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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: OCT 10 2013 OFFICE: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
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 The director's decision of denial will be withdrawn. The petition will be remanded to the director for further proceedings consistent with this decision.

The petitioner submitted a Form I-129 (Petition for Nonimmigrant Worker) to the Vermont Service Center on November 30, 2011. On the Form I-129 visa petition, the petitioner describes itself as an information technology company established in 1986. In order to continue to employ the beneficiary in what it designates as a programmer analyst position, the petitioner seeks to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on September 24, 2012, finding that the beneficiary is not eligible for an extension of stay. On appeal, counsel asserts that the director's basis for denial of the petitioner was erroneous and contends that the petitioner satisfied all evidentiary requirements.

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 notice of decision; and (5) the Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

An alien who will perform services in a specialty occupation may be admitted to the United States as an H-1B nonimmigrant. *See* section 101(a)(15)(H)(i)(B) of the Act. A specialty occupation is defined as an occupation that requires (1) theoretical and practical application of a body of highly specialized knowledge, and (2) the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States. *See* section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l). The total number of aliens who may be issued H-1B visas or otherwise accorded H-1B status in a fiscal year may not exceed 65,000. *See* section 214(g)(1)(A)(vii) of the Act, § 8 U.S.C. 1184(g)(1)(A)(vii).

Under the Act, H-1B admission is limited to six years. *See* section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4). Generally, an H-1B petition may not be approved on behalf of a beneficiary who has spent the maximum allowable stay as an H-1B or L nonimmigrant in the United States, unless he/she has resided and been physically present outside the United States for the immediate prior year. *See* 8 C.F.R. § 214.2(h)(13)(iii)(A). Specific limits on what is regarded as a temporary period of stay in all H classifications are included in the regulations to reflect the temporary nature of these classifications and to achieve consistency in the processing of requests for extensions of stay. However, as will be discussed, section 104(c) and section 106(a) of the "American Competitiveness in the Twenty-First Century Act" (AC21) as amended by the "Twenty-First Century Department of Justice Appropriations Authorization Act" (DOJ21) removes the six-year limitation on the authorized period of stay in H-1B classification for aliens under certain conditions.

More specifically, section 104(c) of AC21 reads in, pertinent part, as follows:

> Notwithstanding section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(4)), any alien who—
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> > (1) is the beneficiary of a petition filed under section 204(a) of that Act [8 U.S.C. § 1154(a)] for a preference status under paragraph (1), (2), or (3) of section 203(b) of that Act [8 U.S.C. § 1153(b)]; and
> >
> > (2) is eligible to be granted that status but for application of the per country limitations applicable to immigrants under those paragraphs,
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> may apply for, and the Attorney General may grant, an extension of such nonimmigrant status until the alien's application for adjustment of status has been processed and a decision made thereon.

Pub. L. No. 106-313, § 104(c), 114 Stat. at 1253.

Under 104(c) of AC21, an alien who is subject to a per-country limitation and who is the beneficiary of an approved immigrant petition under section 203(b)(1), (2), or (3) of the Act, 8 U.S.C. 1153(b)(1), (2), or (3), is eligible for H-1B approval beyond the statutory six-year maximum. *See* Pub. Law 106-313, 114 Stat. at 1252-1253. The H-1B petitioner must demonstrate that an immigrant visa is not available to the alien at the time the H-1B petition is filed.

Likewise, section 106(a) of AC21 as amended by DOJ21 removes the six-year limitation on the authorized period of stay in H-1B visa status for certain aliens whose labor certifications or immigrant petitions remain undecided due to lengthy adjudication delays and broadens the class of H-1B nonimmigrants who may avail themselves of this provision. *See* Pub. L. No. 106-313, § 106(a), 114 Stat. 1251, 1253-54 (2000); Pub. L. No. 107-273, § 11030A(a), 116 Stat. 1836 (2002). According to the text of section 106(b) of AC21, aliens may have their "stay" extended in the United States in one-year increments pursuant to an exemption under section 106(a) of AC21.

As amended by section 11030A(a) of DOJ21, section 106(a) of AC21 reads:

> (a) EXEMPTION FROM LIMITATION. -- The limitation contained in section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. § 1184(g)(4)) with respect to the duration of authorized stay shall not apply to any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) of *such Act (8 U.S.C. § 1101(a)(15)(H)(i)(b))*, if 365 days or more have elapsed since *the filing of any of the following:*
>
> > *(1) Any application for labor certification under section 212(a)(5)(A) of such Act (8 U.S.C. § 1182(a)(5)(A)), in a case in which certification is required or used by the alien to obtain status under section 203(b) of such Act (8 U.S.C. § 1153(b)).*

(2) A petition described in section 204(b) of such Act (8 U.S.C. § 1154(b)) to accord the alien a status under section 203(b) of such Act.

Section 11030A(b) of DOJ21 amended section 106(b) of AC21 to read:

(b) EXTENSION OF H-1B WORKER STATUS--The [Secretary of Homeland Security] shall extend the stay of an alien who qualifies for an exemption under subsection (a) in one-year increments until such time as a final decision is made—

(1) to deny the application described in subsection (a)(1), or, in a case in which such application is granted, to deny a petition described in subsection (a)(2) filed on behalf of the alien pursuant to such grant;

(2) to deny the petition described in subsection (a)(2); or

(3) to grant or deny the alien's application for an immigrant visa or for adjustment of status to that of an alien lawfully admitted for permanent residence.

Pub. L. No. 106-313, § 106(a) and (b), 114 Stat. 1251, 1253-54 (2000); Pub. L. No. 107-273, § 11030A, 116 Stat. 1836, 1836-37 (2002) (emphasis added to identify sections amended by DOJ21). A delay of 365 days or more in the final adjudication of a filed labor certification application or employment based petition under section 203(b) of the Act is considered a lengthy adjudication delay for purposes of this exemption. *See* Pub. Law No. 107-273, 116 Stat. at 1836.

In this matter, the petitioner submitted the Form I-129 petition on November 30, 2011. Counsel indicated that the petitioner is "requesting time beyond the H-1B limit of six years in accordance with the provisions of AC21 §104(c)." In support of the request for the H-1B extension, the petitioner and counsel provided the following documents:

- A copy of the approval notice for the Form I-140, Immigrant Petition for Alien Worker, with the receipt number SRC 07 216 51712. The petition was approved on December 3, 2007 for a skilled worker or professional in the third preference with a priority date of August 8, 2003.

- A copy of the visa bulletin for November 2011. The visa bulletin indicated that the priority date is current for third preference applicants from India whose priority date is earlier than July 22, 2002. Thus, at the time of filing this H-1B petition, the beneficiary's priority date was not current.

On April 6, 2012, the director issued an RFE. The director noted that U.S. Citizenship and Immigration Services (USCIS) records indicate that the Form I-140 petition was revoked on May 16, 2008. In response, the petitioner submitted a letter dated April 23, 2012 stating the following:

> We have never received notice of the revocation, nor has our immigration attorney ever received [the] notice of this revocation. In addition, we have never requested this revocation nor has our immigration attorney requested this revocation.

Further, counsel stated that in the alternative to the three-year extension request under section 104(c) of AC21, the beneficiary qualifies for extension of H-1B nonimmigrant classification under section 106(a) of AC21.

On September 24, 2012, the director denied the instant H-1B petition stating that USCIS records indicate that the Form I-140 petition was revoked on May 16, 2008; thus, the beneficiary was not eligible for an extension of stay under section 104(c) or section 106(a) of AC21. On appeal, counsel asserts that the Form I-140 petition was never revoked, and that the director's basis for denial of the petition was erroneous.

Due to discrepancies in the record, the decision will be remanded to determine if the Form I-140 petition was properly revoked on May 16, 2008 in accordance with the automatic revocation provisions at 8 C.F.R. § 205.1 or the revocation on notice provisions at 8 C.F.R. § 205.2. In addition, the director shall review the record of proceeding to determine the beneficiary's eligibility for an extension of stay under section 104(c) or section 106(a) of AC21.[1]

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[1] As noted by counsel on appeal, the director issued a Notice of Intent to Revoke (NOIR) the Form I-140 petition on December 5, 2012. In the NOIR, the director requested evidence to establish that the Form I-140 petition was filed on behalf of an alien who was eligible for the requested visa classification. Instead of addressing the ineligibility issues raised in the notice, counsel requested that the petition be withdrawn. Based upon the withdrawal request from counsel, the approval of the Form I-140 petition is automatically revoked pursuant to 8 C.F.R. § 205.1(a)(3)(iii)(C) (if it was not already revoked). In support, counsel submitted a copy of an e-mail from the petitioner requesting the withdrawal the Form I-140 petition. Thereafter, counsel submitted a letter notifying USCIS that the beneficiary had changed employers and requested that the beneficiary be permitted to change employers under the portability provision at section 106(c) of AC21. *See also* 204(j) of the Act.

In *Herrera v. USCIS*, 571 F.3d 881 (9th Cir. 2009), the Ninth Circuit Court of Appeals determined that the government's authority to revoke a Form I-140 petition under section 205 of the Act survived portability under section 204(j) of the Act. Citing a 2005 AAO decision, the Ninth Circuit reasoned that in order to remain valid under section 204(j) of the Act, the Form I-140 petition must have been valid from the start. The Ninth Circuit stated that if the plaintiff's argument prevailed, an alien who exercised portability would be shielded from revocation, but an alien who remained with the petitioning employer would not share the same immunity. The Ninth Circuit noted that it was not the intent of Congress to grant extra benefits to those who changed jobs.

By withdrawing the Form I-140 petition and failing to respond to the NOIR, the petitioner failed to establish that the petition was filed for an alien who is "entitled" to the requested classification. The response did not establish that the Form I-140 was ever valid. Consequently, it appears that the petitioner also failed to demonstrate that the beneficiary meets the second criteria of the section 104(c) of AC21, that the beneficiary is eligible to be granted that status but for application of the per country limitations.

In addition, the AAO has identified another issue not addressed by the director that precludes approval of this petition. Specifically, the record of proceeding fails to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.[2]

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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;
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> (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;
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> (3) The employer normally requires a degree or its equivalent for the position; or

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[2] A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

(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 providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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 simply rely on a position's title. 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 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.

In this matter, the petitioner stated in the Form I-129 petition that it is an information technology company and that it seeks the beneficiary's services as a programmer analyst to work on a full-time basis. In the support letter dated November 22, 2011, the petitioner describes the proffered position's duties as follows:

> [The petitioner] would like to continue to employ [the beneficiary] in the temporary, full-time, specialty occupation position to Programmer Analyst. Under the supervision of a Senior Analyst, [the beneficiary] will continue to design, develop, research, convert and input data, develop, and maintain software and Web-based programs to store, process, manipulate and extract facilities management data. He will continue to convert specifications and develop software, website and database schema, and user interfaces for Web-based facilities management using C, C++, Java, Visual Basic, JavaScript, and Extensive Markup Language (XML). He will continue to design, develop, test and modify Web-enabled pages and programs using Enterprise JavaBeans (EJB), CORBA, RMI, Servlets, Java Server Pages (JSP), XML, Active Server Pages (ASP), and COM.
>
> He will also continue to develop and integrate facilities software and Web programs using ATG Dynamo Server 5.0, Bea's WebLogic, Sun Microsystems Application Server, Apache-Timcat, IIS Web, and Java Web Server.
>
> [The beneficiary] will also continue to analyze, troubleshoot, modify and replace codes. He will continue to repair, replace and upgrade software and program applications, utilizing MS SQL server, Sybase and MS Access Database, document the design, development, testing and modification processes, and continue to prepare flow charts, diagrams, and maintenance pages.

In addition, the petitioner stated that this position "requires a minimum of a Bachelor's degree in Computer Science, Information Technology, Computer Engineering, or a related professional discipline because of the highly technical and specialized knowledge and skills required to successfully perform the above-described duties."

With the Form I-129, the petitioner submitted copies of the beneficiary's foreign academic credentials, as well as a credential evaluation from Dr. [redacted] Associate Professor of Computer Sciences at [redacted] The evaluation indicates that the beneficiary's foreign education is equivalent to a U.S. Bachelor of Science degree in Computer Science.

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

the wide variety of occupations that it addresses.[3] The petitioner asserts in the Labor Condition Application (LCA) that the proffered position falls under the occupational category "Computer Programmers."

The AAO reviewed the chapter of the *Handbook* entitled "Computer Programmers," including the sections regarding the typical duties and requirements for this occupational category.[4] However, the *Handbook* does not indicate that "Computer Programmers" 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 into the occupation.

The subsection entitled "How to Become a Computer Programmer" states the following about this occupation:

> Most computer programmers have a bachelor's degree; however, some employers hire workers with an associate's degree. Most programmers specialize in a few programming languages.
>
> **Education**
> Most computer programmers have a bachelor's degree; however, some employers hire workers who have an associate's degree. Most programmers get a degree in computer science or a related subject. Programmers who work in specific fields, such as healthcare or accounting, may take classes in that field in addition to their degree in computer programming. In addition, employers value experience, which many students get through internships.
>
> Most programmers learn only a few computer languages while in school. However, a computer science degree also gives students the skills needed to learn new computer languages easily. During their classes, students receive hands-on experience writing code, debugging programs, and many other tasks that they will do on the job.
>
> To keep up with changing technology, computer programmers may take continuing education and professional development seminars to learn new programming languages or about upgrades to programming languages they already know.

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

[4] For additional information on the occupational category Computer Programmers, *see* U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Computer Programmers, on the Internet at http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-1 (last visited October 9, 2013).

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Computer Programmers, on the Internet at http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4 (last visited October 7, 2013).

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupation. Rather, the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty. The *Handbook* repeatedly states that some employers hire workers who have an associate's degree. Furthermore, while the *Handbook's* narrative indicates that most computer programmers obtain a degree (associate's degree or baccalaureate) in computer science or a related field, the *Handbook* does not report that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. The *Handbook* continues by stating that employers value computer programmers who possess experience, which can be obtained through internships.

The *Handbook* states that most computer programmers have a bachelor's degree (without identifying a specific specialty), but the *Handbook* does not report that it is normally a minimum occupational, entry requirement.[5] The text suggests that a baccalaureate degree may be a preference among employers of computer programmers in some environments, but that some employers hire candidates with less than a bachelor's degree, including candidates that possess an associate's degree. The *Handbook* does not support the claim that the proffered position falls under an occupational group for which normally the minimum requirement for entry is at a baccalaureate (or higher degree) in a specific specialty, or its equivalent.

It is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. As previously mentioned, 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

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[5] The first definition of "most" in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of computer programmers possess a bachelor's degree, it could be said that "most" of these employees have such a degree. It cannot be found, therefore, that a statement that "most" employees in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. The proffered position has been designated by the petitioner in the LCA as a relatively low-level position relative to others within the occupation. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "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." § 214(i)(1) of the Act.

proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The fact that a person may be employed in a position designated under the occupational category "Computer Programmers" and may apply some information technology principles in the course of his or her job is not in itself sufficient to establish the position as one that qualifies as a specialty occupation. Thus, it is incumbent on the petitioner to provide sufficient evidence to establish that its particular position would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of knowledge in a specific specialty. This, the petitioner has failed to do.

Based upon a complete review of the record of proceeding, the AAO finds that in the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding by the petitioner do not indicate that the position 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 failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

The petitioner did not provide probative evidence to demonstrate that a requirement of a bachelor's degree (or higher) in a specific specialty, or its equivalent, is common to the petitioner's industry in parallel positions among similar companies. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). The record of proceeding also lacks evidence establishing that the proffered position is so complex or unique that it can only be performed by an individual with a bachelor's degree (or higher) in a specific specialty, or its equivalent, as required under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). Moreover, the petitioner did not submit probative evidence to establish that it normally requires a baccalaureate or higher degree in a specific specialty, or its equivalent, for the proffered position in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). In addition, the record of proceeding does not establish that the nature of the specific duties is so specialized and complex that the 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. 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*). The petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation.

The 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 proffered 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. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, the combined evaluation of the beneficiary's education and training submitted by the petitioner is insufficient to establish that the beneficiary possesses the equivalent of a U.S. bachelor's degree in any specific specialty. That

is, as the claimed equivalency was based in part on training, there is no evidence that the evaluator 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. *See* 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*) and (D)(*1*). As such, the petitioner has not presented evidence that the beneficiary has at least a U.S. bachelor's degree in any specific specialty, or its equivalent.

As stated above, the decision of the director will be withdrawn. The matter will be remanded to the director to determine whether (1) the Form I-140 petition was properly revoked; and (2) the beneficiary is eligible for an extension of stay under section 104(c) or section 106(a) of AC21. In addition, the matter will be remanded to the director to consider the additional grounds identified in this decision.

ORDER: The director's September 24, 2012 decision is withdrawn. The matter is remanded to the director for action consistent with this decision.