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<sup>2</sup> 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.

- 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:

***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).

As noted above, the job description provided by the petitioner for the proffered position includes 20% of human resources management duties and 20% of financial management/budgeting duties. While the AAO agrees that an executive sous chef may perform duties including some human resources management duties while supervising cooks and other kitchen staff, especially in the absence of the executive chef or head chef, the record is devoid of evidence supporting the claim that the duties of the proffered position include the performance of human resources management and financial management/budgeting duties.

The petitioner states on the petition that it employed two employees at the time of filing. It is not clear whether these two employees include the executive chef/owner [REDACTED] and the operations manager [REDACTED], nor is it clear whether the two employees include the beneficiary or not. In any event, at the time of filing the petition in December 2009, the beneficiary had no staff to supervise and no human resources management duties to perform. In response to the director's RFE, the petitioner submitted its organizational chart. According to the chart, the petitioner consists of 29 staff, the executive sous chef [REDACTED] and the operations manager would be directly under supervision of the executive chef/owner, and the executive sous chef would supervise [REDACTED] four chefs de parties, two commises, and three stewards. However, with the organizational chart, the petitioner also submitted a note which states in pertinent part that with the exception of the Executive Chef/Owner [REDACTED] and [REDACTED] the Operations Manager, "employee names are not provided, as these positions have not yet been filled." The note also states that the beneficiary was the first employee to be offered a position, due to the critical nature of the executive sous chef job. The organizational chart and the note were submitted on February 25, 2010, in response to the director's RFE issued on January 14, 2010.

Therefore, it is more likely than not that the beneficiary not only had no employees to supervise to perform his human resources management duties at the time of the initial filing in December 2009, but also had no employees to supervise on or around February 25, 2010, two months after the instant petition was filed. For the reasons discussed above, the AAO finds that it is more likely than not that the beneficiary would be employed as a sous chef and perform those duties as described in the *Handbook* for chefs and head cooks.<sup>3</sup>

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<sup>3</sup> It is noted that 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). As such, eligibility for the benefit sought must be assessed and weighed based on the facts as they existed at the time the instant petition was filed and not based on what were merely speculative facts not then in existence.

The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from

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:

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.

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potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While the petitioner is certainly permitted to petition for H-1B classification on the basis of facts not in existence at the time the instant petition was filed, it must nonetheless file a new petition to have these facts considered in any eligibility determination requested, as the agency may not consider them in this proceeding pursuant to the law and legal precedent cited, *supra*.

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 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, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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.

Again, 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. As mentioned above, the petitioner submitted opinion letters regarding the degree requirements expected for positions such as the proffered position from the following individuals:

The AAO notes that three out of the four opinion letters were dated at least five months before the petitioning entity was established.<sup>4</sup> Moreover, as mentioned above, those three letters do not specifically mention the petitioner, and they only discuss general high-level culinary management positions, not sous chef or executive sous chef positions. In addition, the letter from [REDACTED] appears to focus exclusively on hotel and resort property management positions. Therefore, given the lack of any discussion relating specifically to the restaurant industry and its standard, their relevance cannot be determined.

Furthermore, none of the authors list the reference materials on which they rely as a basis for their conclusions. It appears that none of the authors based their opinions on any objective evidence, and [REDACTED] letter restates the proffered position's description provided by the petitioner. Although [REDACTED] does list a number of courses "required by a hospitality (culinary or restaurant) management major," he does not demonstrate that these courses constitute a "body of highly specialized knowledge" to be applied "theoretically and practically" in the proffered position and that such a body of highly specialized knowledge would culminate in and/or lead to the "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent)," as required for the position to qualify as a specialty occupation. See § 214(i)(1) of the Act.

While it is recognized that the culinary courses identified by [REDACTED] would certainly benefit someone entering this occupation, this opinion does not demonstrate why such courses leading to a bachelor's or higher degree in culinary arts or management, or its equivalent, is required to enter this occupation in the United States. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO 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).

<sup>4</sup> A copy of the Limited Liability Company Articles of Organization filed with the State of California, Secretary of State indicates that the petitioning entity was formed on August 6, 2009.

Therefore, when weighed against the standard industry information in the *Handbook*, which indicates that a specialty bachelor's degree is not required for entry into this occupation, the AAO finds that the letter from [REDACTED] does not establish that the proffered position is a specialty occupation.

Furthermore, as the petitioner is well aware, [REDACTED] letter dated February 22, 2010, is dated six months before the restaurant opened to public in August 2010.<sup>5</sup> In the letter, [REDACTED] states that various similar growing companies with approximately 30 employees and over \$2 million in revenues regularly hire an executive sous chef or someone in a similar professional position to oversee their culinary operations, and require the minimum attainment of a bachelor's degree for the position. However, there is no evidence in the record that the petitioner had 30 employees and over \$2 million in revenues at the time that [REDACTED] penned the letter. Indeed, [REDACTED] did not provide any further information or documentation to support his statement.<sup>6</sup>

Therefore, the AAO finds that the four expert opinion letters do not establish 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.

The petitioner also submitted five letters from businesses allegedly similar to the petitioner, i.e., [REDACTED] [REDACTED] regarding the industry standard for parallel positions to the proffered position. Even if all of the letters indicated that a bachelor's or higher degree in a specific specialty or its equivalent were required, the petitioner fails to establish that this is the industry-wide standard for parallel positions located in similar organizations as the letters do not provide information about the size and scope of their businesses and the record does not contain any documentary evidence regarding the petitioning business' size and scope. Further, 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 five organizations with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the high-end restaurant industry. [REDACTED]

[REDACTED] Moreover, given that there is no indication that the organizations 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 these letters supported the finding that the position of executive sous chef for a high-end restaurant required a bachelor's or higher degree in a specific specialty or its equivalent,

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<sup>5</sup> See Jonathan Kauffman, *Corey Lee's Haute Cuisine at Benu is Almost Flawless*, SF Weekly, Oct. 27, 2010, available at <http://www.sfweekly.com/2010-10-27/restaurants/corey-lee-s-haute-cuisine-at-benu-is-almost-flawless/>.

<sup>6</sup> The AAO notes that such a statement could not be supported as the petitioner's restaurant was not open at the time the letter was written.

it cannot be found that such letters that appear to have been consciously selected could credibly refute the statistics-based 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.

In addition, even if all of the letters 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 letters are relevant in that the letters do not discuss 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. Simply claiming that the petitioner will be a high-end restaurant without detailing and corroborating how that prospective fact may necessitate complex or unique duties in the proffered position is insufficient to meet the petitioner's burden of proof in this proceeding.

Specifically, even though the petitioner and its counsel claim that the proffered position's duties are so complex and unique that a bachelor's degree is required, the petitioner failed to demonstrate how the sous 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. For instance, while the petitioner submitted a list of courses offered in various programs related to culinary arts and hotel administration, the petitioner did not establish how such curricula is necessary to perform the duties it claims are so complex and unique. While some culinary and hotel administration courses may be beneficial in performing certain duties of a sous 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. Furthermore, the petitioner provided a chart attempting to connect the proffered position's duties to "University Coursework in Culinary Management Required to Perform [Each] Duty," however, it failed to tie the duties to specific courses and failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty or its equivalent are required to perform the duties of the particular position here proffered.

Therefore, the evidence of record does not establish that this position is significantly different from other sous chef positions such that it refutes the *Handbook's* information to the effect that

there is a spectrum of preferred degrees acceptable for chef and head cook positions. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than chef and head cook positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

Consequently, as the petitioner fails to demonstrate how the proffered position of sous chef is so complex or unique relative to other chef and head cook 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 AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) -- the employer normally requires a degree or its equivalent for the position. The petitioner claims that the proffered position is a new position. The petitioner states on the Form I-129 that the petitioning business employed two employees when the instant petition was filed. In response to the director's RFE, the petitioner stated that all positions in the organizational chart except for the executive chef/owner and the operations manager were not filled yet. Therefore, the record does not contain any evidence showing that the petitioner has employed an executive sous chef before. As the record has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty or its equivalent, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).<sup>7</sup>

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 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.<sup>8</sup>

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<sup>7</sup> 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").

<sup>8</sup> Counsel contends 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.

While it is recognized that the proffered position in this matter requires an experienced and skilled worker, such as the beneficiary, this does not in and of itself qualify the position as a specialty occupation. Many vocational trade occupations, e.g., master plumbers and electricians, also require years of experience and thousands of hours of training to master and, as a consequence, demand a high salary. This does not mean that the minimum entry requirement for an experienced skilled worker position is a bachelor's or higher degree in a specific specialty. Absent evidence to the contrary, it would simply mean that the position would require an experience skilled worker, such as the beneficiary.

The AAO, therefore, concludes that the petitioner has not established that it meets the requirements 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 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. Therefore, the AAO need not and will not address the beneficiary's qualifications.

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.

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Moreover, as noted above, 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. *See Prevailing Wage Determination Policy Guidance*. 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. 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).