



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **JUN 25 2013** Office: VERMONT SERVICE CENTER

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 (AAO) 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,

for Michael T. Kelley

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, through counsel, submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on November 3, 2011. On the Form I-129 visa petition, the petitioner describes itself as a computer software developer established in 1981. In order to employ the beneficiary in a position to which it assigned the job title of "Technical Software Support Specialist," the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition on the specialty occupation issue was erroneous. In support of this assertion, counsel for the petitioner submits a brief and additional evidence.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's notice denying the petition; and (5) the petitioner's Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.¹

For the reasons that will be discussed below, the AAO agrees with the director's decision that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

At the outset, and before proceeding with its review of the substantive merits of the appeal, the AAO will state and discuss its finding that the petitioner is incorrect to the extent that it maintains that the director committed prejudicial error by not issuing an additional RFE prior to deciding to deny the petition on a ground for which additional evidence had not been requested.

The AAO finds that there is no requirement for USCIS to issue an RFE or to issue an RFE pertinent to a ground later identified in the decision denying the visa petition. In fact, the regulation at 8 C.F.R. § 103.2(b)(8) clearly permits the director to deny a petition without having first requested evidence regarding the ground or grounds for denial identified in the director's decision. Further, the AAO finds that counsel's assertion is tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361. Counsel's attempt to shift the evidentiary burden in this proceeding is without merit. The burden to establish eligibility in this matter remains solely with

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

the petitioner. Section 291 of the Act. When any person makes an application for a "visa or any other document required for entry, or makes an application for admission [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such relief. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm'r 1972). It is worth emphasizing that the regulations governing the RFE process clearly indicate that the issuance of an RFE is purely discretionary and that the director may instead deny an application when eligibility has not been established. *See* 8 C.F.R. § 103.2(b)(8).

The regulations are clear that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). Also, requiring a director to issue RFEs whenever the evidence filed with a petition fails to satisfy the pertinent regulatory or statutory requirements for the benefits sought would likely generate significant delays and inefficiencies in processing that would affect petitioners in general. Additionally, such a requirement could result in a director having to issue multiple RFEs, with attendant delays and added administrative and adjudicative burdens.

Furthermore, even if the director had erred as a procedural matter in not issuing an RFE or Notice of Intent to Deny relative to the petitioner's failure to establish the proffered position as a specialty occupation, it is not clear what remedy would be appropriate beyond the appeal process itself. As previously noted the petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner yet another additional opportunity to supplement the record with new evidence. Additionally, as already noted, the AAO conducts appellate review on a *de novo* basis, which means that the petitioner had the opportunity on appeal to present whatever additional evidence it wishes to address and overcome the grounds for the director's adverse decision.

Now, there is one additional finding that the AAO will now note as a preliminary matter, namely, that the petitioner – if, in fact, that is its intent – cannot convert the subject of this petition from a Computer Systems Specialist position (for which the petition was filed) to an Accountant or Auditor position without filing an amended petition with a corresponding Labor Condition Application (LCA) and associated fees.²

² The AAO provides this cautionary finding in light of the following language in the RFE response, which may indicate that the petitioner intends that the proffered position be analyzed as an accountant or auditor position, rather than as the computer support specialist position for which the petition had been filed.

Our accounting software focuses on computerized organization of school administration, including budget, accounts receivable, general ledger, and financial reports. . . .

According to the Bureau of Labor Statistics (BLS) Occupational Outlook Handbook, most accountant and auditor positions require at least a bachelor's degree in accounting or a related field. Some employers prefer applicants with a master's degree in accounting, or with a master's degree in business administration with a concentration in accounting.

The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to an RFE, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. Accordingly, the petitioner may not use the RFE process, or, for that matter, the appellate process to re-designate the position as corresponding to a different occupational classification than that for which it was filed.

The AAO will now proceed to its review of the merits of this appeal.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

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

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

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

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

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

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

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *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 this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position to which it assigned the job title of technical software support specialist to work on a full-time basis at a salary of \$43,000 per year.

As already noted, the petitioner identifies itself as a computer software developer.

The AAO notes that, as the supporting Labor Condition Application (LCA) the petitioner submitted one that had been certified for a job prospect that would fall within the occupational classification of "Computer Support Specialists" (SOC (ONET/OES Code) 15-1150.00), at a Level II wage.

On appeal, the petitioner places particular emphasis on the role that the beneficiary would have in "product-specific" communication with and assistance to users of the petitioner's "proprietary [redacted] which the petitioner claims is "rich with accounting features." As articulated in the petitioner's Chief Administrative Officer's January 6, 2012 letter submitted on appeal, the petitioner claims that the nature of the proffered position requires the services of someone with a mixture of problem-solving ability, logical research skills, and "a strong background in accounting," which the Chief Administrative Officer asserts is acquired by a "background in Business Administration, Accounting, or Finance."

In its October 25, 2011 letter of support that it filed with the Form I-129, the petitioner provided the following description of the proffered position:

While many of [the petitioner's] employees share the generic title of "Technical Software Support Specialist," their job duties are quite different. Our company splits our Technical Software Support Team into subgroups. With a background in business, [the beneficiary] will be a Technical Support [redacted] Specialist, responsible for troubleshooting the Accounting-based software we provide. He will also provide training and technical support in our proprietary accounting software to the customers and staff. . . .

All Technical Software Support Specialists test software for quality before being put to use by clients. Technical Support/[redacted] Product Specialists are responsible for troubleshooting and locating defects in our [redacted] software. Working logically to locate and identify any defects found, and report them is essential to providing our clients with the highest degree of quality. . . .

Technical Software Support Specialists must also solve technical problems when speaking with the client. Understanding business accounting applications are essential features of the Technical Software Support Specialist, as is being able to effectively research an issue and brainstorm solutions that are applicable to the client. . . .

An integral part of providing technical accounting support to our clients involves the ability to communicate with the clients in a manner that they can easily understand. It is essential that all the Technical Software Support Specialists including Technical Support/[redacted] understand how to effectively communicate in a business setting.

In its letter of support, the petitioner stated that “[i]n order to work with this software, a Technical Support Specialist must have a background in business accounting. Such individuals must have a degree in Business, Accounting or a related field.”

The petitioner’s December 1, 2011 letter submitted in response to the RFE, included the following comments about the proffered position and its associated work:

As a First-Level Technical Support Specialist for the [REDACTED] software package, [the beneficiary] provides training and technical support in the proprietary accounting software to customers and staff. . . . While many of [the petitioner’s] employees share the generic title of “Technical Software Support Specialist,” their job duties are quite different. Our company splits our Technical Software Support Team into subgroups, [The beneficiary] will be a Technical Support [REDACTED] responsible for troubleshooting the business (school administrator) accounting-based software we provide. He will also provide training and technical support in our proprietary accounting software to the customers and staff. In order to work with this software, a Technical Support Specialist must have a background in business accounting. Such individuals must have a degree in Business, Accounting or a related field.

All Technical Software Support Specialists test software for quality before being put to use by clients. Technical Support/[REDACTED] Specialists are responsible for troubleshooting and locating defects in our [REDACTED] software. . . .

Technical Software Support Specialists must also solve technical problems when speaking with the client. Understanding business accounting is essential for our Technical Software Support Specialist. . . .

An integral part of providing technical accounting support to our clients involves the ability to communicate with the clients in a manner that they can easily understand. It is essential that all the Technical Software Support Specialists including Technical Support/[REDACTED] Specialists understand how to effectively communicate in a business setting. We need to guarantee that our customers and our Technical Software Support Specialists speak the same accounting “language” and that our Technical Software Support Specialists can share their specialized knowledge of business management to better cater to our customers’ needs. . . .

The AAO also notes the following emphasis that the petitioner’s RFE-response letter placed upon accounting dimensions of the [REDACTED] software, which, of course had been developed to assist education-related professionals with accounting aspects of their jobs. In pertinent part, the letter states:

Our accounting software focuses on computerized organization of school administration, including budget, accounts receivable, general ledger, and financial reports. . . .

As already discussed, the petitioner may not by RFE-response, or by appeal for that matter, change the foundational nature of the petition from one filed for a computer support specialist to one for an accountant or auditor.

That being said, the AAO acknowledges and has considered the petitioner's statements regarding the accounting elements of the [REDACTED] software and about the requirement that the beneficiary be sufficiently conversant in business-accounting concepts to understand customer issues with the software and to effectively communicate with customers to address those issues. However, upon considering all of the petitioner's statements and documentary submissions regarding the [REDACTED] software and the beneficiary's associated duties, the AAO finds that the evidence in this record of proceeding does not substantiate any particular level of educational attainment of accounting knowledge that the beneficiary would need in order to perform the duties of the proffered position.

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

The petitioner stated that the beneficiary would be employed in a technical software support specialist position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, the specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F.3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the evidence in the record of proceeding establishes that performance of the particular proffered 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 a specific specialty as the minimum for entry into the occupation, as required by the Act.

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide

variety of occupations that it addresses.³ As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Computer Support Specialists."

The AAO reviewed the information in the *Handbook* regarding the occupational category "Computer Support Specialists." However, the *Handbook* does not indicate that these positions comprise an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry.

The subchapter of the *Handbook* entitled "How to Become a Computer Support Specialist" states the following about this occupational category:

Because of the wide range of skills for different computer support jobs, there are many paths into the occupation. A bachelor's degree is required for some computer support specialist positions, but an associate's degree or postsecondary classes may be enough for others. After being hired, many workers enter a training program that lasts for several months.

Education

Training requirements for computer support specialists vary, but many employers prefer to hire applicants who have a bachelor's degree. More technical positions are likely to require a degree in a field such as computer science, engineering, or information science, but for others the applicant's field of study is less important. Some lower level help-desk jobs or call-center jobs require some computer knowledge, but not necessarily a postsecondary degree.

Training

Computer support specialists usually get on-the-job training after they are hired. For many workers, this training lasts for about 3 months. The training period may be longer for more complex jobs.

To keep up with changes in technology, many computer support specialists continue their training throughout their careers.

Advancement

Entry-level support specialists often work on simple problems. Over time, they may advance to positions that handle questions on complex software or equipment. Many of these workers advance to other IT positions, such as network and computer systems administrators or software developers. Some become managers in the computer support services department. For more information, see the profiles on network and computer systems administrators and software developers.

³ The *Handbook*, which is available in printed form, may also be accessed on the Internet at <http://www.bls.gov/ooh/>. The AAO's references to the *Handbook* are to the 2012-2013 edition available online.

Important Qualities

Interpersonal skills. Computer support specialists must be patient and sympathetic. They must often help people who are frustrated with the software or hardware they are trying to use.

Listening skills. Support workers must be able to understand the problem that their customer is describing and know when to ask questions to clarify the situation.

Problem-solving skills. Support workers must identify both simple and complex computer problems, analyze them, and provide a proper solution.

Speaking skills. Support workers must describe the solution to a computer problem in a way that a nontechnical person can understand.

Writing skills. Strong writing skills are useful for preparing instructions and email responses for employees and customers.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Computer Support Specialists, available on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-support-specialists.htm#tab-4> (last visited May 22, 2013).

When reviewing the *Handbook*, the AAO must note again that the petitioner designated the prevailing wage for the proffered position as wage for a Level II (qualified) position on the LCA.⁴ This designation is indicative of a position a step above entry-level, but a step below experienced, relative to others within the occupation.⁵ That is, in accordance with the relevant

⁴ Wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) 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 a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) 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.

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.

⁵ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level II wage rate is describes as follows:

DOL explanatory information on wage levels, this Level II wage rate is only appropriate for a position in which the beneficiary would be expected to perform moderately complex tasks that require limited judgment.

The *Handbook* does not report that a baccalaureate or higher degree, in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the proffered position. As stated above, this passage of the *Handbook* reports that "[a] bachelor's degree is required for some computer support specialist positions, but an associate's degree or postsecondary classes may be enough for others." This is not indicative of an occupation for which there is a normal requirement for at least a baccalaureate or higher degree, in a specific specialty, or its equivalent. Accordingly, as the *Handbook* does not indicate that the proffered position is one for which a bachelor's or higher degree, or the equivalent, in a specific specialty is normally the minimum requirement for entry, the *Handbook* does not support the proffered position as satisfying the present criterion.

Where, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies the criterion, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Moreover, as previously noted, the petitioner indicates in its letter dated October 25, 2011 that it requires its technical support specialists to "have a degree in Business, Accounting or a related field."

The petitioner's acceptance of a degree in "Business" as acceptable for the proffered position, is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree

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.

Id.

with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

What's more, the petitioner's assertion that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration, is tantamount to an admission that the proffered position is not in fact a specialty occupation. As such, even if the substantive nature of the work had been established, the instant petition could not be approved for this additional reason.

Finally, the AAO accords no evidentiary value to the two pages submitted from the eHow website regarding the "Product Specialist Job Description." There is no evidence provided with regard to any professional standing or recognition of the author, who is simply identified as "Lucy Friend, eHow contributor." Moreover, the author cites no sources or factual bases whatsoever for her statements.

Upon review of the totality of the evidence in the entire record of proceeding, then, the AAO concludes that the petitioner has not established that the proffered position falls within an occupational group for which the *Handbook*, or other authoritative source, indicates that a bachelor's degree, or the equivalent, in a specific specialty is normally required for entry. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the particular position that is the subject of this petition is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner has not satisfied the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This first alternative prong 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.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151,

1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The petitioner and counsel submitted (1) copies of five job-vacancy announcements; and (2) a copy of a printout from the eHow website, entitled "Product Specialist Job Description," to support their assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations.

We will first very briefly review the advertisements.

The first advertisement, for a "Product Specialist – Implementation and Expertise" position with SunGard, states that the qualifications for the position are a "[c]omputer engineering or finance degree." The second advertisement, for a "Product Consultant" position with what the petitioner indicates is Windsor Management Group (it is noted that the advertisement does not list the employer) states a preference (not a requirement) for a Bachelor's degree in either accounting, education, business, or computer science. The third advertisement, for a director level position in the Client Services group at Alight Planning states the following position requirements: "BA degree.. MBA preferred. CPA a plus. –and- Five years hand-on experience in a financial planning or controller position –or- Five years' experience designing/implementing complex financial systems – any platform," and does not specify a degree requirement. The fourth advertisement for a "Client Training Specialist" at Intuit, requires a "Bachelor's Degree in Business, Education, Communication or related field, or equivalent relevant experience." Finally, the last advertisement for a "Product Specialist" with Cornerstone requires a "Bachelor's degree in Mathematics, Computer Science, Finance or related degree, and 1-3 years [of] experience with technical support or software application support." The AAO notes that no information is included to show any objective standard that would be used to determine degree equivalency.

At the outset, the AAO finds that, aside from any other issues with the submitted advertisements, they are not supplemented by any documentary evidence establishing that they are representative of a common degree-requirement practice in the advertisers' industries by organizations that are similar to those advertisers, when seeking to hire for positions parallel to the ones for which the advertisements were issued. In like regard, the AAO also notes that there is no documentary support of the advertisements as being statistically significant evidence of the practice that they are intended to prove.⁶

⁶ Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from just five job advertisements with regard to determining the common educational requirements for entry into parallel positions in similar companies. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position of technical software support specialist at a computer software developer required a bachelor's or higher degree in a specific

The AAO also that these job advertisements are even further devalued in that they are not accompanied by any documentary evidence that they are even representative of what would be the normal hiring and recruiting practices of the companies that issued them.

Additionally, it is not apparent on the face of the job-vacancy advertisements that the five advertised positions are even parallel to themselves, let alone also parallel to the position that is the subject of this appeal. In this regard, the AAO finds that the advertisements do not provide substantively specific information either about the day-to-day matters upon which the advertised jobs focus or about the specific performance requirements of each job. Therefore, there is an insufficient evidentiary basis for the AAO to find that the advertised jobs are parallel to the proffered position. Further, the AAO finds, the petitioner has provided no supplementary evidence to remedy this deficiency.

Further, the AAO finds that it is not apparent on the face of the advertisements that they constitute a group that were generated by organizations that are similar to the petitioner and within its industry. Also, the AAO finds that the petitioner has not provided any evidence as to why the advertising firms should be accepted as being in the same industry as the petitioner and as being organizations that are similar to the petitioner in any substantial sense, or for that matter, even similar to each other. For instance, for the purpose determining whether the petitioner and another organization are similar such that they would share the same basic employment needs as the petitioner, it is appropriate to consider the extent and weight of the evidence of record regarding each organization's market focus, scope of products and/or services, operational requirements, and customer or client base. It is not sufficient for the petitioner to claim that the organizations are similar and in the same industry without providing a persuasive factual foundation for the assertion. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). Also, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO additionally notes that not all five of advertisements even specify a requirement for at least a bachelor's degree in a specific specialty, and the AAO finds that this fact in itself renders them an unpersuasive group with no probative weight.

Additionally, the AAO notes that two of the firms specify ranges of acceptable degrees that are too broad to be indicative of a requirement for a degree in a specific specialty. One of the firms specifies "a Bachelor's degree in either accounting, education, business, or computer science"; the other specifies a "Bachelor's Degree in Business, Education, Communication or related field, or equivalent relevant experience." In general, provided the specialties are closely related, e.g.,

specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as accounting or education, or business and communication, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. See section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

For all of the reasons discussed above, the petitioner's reliance on the job vacancy advertisements is misplaced, as they merit no probative weight.

Thus, based upon a complete review of the record, the AAO finds that the petitioner has not established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is common in the petitioner's industry for positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. Thus, 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 its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

In the instant case, the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of technical software support specialist. Specifically, the petitioner failed to show that the technical software support specialist duties that it ascribes to the proffered position comprise a position that is so complex or unique that it can be performed only by a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

In reaching this determination, the AAO has fully considered all of the petitioner's related assertions, among them the two that we will briefly address here. In the brief on appeal, dated January 6, 2012, the petitioner states the following:

The specialized position [the beneficiary] will fill is Technical Support/Administrator's Plus Accounting Product Specialist.

We wish to emphasize that the scope of technical support our Product Specialist's [sic] offer is product-specific, not simply general IT support. . . . Our proprietary [redacted] is rich with accounting features and is used by clients in school administration, such as business managers. . . . Our accounting software was developed by [redacted] who in fact holds an MBA and has a strong background in accounting. As a result, extensive knowledge in at least one of the specialty areas of Business, Accounting, or Finance is a minimal prerequisite for working with school administrators in order to troubleshoot and support the implementation of the [redacted] software, as well as provide training on how to utilize the software for financial reporting, budget, ledger, accounts receivable/payable, suspense accounts, and its many other specialized accounting and business functions.

Then there is the October 25, 2011 letter of support, in which the petitioner stated that "[the beneficiary's] classroom experience with Management Accounting, Financial Management, and Financial Accounting, prepared him for the arduous task of finding . . . defects [in our Administrator's Plus Accounting software], and identifying any issues with the accounting algorithms used by the program." The petitioner further stated the following:

[The beneficiary] has undertaken coursework that is directly related to the Technical Support/ Administrator[']s Plus Accounting Product Specialist position such as Computer Programming I & II, Business Organization & Management, Business Practicum, Management Accounting, Financial Management, Business Research, Management Services, Business Communication, Financial Accounting and Basic Fundamentals of Accounting, among others.

While some of the courses listed on the copy of the beneficiary's transcript for the Bachelor of Science in Business Administration degree from [redacted] Philippines may be beneficial in performing certain duties of a technical software support specialist position, the petitioner has failed to credibly demonstrate how attainment of a bachelor's degree based upon completion of an established curriculum of such courses would be necessary for a person to engage any particular dimension of the proffered position.

Additionally, the AAO here incorporates by reference and reiterates its earlier discussion regarding the LCA's Level II (qualified) wage level. This designation is indicative of a position a step above entry level, but a step below experienced, relative to others within the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this Level II wage rate is only appropriate for a position in which the beneficiary would be expected to perform moderately complex tasks that require limited judgment.

By way of comparison, the AAO notes that a position classified at a Level IV (fully competent) position is designated by the DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems." Thus, the wage level designated by the petitioner in the LCA for the proffered position is not consistent with claims that the position would entail any particularly complex or unique duties or that the position itself would be so

complex or unique as to require the services of a person with at least a bachelor's degree in a specific specialty.

Further, the record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique than positions in the pertinent occupation that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

Consequently, as the petitioner has not shown that the proffered position is so complex or unique relative to other positions within its occupational group that it can be performed only by a person with at least a baccalaureate degree in a specific specialty, or its equivalent, the petitioner has not 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 in a specific specialty, or the equivalent, for the proffered position.

Of course, the AAO will necessarily review and consider whatever evidence the petitioner may have submitted with regard to its history of recruiting and hiring for the proffered position and with regard to the educational credentials of the persons who have held the proffered position in the past.

Here, the petitioner submitted a copy of the Bachelor of Science in Business degree with a major in Business Administration (and the related transcript) of a person whom it claims is its current Technical Support/Administrator's Plus Accounting Product Specialist. The petitioner also submitted evidence that this individual is pursuing night coursework in accounting at the Harvard Extension School. Here, the AAO incorporates by reference its earlier discussion regarding a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration. The fact that the petitioner holds out a person with a generalized degree (that is, in business administration) as an example of its hiring practice undermines the petitioner's contention that it normally requires for the proffered position persons with at least a bachelor's degree in a specific specialty.

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 as part of its normal recruiting and hiring practices 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 the performance requirements of the position.

While a petitioner may believe and assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner 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 388. In other words, if a petitioner's stated degree-requirement is only designed to artificially

meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. See § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

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 position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F. 3d 384. 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 a 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.

Aside from above-discussed and decisive lack of probative evidence and the adverse impact of the petitioner's reliance on its claimed employment of a person who attained only a bachelor's degree in business administration, the AAO also notes that the petitioner did not submit evidence establishing that this person is actually employed by the petitioner. The record does not contain any pay slips, W-2 forms, and/or other evidence that the petitioner actually employs (or has employed) this individual. Similarly, the record does not contain evidence to corroborate that this individual is employed in a position that is substantially the same as the proffered position. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

In any event, the AAO also finds that, no matter how well it may be established by evidence in a record of proceeding, one instance of hiring a person for the proffered position would not be sufficient to establish the normal course of recruiting and hiring practices that is required to satisfy this criterion.

As the evidence in the record of proceeding does not establish that the petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position, the petitioner has not satisfied the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that 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 in a

specific specialty, or its equivalent.

Upon review of the record of the proceeding, the AAO notes that the petitioner has not provided sufficient evidence to satisfy this criterion of the regulations. Moreover, upon review of the record, there is insufficient evidence to establish that the duties of the proffered position 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.

In the instant case, the evidence in the record of proceeding simply has not developed relative specialization and complexity as distinguishing aspects of the nature of the proposed duties. In fact, the proposed duties have not been developed with sufficient specificity to establish their nature as more specialized and complex than the nature of the duties of other positions in the pertinent occupational category whose performance does not require the application of knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty, or its equivalent.

In this regard, the AAO here also incorporates into this analysis its earlier comments and findings with regard to the implication of the Level II wage-rate designation in the LCA, that is, that the proffered position's Level II wage designation is indicative of a position a step above entry-level, but a step below experienced, relative to others within the occupation. As this decision has repeatedly noted, in accordance with the relevant DOL explanatory information on wage levels, this Level II wage rate is only appropriate for a position in which the beneficiary would be expected to perform moderately complex tasks that require limited judgment.

As the evidence in the record of proceeding has not established that the nature of the duties of the position is so specialized and complex that knowledge required to perform them is usually associated with the attainment of 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)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. ^ 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence 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.

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.