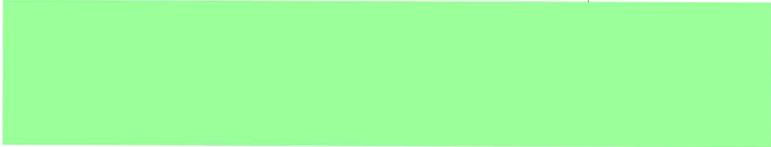
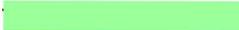


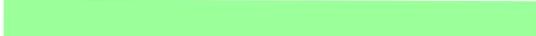


U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **FEB 04 2013** Office: CALIFORNIA SERVICE CENTER FILE: 

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)

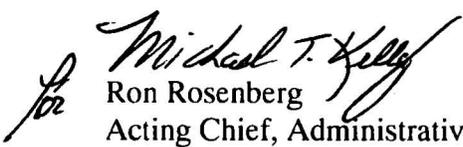
ON BEHALF OF PETITIONER:  


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,

  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

The petitioner describes itself as a business engaged in manufacturing bread, relish, and syrup, with a gross annual income of \$243,000 with four employees. It seeks to employ the beneficiary as a chef and to classify the alien 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 issue before the AAO 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 offered to the beneficiary meets the applicable statutory and regulatory requirements.

In deciding whether a proffered position qualifies as a specialty occupation, the AAO analyzes the evidence of record according to the statutory and regulatory framework below.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which requires [(1)] 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 requires [(2)] 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, the 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 a particular position 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 (5<sup>th</sup> 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. *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.

In the petitioner's support letter dated March 23, 2011, counsel for the petitioner explained that the beneficiary's mother established the manufacturing business on the Island of Kauai, Hawaii, and that the business has expanded onto the Island of Oahu, Hawaii. The letter also stated that the owner of the petitioning entity has also developed and sells a special type of Hawaiian [REDACTED] which has "enjoyed success as a popular [REDACTED]" on the south shore of Oahu, after expanding from Kauai.

Also according to counsel's letter, the petitioner currently manufactures four varieties of [REDACTED]

[REDACTED] The letter further states that that the petitioner supplies its products in jars, "because of the unique flavors offered," and that the petitioner will continue to provide its products to its [REDACTED] locations as well as to "public food/stores/markets."

Counsel's support letter also asserts that the proffered position is an essential management role which entails exercising broad authority with food production operations, entering into contracts, formulating policies, hiring personnel, and reviewing financial reports. Further, counsel stated that the beneficiary had been working in the proffered position in valid E-2 status since 2007. More specifically, the aforementioned letter lists the following "as some of the duties associated with the position:

- **Food production equipment, inventory, and facilities management:**
  - Manage manufacturing facility operations;
  - Ensure compliance with health and fire regulations regarding food preparation;
  - Maintain inventory and relations with vendors;
  - Negotiate and enter into vendor contracts;
  - Monitor financial transactions and review expenditures, profits and opportunities to improve profitability;
  - Maintain all food production equipment and negotiate contracts with vendors;

- Liaise and coordinate with all transactions with [the petitioner's] retailers;
  - Develop new products for [the petitioner] and [the associated brand];
  - Receive orders from clients and place orders with distributors; and
  - Report changes in market prices and adapt costs.
- **Human Resources Management, Food Production:**
    - Manage manufacturing facilities and food production employees;
    - Develop, implement, and enforce company policies;
    - Investigate complaints regarding food quality or service and take appropriate action to resolve production issues with personnel; and
    - Hire, train, and evaluate food production staff and establish standards for personnel performance and customer service.
- **Food Production Management:**
    - Monitor food preparation to ensure company standards are met and unique recipes are properly followed and protected;
    - Check the quality of raw and cooked food products to ensure that standards are met;
    - Monitor sanitation practices to ensure that employees follow standards and regulations;
    - Ensure quality of all food products before and after preparation;
    - Order requisition food and other supplies needed to ensure efficient operation;
    - Supervise and coordinate activities of cooks and workers engaged in food preparation;
    - Inspect supplies, equipment, and work areas to ensure conformance to established standards;
    - Instruct cooks and other workers in the preparation, cooking, garnishing;
    - Prepare all secret recipes to protect from unauthorized production;

- Estimate amounts and costs of required supplies, such as food and ingredients for financial reports regarding budget; and
- Collaborate with executive management on the development of additional recipes.

The petitioner's support letter described the position as a Food Production Manager and Executive Chef<sup>1</sup> but failed to state the minimum educational requirement for the proffered position. However, the letter did describe that the beneficiary possessed professional work experience that had been equated to a U.S. bachelor's degree in culinary arts.

At the outset, the AAO observes that, as reflected in both the above-quoted description of duties from the petitioner's initial letter of support and also in the petitioner's response to the RFE described below, the job duties are described in terms of general functions that appear to be generic to the occupation, and that, as such, even when considered in the context of the information that the petitioner has provided about its business model, do not establish any particular attributes of the proffered position or its duties that would distinguish either from the general range of positions and associated duties within the pertinent occupational classification. The AAO therefore also finds that the petitioner has not established the proposed duties, or the proffered position that they comprise, as more unique, specialized, and/or complex than executive chef, head cook, or chef positions which may share those same generalized functions that the petitioner ascribes to the proffered position and yet not require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty, or its equivalent, which requirement is essential for a specialty occupation as defined at section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

The petitioner submitted several experience verification letters, describing the beneficiary's experience within the food and restaurant industry, and an education-and-experience evaluation opining that the beneficiary possesses the equivalent of a U.S. bachelor's degree in culinary arts.

On April 15, 2011, the director issued an RFE requesting the petitioner to submit evidence showing that a baccalaureate degree in a specific field of study is a standard minimum requirement in the petitioner's company, and in similarly situated businesses in the petitioner's industry. Additionally, the director explained the specialty occupation standard and stated that it was not clear that the beneficiary would be performing services in a

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<sup>1</sup> The AAO observes that the Labor Condition Application (LCA) and Form I-129 reflect the title as "Chef," and that the organization chart refers to the beneficiary named on the chart as the General Manager. 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).

specialty occupation, and further noted that the proffered position did not appear to involve such specialization or complexity as to require the knowledge associated with the attainment of a baccalaureate degree or its commensurate with the nature, scope, and/or size of the employer's business enterprise. Also, the director requested evidence pertinent to whether the petitioner normally requires a degree or its equivalent for the position, and the specialized and complex nature of the duties that would require knowledge that is usually associated with the attainment of a bachelor's or higher degree in a specific specialty.

In response to the director's RFE, the petitioner submitted, in part, (1) a letter that described the proffered position as a specialty occupation with a breakdown of time spent on each duty; (2) an organizational chart showing the hierarchy within the business operations, and identifying each position; (3) promotional material describing the petitioner's brand; (4) press coverage regarding the petitioner's products; and (5) the petitioner's employee manual.

Counsel for the petitioner provided notably different duties in the RFE response, insofar as the duties were less detailed than the duties originally presented, with a breakdown of time spent on each duty.<sup>2</sup>

Notably, the duties presented within the RFE response letter were even more generalized than those presented initially in the first support letter, and they appear below, together with the percentage of time spent on each duty.

- Manage and setup [the petitioner's] warehouse (5%);
- Manage and setup of operations for food production (10%);
- Review orders for preparation for Waikiki and outer Island sores and those received via the internet (5%);
- Supervise/organize warehouse preparation of supplies and orders to outer island store (5%);
- Prepare secret mixture for [redacted] (minimum 800 to 1100) a day for preparation by employees (verbatim)(5%);
- Oversee food preparation to ensure quality (10%);
- Preparation of secret recipes in isolated room to ensure secrecy (10%);
- Create ideas and consult with owners as to new ideas in creating new food products (5%);

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<sup>2</sup> The AAO would like the record of proceeding to reflect that the percentage breakdown presented in the RFE response adds up to 101% of time.

- Create new unique recipes using culinary expertise to achieve a unique blend with other unique recipes, which is the key to the [registered product's] success (5%);
- Perform all testing and tasting to achieve perfected food products (2%);
- Organize warehouse to prepare food products for distribution (3%);
- Manage Waikiki Operations (10%);
- Manage inventory and quality control of food products and other inventory items (3%);
- Perform administrative functions related to inventory control, product orders, and operations within budget requirements (5%);
- Establish training methodology and policies for warehouse and food preparation staff (3%);
- Hire and train warehouse and food preparation staff (3%); and
- Advise and assist in the franchising of the business. (10%)

As the response to the RFE does not supplement the earlier duty descriptions with any substantive information regarding the specific work that the beneficiary would perform and showing a correlation between such work and the necessity for at least a bachelor's degree, or the equivalent, in a specific specialty, the AAO here incorporates by reference its earlier comments and findings regarding the generalized nature of the duties and the position as presented in the record of proceeding.

Counsel for the petitioner maintained that the position undertaken by the beneficiary requires formal university expertise in the culinary arts in food preparation and service management. In asserting that the nature of the specific duties is so specialized and complex, the petitioner, through counsel, claimed that the position differs from other related non-specialty occupation positions in that the petitioner requires a degree, and that the beneficiary's past services had been the key to the petitioner's success. The petitioner also maintained that there is no comparable vendor in the United States, and that the beneficiary would be an integral part of franchising the business, and moreover, that the business could not exist without the beneficiary's services. These elements regarding the business, contended the petitioner, make the proffered position of such a unique nature that a bachelor's degree is necessary. The AAO attributes no probative weight to counsel's claims as they are not supported by documentary evidence substantiating counsel's claims that the aspects he asserts necessitate at least a bachelor's degree or the equivalent, in a specific specialty.

The director denied the petition on June 6, 2011, because the petitioner had failed to establish that a baccalaureate or higher degree, in a specific field of study is normally the minimum requirement for entry into the particular position, or that the degree requirement is common to the industry in parallel positions.

On appeal, counsel for the petitioner claims that USCIS erred in its determination that the proffered position did not meet the specialty occupation standard. Counsel further claims that the petitioner clearly established that the proffered position is a specialty occupation that requires at a minimum a bachelor's degree in culinary arts or its equivalent, and that it demonstrated the proffered position is unique. 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)). The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The AAO will now discuss the basis for its determination that the petitioner has not satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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)(I): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position.

The AAO will now look at the U.S. Department of Labor's *Occupational Outlook Handbook* (hereinafter referred to as the *Handbook*), which the AAO recognizes as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>3</sup> The AAO finds that the petitioner describes duties associated with chefs and head cooks.

The "Chefs and Head Cooks" chapter in the 2012-2013 edition of the *Handbook* describes the associated duties, in part, as follows:

Chefs and head cooks typically do the following:

- Check freshness of food and ingredients
- Supervise and coordinate activities of cooks and other food preparation workers
- Develop recipes and determine how to present the food
- Plan menus and ensure uniform serving sizes and quality of meals
- Inspect supplies, equipment, and work areas for cleanliness and functionality

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<sup>3</sup> 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>.

- 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.

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 December 28, 2012).

In its discussion of the educational and training requirements for chefs, head cooks, and food preparation and serving supervisors, 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.

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-4> (accessed December 28, 2012).

As reflected in the passage quoted above, the *Handbook* indicates that entry into the Executive Chefs occupational classification does not normally require a least a bachelor's degree, or the equivalent, in a specific specialty. The *Handbook's* information also indicates that a position's inclusion within the occupational category of Chefs (which includes Executive Chefs as a subgroup) is not in itself sufficient to establish that a particular Chef, or Executive Chef, position is one for which the normal minimum entry requirement is a bachelor's or higher degree, or the equivalent, in a specific specialty.

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.

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

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

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 AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that the particular position proffered in this petition

is "so complex or unique" that it can be performed only by an individual with at least a bachelor's degree in a specialty occupation.

Specifically, 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 crux of the petitioner's assertion that the position is unique rests upon two of the petitioner's claims, namely that: (1) the business is unique because it offers specialty food combinations not used by other food service entities; and (2) the position is distinguished from other, chef positions, because the petitioner does require a bachelor's degree even though other employers do not demand a bachelor's degree.

To prevail in this regard, the petitioner must demonstrate how the proffered position's duties comprise a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty. For instance, the AAO notes that in the support letter dated March 23, 2011, and in the RFE response letter dated May 24, 2011, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree or its equivalent and did not establish that the proffered position can only be performed by a person with such education or educational equivalency. While a background in food preparation may be beneficial in performing certain duties of a chef position, the petitioner has failed to demonstrate how an established curriculum of such courses or a relevant experience, 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.

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, including the subset of executive 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.

Further, the AAO notes that the LCA indicates a wage level based upon the occupational classification "Chefs and Head Cooks" at a Level II (qualified) wage.

Wage levels should be determined only after selecting the most relevant *O\*NET* occupational code classification. Then, a prevailing-wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation. Prevailing wage determinations start with an entry level wage (i.e. Level I) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent worker) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and

level of supervision, and the level of understanding required to perform the job duties. DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received as indicated by the job description.

The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level II wage rate is described by DOL as follows:

**Level II** (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O\*NET Job Zones.

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at [http://www.foreignlaborcert.doleta.gov/pdf/Policy\\_Nonag\\_Progs.pdf](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

The AAO observes that the wage-rate element of the LCA is indicative of a comparatively low position relative to others within the occupation. According to the DOL information on the four wage levels, the Level II wage rate would be appropriate for a position that only demands a good understanding of the occupation, and one in which the position holder would be expected to perform moderately complex tasks that require limited exercise of judgment.

Thus, based upon the record of proceeding, including the LCA, it does not appear that the proffered position is so complex or unique that it can only be performed by an individual who has completed a baccalaureate program in a specific discipline that directly relates to the proffered position. Furthermore, the petitioner has not established that the nature of the particular position is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

Moreover, the AAO finds that the job duties, as described in the RFE response letter with corresponding breakdown of time by percentage reveals that the beneficiary would be working on many duties that are tangentially related to the claimed occupational category.

Based on the foregoing, as the petitioner fails to demonstrate how its proffered position of chef is more complex or unique than other chef positions that can be performed by persons with less than a bachelor's degree, or the equivalent, in a specific specialty, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

The AAO's review of the record of proceeding under this criterion always necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and with regard to employees who previously held the position in question.

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. Further, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. In the instant case, the record does not establish a prior history of recruiting and hiring only persons with at least a bachelor's degree, or the equivalent, in a specific specialty for the proffered position. As the record contains insufficient information on point, the petitioner has not met the burden at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Now, the AAO looks to the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), which requires a petitioner to establish that the nature of the specific 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.

More specifically, it is noteworthy that the second iteration of duties contained in the RFE response letter area much more generalized. Again, the relative specialization and complexity have not been developed by the petitioner as an aspect of the proffered position. As this petition lacks a credible evidentiary foundation for establishing the actual substantive nature of any specific duties that the beneficiary would perform, there is no basis for the AAO to determine the actual nature of the duties that would be performed, and so also no basis for a determination that there is a usual association between attainment of at least a bachelor's degree in a specific specialty and whatever knowledge would have to be applied to perform the duties. Even though the relative specialization and complexity had been claimed in that the beneficiary would be assisting in the franchising process, 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 at least a bachelor's degree in a specific specialty.<sup>4</sup>

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the additional, supplemental requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, it cannot be found that the proffered position

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<sup>4</sup> In particular, the AAO observes that the percentage breakdown of duties show that the beneficiary would only be working on the franchising duties for 10% of his time, therefore it is an incidental proportion of the overall job duties.

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. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note (1) that many of the experience letters that served as a basis for the educational equivalency evaluation did not contain an adequate translation statement that certifies the translator is fluent in both languages,<sup>5</sup> and (2) that the petitioner's reliance on the evaluation submitted to establish the petitioner's qualification to serve in a specialty occupation position was misplaced, in that, contrary to the evaluator's self-endorsement as such, the evidence of record does not establish that the evaluator is an official that USCIS recognizes as competent to evaluate the educational equivalency of training and/or experience pursuant to 8 C.F. R. § 214.2(h)(4)(iii)(D)(5), in that they are a matter for USCIS determination only and do not contemplate award of years of academic credit based upon mere calendar-time involvement in the occupation-as clearly manifest in the language of the regulation.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

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. Section 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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<sup>5</sup> Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.