

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

The petitioner claims to be an Indian fine dining restaurant with 10 employees and a gross annual income of \$800,000. It seeks to employ the beneficiary as an executive 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) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

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

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

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

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

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

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

- (1) A baccalaureate or higher degree or its equivalent is normally the

minimum requirement for entry into the particular position;

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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 the petition signed on January 11, 2010, the petitioner indicated that it wished to employ the beneficiary as an executive chef at a rate of pay of \$41,600 per year. In the petitioner’s support letter dated January 14, 2010, the petitioner states that the beneficiary “will be involved in the preparation, seasoning, and cooking of Indian Mughlai cuisine. [The beneficiary] will plan and price menu items, order supplies, and keep records and accounts.” Further, the petitioner states

that the proffered position's duties will include the following:

- Managing, supervising and delegating responsibilities to sous chefs and cooks, as well as waiters and other kitchen staff;
- Involved in restaurant's administrative decisions, including responsibilities inside and outside the kitchen;
- Designing the menu, setting the prices, reviewing food and beverage purchases and planning special menu items;
- Interviewing and hiring prospective kitchen workers and investing in employee development and training;
- Interacting with special guests and favored customers;
- Giving and receiving feedback from cooks, initiating cleanup and logging the sales on a daily basis;
- Practicing new recipes and creating unique meals that are easily reproduced[;]
- Inspecting kitchen and restaurant for cleanliness and food quality; [and]
- Interacting with food suppliers regarding issues relating to quantity, quality and timeliness of orders.

The petitioner's support letter also states that the minimum requirement for the proffered position is a bachelor's degree in culinary arts or the equivalent in education, training and/or experience. The petitioner submitted a credential evaluation from [REDACTED], finding that the beneficiary's work experience is equivalent to a U.S. bachelor's degree in culinary arts.

In addition, the petitioner submitted an expert opinion letter from [REDACTED] Associate Professor and Blanchard Professor of Human Resources at the School of Hotel Administration at Cornell University. The petitioner also claims that the AAO has previously determined that an executive chef position can be a specialty occupation and cites *Matter of [name not provided]*, Case No. EAC 03 143 51185 (AAO Jan. 28, 2005).

On January 27, 2010, the director issued an RFE requesting the petitioner to submit, *inter alia*, (1) a more detailed job description, including specific job duties, percentage of time spent on each duty, level of responsibility, hours per week of work and the minimum education, training and experience necessary; (2) a line-and-block organizational chart showing the petitioner's hierarchy and staffing levels; (3) evidence that the proffered position is a common position required by similar sized organizations with similar annual incomes; (4) documentation to show that an industry-related professional association has made a bachelor's degree in a specific speciality a requirement for entry into the field; (5) letters or affidavits from firms or individuals in the industry that attest that such firms routinely employ and recruit only degreed individuals in a specific specialty; and (6) evidence to establish that the petitioner has a past practice of hiring persons with a baccalaureate degree, or higher in a specific specialty, to perform the duties of the proffered position.

On February 26, 2010, in response to the director's RFE, the petitioner broke down the day-to-day responsibilities of the proffered position as follows:

- To create a guide-book to standardize the preparation of sauce [sic] and recipes – 25% of total time during the first 6 months (Indian food is made in different type [sic] of sauces like tomato sauce, onion sauce, cashew nut sauce to name a few. These sauces determine the taste of the final Indian dishes cooked with spices and other ingredients. So if we can maintain the same standard of sauce [sic] and recipes at the different locations, the customers would have the same taste of our food everywhere. This is the most critical and the very fundamental step in making an Indian food chain and an executive chef with huge practical experience can do justice with this task)[;]
- To guide his/her subordinates in preparing different sauces – 15% of total time[;]
- To prepare and finalize menu for the different satellite locations as well as other 'Temptations' restaurants – 10% of total time spent[;]
- To order, manage and control inventory of raw materials – 10% of total time[;]
- To take charge/guide for Ala carte (during Dinner at the restaurant) – 15% of total time[;]
- To ensure, manage control of distribution of food to our different satellite locations like Ross School of Business, U of M Hospital, North campus[,] etc[.] (this is [a] 10AM – 6PM operation) – 15% of total time at the start moving to 40% of total time as we grow and have more satellite centers after 6 months (25% time from item 1)[;] [and]
- To interact with customers on the floor, attend important meeting [sic] with our clients, assist his superiors to finalize the big catering orders like wedding catering – 10% of total time[.]

In addition, the petitioner submitted, in part, eight job vacancy advertisements and a line-and-block organizational chart.

The director denied the petition on March 12, 2010.

On appeal, counsel for the petitioner claims that the petition was denied via a highly conclusory, boilerplate Notice of Decision that stated that the record did not sufficiently establish that the position offered to the beneficiary qualifies as a specialty occupation. Counsel further claims that the evidence submitted demonstrated that it is common for restaurants like the petitioner to require a bachelor's degree for the proffered position. In addition, counsel states that the proffered position is more complex than the average, high-level executive chef position because the beneficiary will also oversee material aspects of the petitioner's efforts to create an Indian food chain across the nation.

As a preliminary matter, the AAO notes that on appeal, counsel states that the denial cites no authority for the proposition that a specialty occupation position must require a very specific field of study. Counsel further claims that the specialty occupation regulation at 8 C.F.R. 214.2(h)(4)(iii) is silent on the issue of specific fields of study. Counsel appears to have overlooked section 214(i)(1) of the Act, which clearly states that a specialty occupation requires in part the “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.” (Emphasis added.)

In addition, counsel states on appeal that the AAO has previously found that the USCIS may not impose specific degree requirements at its whim and cites *Matter of [name not provided]* (AAO Oct. 30, 2009), which indicates that a job can qualify as a “profession” even if it allows for any degree. The AAO finds that *Matter of [name not provided]* is irrelevant to the instant petition as the petitioner is seeking in the instant petition to classify the beneficiary as an H-1B nonimmigrant worker in a specialty occupation pursuant to section 214(i)(1) of the Act and not as an immigrant worker in a professional position as defined by section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), and 8 C.F.R. § 204.5(k)(2). The primary, fundamental difference between qualifying as a “profession” and qualifying as a “specialty occupation” is that specialty occupations require the U.S. bachelor’s or higher degree, or its equivalent, to be in a specific specialty as defined at section 214(i)(1) of the Act.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO first turns 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 U.S. Department of Labor’s (DOL’s) *Occupational Outlook Handbook* (hereinafter the *Handbook*), on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry’s professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms “routinely employ and recruit only degreed individuals.” See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ The duties of the proffered position are essentially those noted for executive chefs. In the *Handbook*, in part, the duties of an executive chef are described as follows:

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

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

U.S. Dept. 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> (accessed May 30, 2012).

In its discussion of the educational and training requirements for chefs and head cooks, the *Handbook* states the following, in pertinent part:

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.

* * *

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

Handbook, 2012-13 Ed., "Chefs and Head Cooks," <http://www.bls.gov/ooh/Food-Preparation-and-Serving/Chefs-and-head-cooks.htm#tab-4> (accessed May 30, 2012).

As indicated in that passage, there are numerous different paths that may lead to a chef position. Because the *Handbook* indicates that entry into the chef occupation does not normally require a degree in a specific specialty as a minimum entry requirement, the *Handbook* does not support the proffered position as being a specialty occupation.

The AAO will now discuss the expert opinion letter submitted by the petitioner with the initial petition. The letter is from [REDACTED], Associate Professor and Blanchard Professor of Human Resources at [REDACTED] at Cornell University in Ithaca, New York. In the letter, [REDACTED] states that, in his opinion, the proffered position is a specialty occupation and therefore requires at a minimum a bachelor's degree in culinary arts, restaurant and food services management or a related area. [REDACTED] further states that "it is a general practice within the field of restaurant management for a restaurant to hire an Executive Chef with such a background, particularly given the employer's ambitions for multi-restaurant

ownership." [REDACTED] does not list the reference materials on which he relies as a basis for his conclusion. It appears that [REDACTED] did not base his opinion on any objective evidence, but instead restates the proffered position description as provided by the petitioner. 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). Therefore, the AAO finds that the letter from [REDACTED] does not establish that the proffered position is a specialty occupation, especially when compared to the information provided by the Bureau of Labor Statistics in the *Handbook* indicating that a bachelor's or higher degree in a specific specialty is not required for entry into this occupation.

With regard to *Matter of [name not provided]*, Case No. EAC 03 143 51185 (AAO Jan. 28, 2005), cited by the petitioner in its support letter and in response to the RFE, and cited by counsel on appeal, the AAO notes that neither the petitioner nor counsel submit a copy of *Matter of [name not provided]*, Case No. EAC 03 143 51185 (AAO Jan. 28, 2005) and, as such, there is no evidence that the facts of the instant petition are analogous to those in the unpublished decision. More importantly, however, even if the facts of this case were analogous to those in the unpublished decision, *Matter of [name not provided]*, Case No. EAC 03 143 51185 (AAO Jan. 28, 2005) is not a precedent decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

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, or the equivalent, in a specific specialty, 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.

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement of at least a bachelor's degree in a

specific specialty or its equivalent.

In addition, as previously discussed, the expert opinion letter submitted by the petitioner with the initial petition is not deemed credible as [REDACTED] did not list or cite the reference materials on which he relied as a basis for his conclusion that it is a standard practice to require a bachelor's degree in a specific specialty or its equivalent for the proffered position such that it does not refute the statistics-based findings of the Bureau of Labor Statistics that a specialty, baccalaureate degree is not a minimum entry requirement for this occupation.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner submitted copies of eight advertisements in response to the RFE. The advertisements provided, however, establish at best that a bachelor's degree may be required for some positions but, even then, the degree or its equivalent does not have to be *in a specific specialty*. Other advertisements indicated, however, that such a general degree is only preferred and/or that a culinary arts degree is also acceptable. In addition, even if all of the job postings indicated that a bachelor's or higher degree in a specific specialty or its equivalent were required, the petitioner fails to establish that the submitted advertisements are relevant in that the posted job announcements are not for parallel positions in similar organizations in the same industry. For instance, it is unclear from the sixth and seventh advertisements who the hiring companies are and whether they would be similar to the petitioner and, as such, it also cannot be determined whether the jobs would be considered parallel to that of the proffered position. Moreover, five of the advertisements are for executive chef positions for large, multi-million dollar companies and therefore, they also cannot be found to be parallel positions in similar organizations in the same industry. As a result, the petitioner has not established that similar companies in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.²

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).

² Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from just eight job advertisements with regard to determining the common educational requirements for entry into parallel positions in similar Indian fine dining establishments. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position of executive chef for an Indian fine dining establishment required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the 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.

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." The petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of executive chef.

Specifically, even though the petitioner and its counsel claim that the proffered position's duties are so complex that a bachelor's degree is required, the petitioner failed to demonstrate how the executive 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, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it claims are so complex. For example, the petitioner did not demonstrate what coursework would be necessary to prepare an individual to create a sauce preparation guide-book. While courses in food preparation or even a two-year culinary arts degree may be beneficial in performing certain duties of an executive chef position, such as sauce preparation, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in culinary arts or its equivalent are required to perform the duties of the particular position here proffered.

In addition, the AAO notes that in the petitioner's letter dated April 6, 2010 submitted on appeal, the petitioner states that "running a 2-3 or even 10 restaurants in one area/location would not necessarily qualify as a 'complex and extraordinary' effort. But here we are talking of running potentially 400 restaurants under one umbrella." 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).³

³ The agency made clear long ago that speculative employment to meet possible workforce needs arising from potential business expansions 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 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.

Therefore, the evidence of record does not establish that this position is significantly different from other chef positions such that it refutes the *Handbook's* information to the effect that many years of training and experience are acceptable for chef positions. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than chef 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 executive chef is so complex or unique relative to other chef positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, the record of proceeding does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty. The AAO notes that the petitioner and counsel claim repeatedly that the duties of the executive chef position can only be employed by an individual with at least a bachelor's degree in culinary arts or the equivalent in education, training and/or experience. 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"). 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.

Finally, the petitioner has not proven, and the record does not establish, that the nature of the position's duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The duties as described appear to be routine for executive chefs in the industry, which, as noted in the *Handbook*, do not require a baccalaureate degree in a specific specialty to perform them. Even if the petitioner had sufficiently developed relative specialization and complexity in this matter such that post-secondary education and not just experience were associated with the proffered position as a minimum entry requirement, the petition does not even distinguish the duties of the proffered position as those requiring a 4-year rather than a 2-year degree. The petitioner has thus failed to establish the referenced regulatory criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).⁴

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998).

⁴ On appeal, counsel states 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

The petitioner has failed to establish that it satisfies any of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it has failed to establish that the proffered position qualifies as specialty occupation. The appeal must be dismissed and the petition denied for this reason.

Beyond the decision of the director, the record does not establish that the beneficiary is qualified to perform the services of an occupation requiring a U.S. bachelor's degree in culinary arts. The petitioner submits a credential evaluation that considers the beneficiary's work experience. The record does not establish, however, that the evaluator, [REDACTED], Director of Culinary Education at [REDACTED] is an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit, as required by 8 C.F.R. § 214.2(h)(4)(iii)(d)(I). For instance, no documentation was provided from [REDACTED] establishing that, at the time [REDACTED] produced his evaluation for the petitioner, (1) [REDACTED] had a program for granting college-level credit in the pertinent academic specialty for work experience in that specialty, and (2) that this evaluator had authority for granting such credit based upon a person's work experience. Accordingly, this evaluation does not meet the standard of 8 C.F.R. § 214.2(h)(4)(iii)(D)(I) for competency to render to USCIS an opinion on the educational equivalency of the beneficiary's work experience. Thus, the opinion does not establish that the beneficiary has the equivalent of a bachelor's degree in culinary arts. In other words, even if the proffered position were established as being a specialty occupation requiring a U.S. bachelor's or higher degree in culinary arts, the petitioner failed to demonstrate that the beneficiary is qualified for that specialty occupation. For this additional reason, the petition may not be approved.

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

distinguish the proffered position from other chef positions for which a bachelor's or higher degree in a specific specialty, or its equivalent, is not required to perform their duties.

Moreover, the petitioner has designated the proffered position as a Level II position on the submitted Labor Condition Application (LCA), which is for qualified employees who have attained, either through education or experience, a good understanding of the occupation. *See Employment and Training Administration (ETA), Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs* (Rev. Nov. 2009). Therefore, it is simply not credible that the position is one with specialized and complex duties, as such a higher-level position would be classified as a Level IV position, requiring a significantly higher prevailing wage. 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).

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