U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: APR 0 2 2013 OFFICE: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

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

Thank you,

Michael T. Kelly
for Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director revoked the approval of the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. Approval of the petition remains revoked.

On the Form I-129 visa petition, the petitioner describes itself as a company providing computer consulting services to travel agencies[1] established in 2002. The approved petition that is the subject of the revocation action had been filed so that the petitioner could continue its employment of the beneficiary in what it designates as a systems administrator position,[2] by extending her classification 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 revoked the approval of the petition on the basis of his determination that the petitioner had failed to demonstrate: (1) that the proffered position qualifies for classification as a specialty occupation; (2) that the petitioner is employing the beneficiary pursuant to the terms and conditions of the approved petition; and (3) the existence of a valid employer-employee relationship between the petitioner and the beneficiary.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's notice of intent to revoke approval of the petition (NOIR); (3) counsel's response to the NOIR; (4) the director's letter revoking approval of the petition; and (5) the Form I-290B and supporting documentation.

Upon review of the entire record, the AAO finds that although the record of proceeding does not support the director's third ground for revoking approval of this petition, it has failed to overcome the director's first and second grounds for revoking the approval of this petition. Accordingly, the appeal will be dismissed, and approval of the petition will be revoked.

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[1] Although the petitioner described itself as a company providing computer consulting services to travel agencies on the Form I-129, it also provided a North American Industry Classification System (NAICS) Code of 561510, "Travel Agencies." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "561510 Travel Agencies," http://www.census.gov/cgi-bin/sssd/naics/naicsrch (accessed Mar. 6, 2013). The petitioner also refers to itself as a travel agency in its July 16, 2012 letter submitted on appeal.

Accordingly, the petitioner has provided conflicting information regarding its business operations, in that it claims to be both a computer consulting services company and a travel agency. 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).

[2] The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for the SOC (O*NET/OES) Code 15-1051, the associated Occupational Classification of "Computer Systems Analysts," and a Level II (qualified) prevailing wage rate.

Beyond the decision of the director, the AAO finds an additional issue which, although not addressed in the director's decision, nevertheless would have been a proper basis for revocation of the approval of the petition, namely, the petitioner's failure to demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation.[3] Although the director did not revoke approval of the petition on this ground, this would not preclude the director from again initiating revocation-on-notice proceedings on this issue.

Furthermore, the AAO also finds that the petitioner has failed to establish that the LCA submitted in support of the petition actually corresponds to it.[4] This issue undermines the credibility of the entire petition.

I. Procedural History

The petitioner filed the instant petition on October 19, 2009, and it was approved on November 3, 2009. In 2010, U.S. Citizenship and Immigration Services (USCIS) randomly selected the petitioner for a post-adjudicative site visit.

The record of proceeding reflects that when USCIS attempted to conduct its site visit to the petitioner's business premises, it discovered that the address the petitioner provided on the Form I-129 is a residential apartment building. Furthermore, the current resident of the apartment named by the petitioner as its business location had no knowledge of the petitioner. Although the site investigator subsequently left two telephone messages at the number provided on the Form I-129, neither call was returned.

As such, the director issued the NOIR on August 8, 2011. The petitioner, through counsel, submitted a timely response. The director did not find counsel's response persuasive, and he revoked approval of the petition on June 15, 2012. Counsel submitted a timely appeal.

II. The Proffered Position

As will be discussed at section IV below, there is a material conflict between the occupational group claimed for the proffered position in the Form I-129, on the one hand, and, on the other, the occupational group identified in the LCA as the one to which the proffered position belonged and as the one setting the minimum wage-level and the other LCA obligations.

On the Form I-129, which the petitioner signed on September 30, 2009, the petitioner proposed the following duties for the beneficiary:

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[3] The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that the AAO identified this additional aspect of the petition.

[4] *See id.*

- Installing, configuring, and supporting the petitioner's local area network, wide area network, and internet;
- Maintaining the petitioner's network hardware and software;
- Supervising other network support and client server specialists; and
- Planning, coordinating, and implementing network security measures.

The petitioner claimed that the beneficiary had performed these duties since 2002, when it obtained its first H-1B approval on behalf of the beneficiary.

III. Authority to Revoke Approval of a Petition

In general, the authority to revoke approval of an H-1B petition is found at 8 C.F.R. § 214.2(h)(11), which states, in pertinent part, the following:

> *Revocation of approval of petition.*
>
> (i) *General.*
>
> (A) The petitioner shall immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility under section 101(a)(15)(H) of the Act and paragraph (h) of this section. An amended petition on Form I-129 should be filed when the petitioner continues to employ the beneficiary. . . .
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> (B) The director may revoke a petition at any time, even after expiration of the petition.
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> * * *
>
> (iii) *Revocation on notice—*
>
> (A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:
>
> (*1*) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition. . . .; or

(2) The statement of facts contained in the petition . . . was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or

(3) The petitioner violated terms and conditions of the approved petition; or

(4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or

(5) The approval of the petition violated [paragraph] (h) of this section or involved gross error.

(B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. . . .

IV. The LCA Submitted by the Petitioner in Support of the Petition

Before addressing the director's grounds for revoking the approval of this petition, the AAO will first discuss the LCA submitted by the petitioner in support of this petition. As noted above, the LCA submitted by the petitioner in support of the petition was certified for the SOC (O*NET/OES) Code 15-1051.00 and the associated Occupational Classification of "Computer Systems Analysts." However, as will be discussed below, that is not an accurate characterization of the proffered position.

The U.S. Department of Labor (DOL) has clearly stated that its LCA certification process is cursory, that it does not involve substantive review, and that it makes the petitioner responsible for the accuracy of the information entered in the LCA.

With regard to LCA certification, the regulation at 20 C.F.R. § 655.715 states the following:

> *Certification* means the determination by a certifying officer that a labor condition application is not incomplete and does not contain obvious inaccuracies.

Likewise, the regulation at 20 C.F.R. § 655.735(b) states, in pertinent part, that "[i]t is the employer's responsibility to ensure that ETA [(the DOL's Employment and Training Administration)] receives a complete and accurate LCA."

Further, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) also makes clear that certification of an LCA does not constitute a determination that a position qualifies for classification as a specialty occupation:

> Certification by the Department of Labor of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H–1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

> For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit an LCA that corresponds to the claimed duties of the proffered position, as the proposed duties as described in the record of proceeding do not comprise the type of position designated on the LCA – a financial analyst.

The appropriate wage level is determined only after selecting the most relevant O*NET occupational code classification. The *Prevailing Wage Determination Policy Guidance*[5] issued by DOL states that "[t]he O*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification" for determining the prevailing wage for the LCA.

The O*NET Summary Report for "Computer Systems Analysts," the occupational category specified in the LCA, summarizes that occupation as follows:

> Analyze science, engineering, business, and other data processing problems to implement and improve computer systems. Analyze user requirements, procedures,

[5] Available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf (last accessed Mar. 6, 2013).

and problems to automate or improve existing systems and review computer system capabilities, workflow, and scheduling limitations. May analyze or recommend commercially available software.

* * *

Tasks

- Expand or modify system to serve new purposes or improve work flow.
- Test, maintain, and monitor computer programs and systems, including coordinating the installation of computer programs and systems.
- Develop, document and revise system design procedures, test procedures, and quality standards.
- Provide staff and users with assistance solving computer related problems, such as malfunctions and program problems.
- Review and analyze computer printouts and performance indicators to locate code problems, and correct errors by correcting codes.
- Consult with management to ensure agreement on system principles.
- Confer with clients regarding the nature of the information processing or computation needs a computer program is to address.
- Read manuals, periodicals, and technical reports to learn how to develop programs that meet staff and user requirements.
- Coordinate and link the computer systems within an organization to increase compatibility and so information can be shared.
- Determine computer software or hardware needed to set up or alter system.

See Employment & Training Administration, U.S. Dept. of Labor, O*Net OnLine, Summary Report for Computer Systems Analysts, available at http://www.onetonline.org/link/summary/15-1051.00 (accessed Mar. 6, 2013).

These are not the duties proposed for the beneficiary in the Form I-129 and supporting documentation. Instead, the duties of the proffered position align with those of the Systems Administrators occupational classification, which is what is claimed in the Form I-129. The petitioner seems to agree, notwithstanding its submission of an LCA certified for a computer systems analyst position, as it described the position as a systems administrator on the Form I-129

and in all supporting documentation, except for the LCA. Both previous and current counsel described the proffered position as a systems administrator, as well. The O*NET Summary Report for the occupational category "Network and Computer Systems Administrators" summarizes that occupation as follows:

> Install, configure, and support an organization's local area network (LAN), wide area network (WAN), and Internet systems or a segment of a network system. Monitor network to ensure network availability to all system users and may perform necessary maintenance to support network availability. May monitor and test Web site performance to ensure Web sites operate correctly and without interruption. May assist in network modeling, analysis, planning, and coordination between network and data communications hardware and software. May supervise computer user support specialists and computer network support specialists. May administer network security measures.
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> * * *
>
> Tasks
>
> - Maintain and administer computer networks and related computing environments including computer hardware, systems software, applications software, and all configurations.
> - Perform data backups and disaster recovery operations.
> - Diagnose, troubleshoot, and resolve hardware, software, or other network and system problems, and replace defective components when necessary.
> - Plan, coordinate, and implement network security measures to protect data, software, and hardware.
> - Configure, monitor, and maintain email applications or virus protection software.
> - Operate master consoles to monitor the performance of computer systems and networks, and to coordinate computer network access and use.
> - Load computer tapes and disks, and install software and printer paper or forms.
> - Design, configure, and test computer hardware, networking software and operating system software.

- Monitor network performance to determine whether adjustments need to be made, and to determine where changes will need to be made in the future.

- Confer with network users about how to solve existing system problems.

See Employment & Training Administration, U.S. Dept. of Labor, O*Net OnLine, Summary Report for Network and Computer Systems Administrators, available at http://www.onetonline.org/link/summary/15-1142.00 (accessed Mar. 6, 2013).

The duties of the proffered position clearly align with those of network and computer systems administrators, and not with those of computer systems analysts.

DOL guidance specifies that when ascertaining the proper occupational classification, a determination should be made by "consider[ing] the particulars of the employer's job offer and compar[ing] the full description to the tasks, knowledge, and work activities generally associated with an O*NET-SOC occupation to insure the most relevant occupational code has been selected." *See Prevailing Wage Determination Policy Guidance*. In this case, the petitioner has provided no explanation of its apparently erroneous claim that the position's primary and essential tasks, knowledge, and work activities are those generally associated with the occupational category of "Computer Systems Analysts" as depicted by O*Net. As such, it has not established that this LCA actually corresponds to this petition.

The AAO finds that this conflict between the petition and the LCA the petitioner submitted in its support undermines the credibility of the petition. Having made this initial observation, the AAO will turn next to the director's grounds for revoking the approval of the petition.

V. Specialty Occupation

The director's first basis for revoking approval of this petition was his determination that the petitioner had failed to demonstrate that the proffered position qualifies for classification as a specialty occupation. The AAO agrees. Based upon a complete review of the record of proceeding, the AAO finds that the evidence of record fails to establish that the position as described in the petition constitutes a specialty occupation.

To meet its burden of proof in establishing the proffered position as a specialty occupation, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

> 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 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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

The AAO will now discuss the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

The AAO will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), which is satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition.

The AAO recognizes DOL's *Occupational Outlook Handbook* (the *Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.[6] As discussed above, the duties of the proffered position align with those of the Network and Computer Systems Administrators occupational group, as claimed by the petitioner on the Form I-129, and not those of the Computer Systems Analysts occupational group, as claimed by the petitioner on the LCA.

[6] The *Handbook*, which is available in printed form, may also be accessed online at http://www.stats.bls.gov/oco/. The AAO's references to the *Handbook* are from the 2012-13 edition available online.

The *Handbook's* discussion of the duties typically performed by network and computer systems administrators states, in pertinent part, the following:

> Computer networks are critical parts of almost every organization. Network and computer systems administrators are responsible for the day-to-day operation of these networks. They organize, install, and support an organization's computer systems, including local area networks (LANs), wide area networks (WANs), network segments, intranets, and other data communication systems. . . .
>
> Network and computer systems administrators typically do the following:
>
> - Determine what the organization needs in a network and computer system before it is set up
> - Install all network hardware and software and make needed upgrades and repairs
> - Maintain network and computer system security and ensure that all systems are operating correctly
> - Collect data to evaluate the network's or system's performance and help make the system work better and faster
> - Train users on the proper use of hardware and software when necessary
> - Solve problems quickly when a user or an automated monitoring system lets them know about a problem
>
> Administrators manage an organization's servers. They ensure that email and data storage networks work properly. They also make sure that employees' workstations are working efficiently and stay connected to the central computer network. Some administrators manage telecommunication networks at their organization.
>
> In some cases, administrators help network architects who design and analyze network models. They also participate in decisions about buying future hardware or software to upgrade the organization's network. Some administrators provide technical support to computer users, and they may supervise computer support specialists who help users with computer problems.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Network and Computer Systems Administrators," http://www.bls.gov/ooh/computer-and-information-technology/network-and-computer-systems-administrators.htm#tab-2 (accessed Mar. 6, 2013).

The *Handbook* states the following with regard to the educational requirements necessary for entrance into this field:

> Network and computer systems administrators must often have a bachelor's degree, although some positions require an associate's degree or professional certification along with related work experience. . . .

Id. at http://www.bls.gov/ooh/computer-and-information-technology/network-and-computer-systems-administrators.htm#tab-4.

That information from the *Handbook* does not indicate that a bachelor's degree in a specific specialty, or the equivalent, is normally required for entry into this occupation. To the contrary, the *Handbook* specifically states that an associate's degree or professional certification along with related work experience is sufficient for some positions; and its statement that such individuals "must often" possess a bachelor's degree does not necessarily even indicate that a majority of systems administrators are required to possess that credential, let alone that it be in a specific specialty. Accordingly, inclusion of the proffered position within this occupational category is not in itself sufficient to establish the position as one for which the normal minimum entry requirement is at least a bachelor's or higher degree, or the equivalent, in a specific specialty.

Nor does the record of proceeding contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion in this occupational category is sufficient in and of itself to establish the proffered position as, in the words of this criterion, a "particular position" for which "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

As the evidence in the record of proceeding does not establish that a baccalaureate degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).[7]

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 calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, 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.

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[7] Even if the proffered position had been established as being that of a computer systems analyst, as indicated by the petitioner on the LCA – which it has not, and could not by the evidence and claims in this petition – a review of the *Handbook* does not indicate that, as a category, such a position qualifies as a specialty occupation in that the *Handbook's* information indicates that a position's inclusion in the Computer Systems Analysts occupational category does not require at least a bachelor's degree, or the equivalent, in a specific specialty. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Computer Systems Analysts," http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4 (accessed Mar. 6, 2013).

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 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

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 for at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions. Nor did the petitioner submit any other evidence to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, 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.

Therefore, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty as 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.

Next, the AAO finds that the petitioner did not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree."

In this particular case, the petitioner has failed to credibly demonstrate that the duties the beneficiary would perform on a day-to-day basis constitute 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. The duties which collectively constitute the position are similar to those outlined in the *Handbook* as normally performed by network and computer systems administrators, and the petitioner's vague and generic description of them, which did not explain the proposed duties in the specific context of the petitioner's own business operations, does not establish that they surpass or exceed the duties performed by typical network and computer systems administrators in terms of complexity or uniqueness.

The AAO finds further that, even outside the context of the *Handbook*, the petitioner has simply not established complexity or uniqueness as attributes of the proffered position, let alone as attributes with such elevated responsibilities as to require the services of a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

The petitioner therefore failed to establish how the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an

individual with a bachelor's degree, or the equivalent, in a specific specialty. Consequently, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The AAO turns next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*), which entails an employer demonstrating that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

To satisfy 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. 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 the performance requirements of the proffered position. In the instant case, the record 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.

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 assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the actual performance requirements of the position necessitate a petitioner's history of requiring a particular degree in its recruiting and hiring for the position. *See generally Defensor v. Meissner*, 201 F. 3d at 387. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The petitioner has submitted no evidence regarding its previous hiring history for this position. As such, the record lacks evidence for the AAO's consideration under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*).

Next, the AAO finds that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*), which requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specialty.

Again, the duties of the position are similar to those outlined in the *Handbook* as normally performed by network and computer systems administrators, and the petitioner's description of those duties simply does not establish that they surpass or exceed the duties performed by typical network and computer systems administrators in terms of specialization and complexity. The petitioner has simply failed to provide sufficiently detailed documentary evidence to establish that the nature of the specific duties that would be performed if this petition were approved is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

Accordingly, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(4)*.

Finally, the AAO turns to the previous H-1B approvals the petitioner obtained on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. However, if those petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director and, as such, would also be appropriate for revocation-on-notice proceedings. USCIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

As the petitioner has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. The director therefore properly revoked approval of the petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(*5*).

VI. Compliance with Terms and Conditions of the Approved Petition

In revoking approval of the petition on this basis, the director stated that it was not clear what duties the beneficiary is actually performing and that, as such, it could not be ascertained whether the petitioner is employing the beneficiary in the capacity stated in the petition.

In his April 8, 2011 NOIR the petitioner requested, *inter alia*, a more detailed description of the duties performed by the beneficiary, including the approximate percentages of time that the beneficiary spends performing each duty. In its September 18, 2011 letter submitted in response,

the petitioner stated only that although it had downsized, the beneficiary was too valuable to fire. As noted, the director found this statement too vague to demonstrate that the petitioner was employing the beneficiary in the capacity stated in the petition.

The AAO agrees. Although the petitioner submits a more detailed description of the beneficiary's duties on appeal, it will not be considered. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. *See* 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Although the requested detailed description of the duties performed by the beneficiary was eventually submitted, it was only submitted for the first time on appeal. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the detailed description of the duties performed by the beneficiary submitted on appeal to be considered, it should have submitted it in response to the director's NOIR. *Id.* Under the circumstances, the AAO need not and does not consider it on appeal.

Accordingly, the AAO finds that the petitioner failed to demonstrate that it has complied with the terms and conditions of the approved petition, and consequently the director properly revoked approval of the petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(*3*).

VII. Employer-Employee Relationship Between the Petitioner and the Beneficiary

In revoking approval of the petition on this basis, the director notified the petitioner that a review of a publicly available website indicated that the beneficiary is the petitioner's manager rather than its systems administrator, and that a review of another resource which utilizes commercially available data indicated that the beneficiary is the petitioner's chief executive officer rather than its systems administrator.

The AAO finds that the record of proceeding as currently constituted does not support revocation of the petition's approval on this basis as it was presented in the NOIR, and this portion of the director's revocation decision is hereby withdrawn.[8]

[8] It is emphasized that the AAO is not entering a finding that the petitioner would in fact engage the beneficiary in an employer-employee relationship. It is merely stating that the record of proceeding as it currently exists lacks sufficient evidence to support this particular portion of the director's revocation decision. The record does contain evidence of an ownership interest in the petitioner's business by the beneficiary, and it may have been the beneficiary who actually founded the company. In the unlikely event

VIII. Beneficiary's Qualifications to Perform the Duties of a Specialty Occupation

The AAO will now address an issue not raised by the director, which would have been a proper basis for revocation of the approval of this petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(*5*) because the director's approval of the petition violated section (h) of that paragraph. Specifically, the petitioner has failed to demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

> (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
>
> (B) completion of the degree described in paragraph (1)(B) for the occupation, or
>
> (C) (i) experience in the specialty equivalent to the completion of such degree, and
>
> (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In implementing section 214(i)(2) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

> (*1*) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
>
> (*2*) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
>
> (*3*) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
>
> (*4*) Have education, specialized training, and/or progressively responsible experience that are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of

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the petitioner is able to overcome the other deficiencies in this petition identified by the director and the AAO, this particular matter must be explored further before the petition may be approved.

expertise in the specialty through progressively responsible positions directly related to the specialty.

Therefore, to qualify an alien for classification as an H-1B nonimmigrant worker under the Act, the petitioner must establish that the beneficiary possesses the requisite license or, if none is required, that he or she has completed a degree in the specialty that the occupation requires. Alternatively, if a license is not required and if the beneficiary does not possess the required U.S. degree or its foreign degree equivalent, the petitioner must show that the beneficiary possesses both (1) education, specialized training, and/or progressively responsible experience in the specialty equivalent to the completion of such degree, and (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The record of proceeding contains no evidence that the beneficiary earned a baccalaureate or higher degree from an accredited college or university in the United States. Accordingly, she does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*1*).

Nor does the record of proceeding contain any evidence that the beneficiary possesses a foreign degree that has been determined to be equivalent to a baccalaureate or higher degree from an accredited college or university in the United States. Accordingly, she does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*2*), either.

Nor has the petitioner demonstrated that the beneficiary holds an unrestricted state license, registration or certification to perform the duties of a specialty occupation. As such, the beneficiary does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*3*), either.

Accordingly, 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*) remains as the only avenue for the petitioner to demonstrate the beneficiary's qualifications to perform the duties of the proffered position.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*) requires a demonstration that the beneficiary's education, specialized training, and/or progressively responsible experience is equivalent to the completion of a United States baccalaureate or higher degree in the specialty occupation, and that the beneficiary also has recognition of that expertise in the specialty through progressively responsible positions directly related to the specialty. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating a beneficiary's credentials to a United States baccalaureate or higher degree under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*) is determined by at least one of the following:

(*1*) An evaluation from 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 based on an individual's training and/or work experience;

(*2*) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

(*3*) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;[9]

(*4*) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(*5*) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

As the record does not contain an evaluation of the beneficiary's work experience performed by an individual 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 based on an individual's training and/or work experience, the beneficiary does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*).

No evidence has been submitted to establish, nor does the petitioner assert, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(*2*), which requires submission of the results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI).

Nor does the beneficiary qualify under 8 C.F.R. § 214.2(h)(4)(iii)(D)(*3*). As was the case under 8 C.F.R. §§ 214.2(h)(4)(iii)(C)(*1*) and (*2*), the beneficiary is unqualified under this criterion because the record contains no evidence that she earned a baccalaureate or higher degree from an accredited college or university in the United States, and does not possess a foreign degree that has been determined to be equivalent to a baccalaureate or higher degree from an accredited college or university in the United States.

No evidence has been submitted to establish, nor does the petitioner assert, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(*4*), which requires that the beneficiary submit evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) states the following with regard to USCIS analyzing an alien's qualifications:

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[9] The petitioner should note that, in accordance with this provision, the AAO will accept a credentials evaluation service's evaluation of *education only*, not experience.

> For purposes of [USCIS] determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:
>
> (*i*) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;[10]
>
> (*ii*) Membership in a recognized foreign or United States association or society in the specialty occupation;
>
> (*iii*) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
>
> (*iv*) Licensure or registration to practice the specialty occupation in a foreign country; or
>
> (*v*) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Although the record contains some information regarding the beneficiary's work history, it does not establish that this work experience included the theoretical and practical application of specialized knowledge required by the proffered position; that it was gained while working with peers, supervisors, or subordinates who held a bachelor's degree or its equivalent in the field; and that the beneficiary achieved recognition of her expertise in the field as evidenced by at least one of the five types of documentation delineated in 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*)(*i*)-(*v*).

Accordingly, the beneficiary does not qualify under any of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*)(*i*)-(*v*) and therefore does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*). As such, the petitioner has failed to establish that the beneficiary qualifies to perform the duties of a specialty occupation, and

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[10] *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. *See* 8 C.F.R. § 214.2(h)(4)(ii).

reinitiation of revocation proceedings on this additional ground, pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(5), for a petition approved would be within the director's discretion.

IX. Conclusion

As set forth above, the AAO agrees with the director's findings that the petitioner failed to demonstrate: (1) that the proffered position qualifies for classification as a specialty occupation; and (2) that the petitioner is employing the beneficiary pursuant to the terms and conditions of the approved petition. Accordingly, the AAO has determined that approval of the petition was properly revoked on two of the three separate and independent grounds addressed earlier in this decision, upon which the Notice of Revocation was issued. Accordingly, the appeal will be dismissed, and the petition will remain revoked. The record of proceeding as currently constituted does not support the director's third ground for revocation – the lack of a valid employer-employee relationship between the petitioner and the beneficiary – and that particular portion of the director's Notice of Revocation is withdrawn.

Beyond the decision of the director, the AAO finds that reinitiation of revocation proceedings on the basis of the petitioner's failure to establish that the beneficiary qualifies to perform the duties of a specialty occupation would be within the director's discretion.

Finally, the AAO also finds that the conflict between the LCA and the petition described above adversely affects the merits of this petition, because it materially undermines the credibility of the petition's statements with regard to the nature and level of work that the beneficiary would perform.[11]

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. Approval of the petition remains revoked.

[11] It is also noted that the petitioner did not file this petition within the required time frame. The regulation at 8 C.F.R. § 214.2(h)(14) provides, in pertinent part, that a petition extension may be filed only if the validity of the original petition has not expired. In the present case, the beneficiary's prior H-1B petition expired on September 30, 2009. However, the instant petition extension was filed on October 19, 2009, nearly three weeks subsequent to the expiration date of the previous petition.