



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **APR 15 2014**

OFFICE: CALIFORNIA 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. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

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 The director's decision will be withdrawn. The matter will be remanded to the director for action consistent with this decision.

On the Form I-129 visa petition, the petitioner describes itself as an information technology (IT) consulting firm established in 2004. In order to employ the beneficiary in what it designates as a programmer analyst position, the petitioner seeks to classify her 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 beneficiary is qualified to perform services in a specialty occupation. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the 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; (5) the Form I-290B and supporting materials; (6) the AAO's RFE; (7) the petitioner's response to the AAO's RFE; (8) counsel's correspondence; (9) the AAO's notice reopening the proceeding *sua sponte*; and (10) counsel's submission in response to the AAO's notice. The AAO reviewed the record in its entirety before issuing its decision.

## **I. Factual and Procedural History**

In the petition signed on April 16, 2012, the petitioner indicates that it wishes to employ the beneficiary as a programmer analyst on a full-time basis at the rate of pay of \$46,675 per year. In the support letter dated April 14, 2012, the petitioner describes the proffered position as follows:

- Correct errors by making appropriate changes and rechecking the program to ensure that the desired results are produced.
- Conduct trial runs of programs and software applications to be sure they will produce the desired information and that the instructions are correct.
- Write, update, and maintain computer programs or software packages to handle specific jobs such as tracking inventory, storing or retrieving data, or controlling other equipment.
- Write, analyze, review, and rewrite programs, using workflow chart and diagram, and applying knowledge of computer capabilities, subject matter, and symbolic logic.
- Perform or direct revision, repair, or expansion of existing programs to increase operating efficiency or adapt to new requirements.

- Consult with managerial, engineering, and technical personnel to clarify program intent, identify problems, and suggest changes.
- Perform systems analysis and programming tasks to maintain and control the use of computer systems software as a systems programmer.
- Compile and write documentation of program development and subsequent revisions, inserting comments in the coded instructions so others can understand the program.
- Prepare detailed workflow charts and diagrams that describe input, output, and logical operation, and convert them into a series of instructions coded in a computer language.
- Consult with and assist computer operators or system analysts to define and resolve problems in running computer programs.

In the letter of support, the petitioner did not provide any specific requirements for the proffered position. The petitioner states that the beneficiary is ideally suited to serve in the position based upon her educational background. According to the petitioner, the beneficiary has a Bachelor of Technology degree in Electronics and Communication Engineering from [REDACTED] in India. With the initial petition, the petitioner submitted a copy of the beneficiary's foreign diploma and transcript. The petitioner did not provide an academic evaluation.

In support of the petition, the petitioner submitted several documents, including the following:

- A Labor Condition Application (LCA). The occupational category is designated as "Computer Programmers" at a Level I (entry level) wage. The LCA lists the place of employment as [REDACTED]. No other work sites are provided.
- An itinerary. In the itinerary, the petitioner provides the following job description for the proffered position:
  - Requirements gathering and analysis, high level and low level design, coding, code review, building coding guidelines and reusable frameworks, leveraging and implementing security best practices, guiding the development team during development and other SDLC phases, writing and reviewing test cases and test plans, configuration along with the client BA's, building application documentation[.]
  - Work on a web based application for managing application releases and builds using C#, ASP.Net and Visual Studio 2010[.]
  - Create a Web based Master Application for managing all Internal Applications and Security at one place.



- Migrate Application from .Net2.0 to .Net3.0 and upgraded some of the modules for faster performance.
- Build Custom menu and dynamic master page to use them across all Internal applications.
- Use Team Foundation Server API's for downloading all source control Items dynamically through application.
- Use LINQ for fetching data from an object and also used for filtering, sorting and grouping data.
- Write code using JQuery Ajax for loading data using web services and XML.
- Use Collapsible Panel Extender AJAX to make user interface more usable and presentable.
- Use ASP.Net Validation Controls and JavaScript to perform form validation.
- Write Stored Procedures, User Defined Functions for retrieving data from database using SQL Server 2008 R2.
- Write XSLT Transformations for generating Word Document using XML.
- Use XML Web Services to expose web methods that give access to Sharepoint for working with Document Libraries and Lists to upload documents and spreadsheets.
- Use Team Foundation Server as Source control.
- Involve in Testing, Deployment and Maintenance of the project on IIS.

In addition, the petitioner indicates that the proffered position requires a minimum of a "Bachelor[']s degree in engineering or science or equivalent degree."

- A letter purportedly from [REDACTED] dated February 8, 2011. Notably, the letter is not endorsed by [REDACTED]
- A Development Agreement between the petitioner and [REDACTED] along with Schedules A through D. The documentation states that "the parties hereto have, through duly authorized officials, executed this Agreement effective as of the day and year indicated on the first page. The first page, however, is undated. Schedule B indicates the following:

Phase I Project Segment 1: . . . . To be completed by January 31, 2011

Phase I Project Segment 2: . . . . To be completed by February 28, 2011

- Documents regarding the petitioner's operations.
- Information regarding [REDACTED]



- A copy of the petitioner's lease agreement.
- An organizational chart for the petitioner.
- A blank copy of the petitioner's performance appraisal.
- An offer of employment letter from the petitioner to the beneficiary, dated February 2, 2012. Notably, the letter does not include the beneficiary signature accepting the terms.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on September 10, 2012. The director outlined the specific evidence to be submitted.

On October 25, 2012, the petitioner and counsel responded to the RFE by submitting further information regarding the proffered position and additional evidence.<sup>1</sup> Counsel submitted a letter in which he initially claimed that "the incumbent [needs] a Bachelors degree in computer science, [e]ngineering, [i]nformation science, or the equivalent through a combination of education and work experience." Thereafter, in the same letter, counsel stated that "the beneficiary needs to have a Bachelor's degree in computer science or IT to perform these duties."

In response to the RFE, the petitioner submitted a document entitled "Detailed Roles & Responsibilities of [the beneficiary] with percentage of time spent on each of the tasks," which included a revised description of the duties of the proffered position, along with the percentage of time that the beneficiary will spend performing each duty. Specifically, the document indicated the following:

Following are the main roles and responsibilities expressed in percentage basis to be played by [the beneficiary] during the course of the project.

1. Requirements gathering and analysis, understanding the SRS (Software Requirement Specification) documents, preparing high level and low level designs, preparing the data base schemas in ORACLE, designing indexes for improving the performance, prepare the UML diagrams for developing software[.] (20%)
2. Prepare the dataflow diagrams using Microsoft Visio and Develop / Program / Write / Code complex application programs using object oriented programming languages like Java, WSDL, SOAP Web Services, XMPP Protocol and reusable frameworks, creating the stored procedures to access the data from the back end tables using oracle SQL, PL/SQL, leveraging and

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<sup>1</sup> In response to the RFE, counsel submitted a brief dated October 23, 2012. It must be noted for the record that in the brief, counsel mistakenly and repeatedly referenced the beneficiary in the masculine pronoun case. The record provides no explanation for this inconsistency. Thus, the AAO must question the accuracy of the letter and whether the information provided is correctly attributed to this particular position and beneficiary.

implementing security best practices during development and other SDLC phases. (50%)

3. Writing and reviewing test cases and test plans, reviewing the tractability matrix for the test cases, regression test cases, coordinating with the integration testing and user acceptance testing (UAT) teams along with the client BA's. Going thru the QTP suite to get the metrics and measure the quality of the application. (10%)
4. Configuring the application servers JBOSS/TomCat to fine tune the performance before deploying the Java applications. Ensure smooth deployment to production environment and analyze and resolve any issues that rise post go-live. Once the production is smooth hand over the release to the support team[.] (10%)
5. Manage complex programming and analysis projects; Analyze systems with a focus on technical, internal and some external specifications, coding, testing and documentation[.] (10%)

In addition, the petitioner and counsel submitted the following documentation:

- Copies of the petitioner's newspaper advertisements in the [REDACTED] on July 3, 2011 and July 10, 2011.<sup>2</sup>
- Job vacancy announcements.
- A letter from [REDACTED] – Human Resources at [REDACTED] dated October 17, 2012.
- A letter from [REDACTED], dated October 12, 2012.
- A document on the petitioner's letterhead entitled "List of employees, title and their education."
- Copies of several individual's academic credentials and Forms W-2, Wage and Tax Statements.
- A letter from [REDACTED] dated April 20, 2012. In the letter, [REDACTED] provides a list of the duties and responsibilities the beneficiary will perform in the programmer analyst

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<sup>2</sup> It must be noted that the font of the advertisements is so small that the content of the job postings is partially illegible.

position.<sup>3</sup> [REDACTED] states that "[t]hese duties are complex and require at the minimum a Bachelor's Degree in Engineering or a directly related field."<sup>4</sup>

- A credential evaluation from [REDACTED] Evaluations and Consulting, which indicates that the beneficiary's foreign education is equivalent to a "Bachelor of Science degree in Electronics Engineering from an accredited institution of higher education in the United States." In addition, the evaluation indicates that the beneficiary's foreign education and work experience amount to "the equivalent of at least a Bachelor of Science degree in Computer Information Systems from an accredited institution of higher education in the United States."<sup>5</sup>
- Documents regarding the petitioner, including copies of the petitioner's Income Tax Returns for 2010 and 2011 and payroll documents for 2011 (quarters 3 and 4) and 2012 (quarters 1 and 2).
- A revised organization chart for the petitioner.
- Printouts from the petitioner's website.
- A Development Agreement between the petitioner and [REDACTED] The agreement was signed by the petitioner and [REDACTED] on July 18, 2011. The document states, "Period of Agreement: Developer [the petitioner] and Company agree that this agreement is for a period of 3 (three) Years from June 1, 2011 to May 31<sup>st</sup> 2014." The document states, "This Agreement constitutes the entire understanding of the parties, and revokes and supersedes all prior agreements between the parties and is intended as a final expression of their Agreement."
- Articles regarding [REDACTED]

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on January 2, 2013. Counsel submitted an appeal of the denial of the H-1B petition. With the appeal brief, counsel submitted a second credential

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<sup>3</sup> The AAO notes that the job duties in this letter differs from the duties of the proffered position as stated by the petitioner in the April 14, 2012 letter of support, itinerary, and document entitled "Detailed Roles & Responsibilities of [the beneficiary] with percentage of time spent on each of the tasks."

<sup>4</sup> Notably, the requirements for the proffered position as stated in this document are not the same as the academic requirements for the proffered position as stated by the petitioner. No explanation was provided.

<sup>5</sup> In the letter dated October 23, 2012, counsel initially states that "[t]he beneficiary has the equivalent of a bachelor's degree in computer science" and thereafter, in the same letter, reports that "[t]he beneficiary has the equivalent of a bachelors degree in computer science and in electronics engineering based on a combination of work experience and education." However, his statements are not in accordance with the credential evaluation submitted by the petitioner.



evaluation from The [REDACTED], which indicates that the beneficiary's foreign education is equivalent to a "Bachelor of Science Degree in Electronic Engineering from an accredited college or university in the United States."

## II. Beneficiary's Qualifications

The AAO notes that the director denied the petition, finding that the petitioner failed to establish that the beneficiary is qualified to perform the services in a specialty occupation. However, a beneficiary's credentials to perform a particular job are relevant only when the job is found to qualify as a specialty occupation. U.S. Citizenship and Immigration Services (USCIS) is required to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation]"). In the instant case, the record of proceeding does not establish that the proffered position qualifies as a specialty occupation. Thus, the matter will be remanded to the director for review and issuance of a new decision.

## III. Specialty Occupation

To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the 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 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.

The issue is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. 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."

In the instant case, the petitioner provided several job descriptions for the proffered position that vary considerably. No explanation for the variances was provided by the petitioner. Furthermore, the petitioner and counsel have provided inconsistent information regarding the requirements of the proffered position.

- In the letter of support dated April 14, 2012, the petitioner did not provide any requirements for the proffered position.
- In the itinerary, the petitioner stated that the proffered position requires a minimum of a "Bachelor['s] degree in engineering or science or equivalent degree."
- In the petitioner's newspaper advertisements, which the petitioner and counsel claim are relevant in this matter, the petitioner indicated that the position requires a "Bach's + 5 yrs exp/Master's + 6 mts - 2 yrs (Comp Sci, Engg, Bus. Admin, Math, MIS [Management Information Systems] or Sci.)"
- In the October 23, 2012 letter, counsel stated that "a Bachelors [sic] degree in computer science, Engineering, Information Science, or the equivalent through a combination of education or work experience" is required for the position.
- Thereafter, in the same letter, counsel stated that "the beneficiary needs to have a Bachelor's degree in computer science or IT to perform these duties."
- The petitioner submitted a letter dated April 20, 2012 from [REDACTED]



which indicates that duties require "a Bachelor's Degree in Engineering or a directly related field."

No explanation for the variance was provided. The petitioner and counsel have provided inconsistent information regarding the minimum educational requirement for the proffered position. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Moreover, it must be noted that within the record of proceeding, the petitioner and its counsel have represented that the position requires a bachelor's degree in engineering, science (without further specification), computer science, business administration, math, management information systems, information science, or IT.

In general, provided the specialties are closely related, e.g., 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 (or its equivalent)" 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 philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," 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.

Again, the petitioner and counsel have represented that a bachelor's degree in a number of disciplines is acceptable, specifically, engineering, science (without further specification), computer science, business administration, math, management information systems, information science, and IT. However, it must be noted that these include broad categories that cover numerous and various specialties.<sup>6</sup> Therefore, it is not readily apparent that a degree in any and all of these fields is

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<sup>6</sup> The AAO notes that the term "business" is defined as "1. The occupation, work, or trade in which one is engaged. . . . 2. Commercial, industrial, or professional dealings. 3. A commercial enterprise or establishment." WEBSTER'S II NEW COLLEGE DICTIONARY 153 (2008). A degree in business administration may include a range of disciplines, some of which may not directly relate to the duties of the proffered position. For instance, U.S.

directly related to the duties and responsibilities of the particular position proffered in this matter.

Here and as indicated above, the petitioner, who bears the burden of proof in this proceeding, fails to establish either (1) that all of the disciplines are closely related fields, or (2) that all of the disciplines are directly related to the duties and responsibilities of the proffered position. Absent this evidence, it cannot be found that normally the minimum requirement for entry into the particular position proffered in this matter is a bachelor's or higher degree in a specific specialty, or its equivalent, under the petitioner's own standards.

As the evidence of record fails to establish how these dissimilar fields of study form either a body of highly specialized knowledge or a specific specialty, or its equivalent, the petitioner's assertion that the job duties of this particular position can be performed by an individual with a bachelor's degree in any of these fields suggests that the proffered position is not in fact a specialty occupation. Therefore, absent probative evidence of a direct relationship between the claimed degrees required and the duties and responsibilities of the position, it cannot be found that the proffered position requires, at best, anything more than a general bachelor's degree. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The AAO will now address the petitioner's proffered position under 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*), on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry

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News and World Report publishes a guide for colleges. The entry for [REDACTED] indicates that its business school offers concentrations in a range of disciplines, including arts administration, e-commerce, health care administration, human resources management, not-for-profit management, organizational behavior, public administration, public policy, real estate, sports business, as well as many others. See U.S. News and World Report on the Internet at [http://www.usnewsuniversitydirectory.com/graduate-schools/business/harvard-university\\_01110.aspx](http://www.usnewsuniversitydirectory.com/graduate-schools/business/harvard-university_01110.aspx) (last visited April 14, 2014).

The term "science" is defined as "1a. The observation, identification, description, experimental investigation, and theoretical explanation of natural phenomena. . . . 2. Methodological activity, disciplines, or study <culinary science> 3. An activity that appears to require study and method." WEBSTER'S II NEW COLLEGE DICTIONARY 1012 (2008). U.S. News and World Report's guide for colleges designates science programs into various subcategories, including biological sciences, chemistry, earth sciences, math, physics, statistics, as well as social science programs such as criminology, economics, English, history, political science, psychology, and sociology. See U.S. News and World Report on the Internet at <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-science-schools> (last visited April 14, 2014).



requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>7</sup> As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Computer Programmers."<sup>8</sup>

The AAO reviewed the chapter of the *Handbook* entitled "Computer Programmers," including the sections regarding the typical duties and requirements for this occupational category.<sup>9</sup> However, the *Handbook* does not indicate that "Computer Programmers" comprise an occupational group for which normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent.

The subchapter of the *Handbook* entitled "How to Become a Computer Programmer" states the following about this occupation:

#### **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 to supplement their degree in computer programming. In addition, employers value experience, which many students gain through internships.

Most programmers learn only a few computer languages while in school. However, a computer science degree gives students the skills needed to learn new computer

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<sup>7</sup> 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 2014 – 2015 edition available online. The AAO hereby incorporates into the record of proceeding the excerpt from the *Handbook* regarding the occupational category "Computer Programmers."

<sup>8</sup> The *Handbook* is revised every two years. The AAO observes that the Form I-129 petition was filed on April 20, 2012; however, counsel references the 1994-95 edition of the *Handbook* in his letter. No explanation was provided. The edition cited by counsel was issued approximately 18 years prior to the H-1B submission and does not address how the occupational category has evolved. Thus, the AAO finds counsel's reliance on the cited resource misplaced.

<sup>9</sup> For additional information regarding the occupational category "Computer Programmers," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Computer Programmers, on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-1> (last visited April 14, 2014).



languages easily. During their classes, students receive hands-on experience writing code, debugging programs, and doing many other tasks that they will perform 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.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Computer Programmers, on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4> (last visited April 14, 2014).

When reviewing the *Handbook*, the AAO must note that the petitioner designated the proffered position as a Level I (entry level) position on the LCA. This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.<sup>10</sup> That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that she would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results. DOL guidance indicates that a Level I designation should be considered for positions in which the employee will serve as a research fellow, worker in training, or an intern.

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

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<sup>10</sup> The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

**Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

that most computer programmers obtain a degree (either a bachelor's degree or an associate's degree) 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, but the *Handbook* does not report that it is an occupational, entry requirement.<sup>11</sup> 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 petitioner's claim that the proffered position falls under an occupational category for which normally the minimum requirement for entry is at a baccalaureate (or higher degree) in a specific specialty, or its equivalent.

In response to the director's RFE, counsel references the Dictionary of Occupational Titles (hereinafter the DOT). It is important to note, however, that DOT was last updated in 1991 (approximately 20 years prior to the submission of the H-1B petition) and has been superseded by Occupational Information Network (O\*NET).<sup>12</sup> Although counsel references DOT, he fails to establish its relevancy to establish the current educational requirements for entry into the occupation.

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<sup>11</sup> It must be noted that "most" is not indicative that a particular position within the wide spectrum of computer programming jobs normally requires at least a bachelor's degree in a specific specialty, or its equivalent. For instance, the first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of the positions require at least a bachelor's degree in specific specialty, it could be said that "most" of the positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. As previously mentioned, 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." Section 214(i)(1) of the Act.

<sup>12</sup> See, for instance, this note at the opening page of the U.S. Department of Labor Internet site at <http://www.oalj.dol.gov/libdot.htm> (last visited April 14, 2014):

The Dictionary of Occupational Titles (DOT) was created by the Employment and Training Administration, and was last updated in 1991. It is included on the Office of Administrative Law Judges (OALJ) web site because it was a standard reference in several types of cases adjudicated by the OALJ, especially in older labor-related immigration cases. **The DOT, however, has been replaced by the O\*NET.**



Nevertheless, the AAO reviewed the DOT entry regarding programmer analysts in its entirety. However, it does not support a finding that the proffered position qualifies as a specialty occupation normally requiring at least a bachelor's degree in a specific specialty, or its equivalent. More specifically, the occupational title of "Programmer Analyst" has a Specialized Vocational Preparation (SVP) rating of 7.0 < 8.0. It must be noted that an SVP rating of 7.0 < 8.0 is not indicative of a specialty occupation. More specifically, Section II of the DOT's Appendix C, Components of the Definition Trailer, addresses the SVP rating system and states the following:<sup>13</sup>

## II. SPECIFIC VOCATIONAL PREPARATION (SVP)

Specific Vocational Preparation is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.

This training may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.

Specific vocational training includes training given in any of the following circumstances:

- a. Vocational education (high school; commercial or shop training; technical school; art school; and that part of college training which is organized around a specific vocational objective);
- b. Apprenticeship training (for apprenticeable jobs only);
- c. In-plant training (organized classroom study provided by an employer);
- d. On-the-job training (serving as learner or trainee on the job under the instruction of a qualified worker);
- e. Essential experience in other jobs (serving in less responsible jobs which lead to the higher grade job or serving in other jobs which qualify).

The following is an explanation of the various levels of specific vocational preparation:

Level	Time
1	Short demonstration only

<sup>13</sup> Section II of the DOT's Appendix C, Components of the Definition Trailer, can be found on the Internet at the website [http://www.occupationalinfo.org/appendxc\\_1.html#II](http://www.occupationalinfo.org/appendxc_1.html#II).



- 2 Anything beyond short demonstration up to and including 1 month
- 3 Over 1 month up to and including 3 months
- 4 Over 3 months up to and including 6 months
- 5 Over 6 months up to and including 1 year
- 6 Over 1 year up to and including 2 years
- 7 Over 2 years up to and including 4 years
- 8 Over 4 years up to and including 10 years
- 9 Over 10 years

Note: The levels of this scale are mutually exclusive and do not overlap.

Thus, an SVP rating of  $7.0 < 8.0$  does not indicate that at least a four-year bachelor's degree is required, or more importantly, that such a degree must be in a specific specialty directly related to the duties and responsibilities of that occupation. Rather, an SVP rating of  $7.0 < 8.0$  indicates that over *two years* (but not more than four years) of preparation is required for average performance of the duties of the occupation. Moreover, DOT indicates that preparation for the occupation may be the result of vocational training, including vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs. Accordingly, DOT does not indicate that at least a bachelor's degree in a specific specialty (or its equivalent) is normally required to perform the duties of the occupation. Therefore, the DOT information regarding the SVP rating is not probative of the proffered position being a specialty occupation.

In addition, counsel refers to unpublished decisions in which the AAO determined that the positions in those matters qualified as a specialty occupation positions. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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 the benefit. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I&N Dec. 190. Furthermore, any suggestion that USCIS must review unpublished decisions and possibly request and review each case file relevant to those decisions, while being impractical and inefficient, would also be 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. Accordingly, the USCIS was not required to request and/or obtain a copy of the unpublished decisions cited by counsel.

If a petitioner wishes to have unpublished decisions considered by USCIS in its adjudication of a petition, the petitioner is permitted to submit copies of such evidence that it either obtained itself through its own legal research and/or received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. Part 5. Otherwise, "[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility." 8 C.F.R. § 103.2(b)(2)(i). In the instant case, the petitioner failed to submit copies of the unpublished decisions. As the record of proceeding does not contain any evidence of the unpublished decisions, there were no underlying

facts to be analyzed and, therefore, no prior, substantive determinations could have been made to determine what facts, if any, were analogous to those in this proceeding. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook* (or other objective, authoritative source) indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding 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).

Next, the AAO will review the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* (or other objective, authoritative source), reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter. The petitioner did not submit any documentation from the industry's professional association stating that it has made a degree a minimum entry requirement.

In the Form I-129 petition, the petitioner stated that it is an IT consulting firm established in 2004. The petitioner further stated that it has 20 employees and a gross annual income of \$7.13 million.<sup>14</sup> Although requested in the Form I-129 petition, the petitioner did not state its net annual income. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 541511.<sup>15</sup> This NAICS code is designated for "Custom Computer

<sup>14</sup> The AAO observes that the petitioner submitted an organization chart with the initial petition. Thereafter, in response to the RFE, the petitioner submitted a revised organizational chart, which differs from the original chart. No explanation was provided.

<sup>15</sup> According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and each establishment is



Programming Services." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating, "This U.S. industry comprises establishments primarily engaged in writing, modifying, testing, and supporting software to meet the needs of a particular customer." See U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 541511 – Custom Computer Programming Services, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited April 14, 2014).

For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). Notably, it is not sufficient for the petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

In response to the director's RFE, counsel submitted copies of job advertisements in support of the assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations. However, upon review of the documents, the AAO finds that the reliance on the job announcements is misplaced.

Upon review of the documentation, the petitioner fails 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.

For instance, counsel submitted an advertisements for the following organizations:

- [REDACTED] (retail clothing company);
- [REDACTED] (a staffing company "[w]ith more than 100 locations in North America, Europe, Australia and Asia");
- [REDACTED] ("one of the country's largest and strongest mutual insurance companies")
- [REDACTED] ("a fully integrated engineering, construction and technical services organization" with a "network of offices in nearly 50 countries" and focusing on the following market sectors: federal, oil and gas, infrastructure, power, and industrial); and
- [REDACTED] System.

Upon review, the advertising employers do not appear to be similar to the petitioner, and the petitioner has not provided any information regarding which aspects or traits (if any) it shares with

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classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited April 14, 2014).

the advertising organizations.

Furthermore, the petitioner submitted job postings for which little or no information regarding the employers was provided, including [REDACTED]. Consequently, the record lacks sufficient information regarding the advertising employers to conduct a legitimate comparison of the organizations to the petitioner. The petitioner and counsel failed to supplement the record of proceeding to establish that the advertising organizations are similar to it. Again, the petitioner must demonstrate the degree requirement is common to the industry in parallel position among similar organizations.

Moreover, some of the advertisements do not appear to be for parallel positions. More specifically, counsel submitted a posting for [REDACTED] which requires a degree and "2+ to 5 Years" of experience. The record also contains a posting for [REDACTED] that requires a degree and "at least 10 years of job-related experience." Counsel also provided a posting for [REDACTED] which requires a degree and "6+ years of software development experience." As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as a Level I (entry level) position. The advertised positions appear to be for more senior positions than the proffered position.

More importantly, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position. For instance, some of the advertising employers provided brief and/or vague job descriptions for the advertised positions. Thus, these advertisements do not contain sufficient information regarding the day-to-day duties, complexity of the job duties, supervisory duties (if any), independent judgment required, the amount of supervision received, or other relevant factors within the context of the advertising employers' business operations to make a legitimate comparison of the advertised positions to the proffered position.

Furthermore, contrary to the purpose for which the advertisements were submitted, the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. For instance, some of the postings state that a bachelor's degree is required, but they do not provide any further specification. These include the following advertisements: [REDACTED]

Moreover, one of the employers (specifically, [REDACTED]) indicates that a degree in a wide variety of disciplines is acceptable for the advertised positions. Again, since there must be a close correlation between the required "body of highly specialized knowledge" and the position, a minimum entry requirement of a degree in disparate fields would not meet the statutory requirement that the degree be "in the specific specialty," unless the petitioner establishes how each field is

<sup>16</sup> The posting for [REDACTED] lists the qualifications for the advertised position as a "Bachelor's degree from accredited four-year college or university (preferably in Computer Science)." In addition, the posting for [REDACTED] indicates "Bachelors or Masters degree in CS [Computer Science] or related field preferred" for the advertised position. Obviously, a *preference* is not an indication of a *requirement* for a degree in a particular discipline.



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). Thus, upon review, the advertisements do not indicate that a bachelor's degree in a *specific specialty* that is directly related to the duties of the position is required.

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed. The evidence does not establish that the proffered position qualifies as a specialty occupation under this criterion of the regulations.<sup>17</sup>

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, counsel submitted a letter from [REDACTED]

[REDACTED] The AAO reviewed the letters and observes that the letters lack sufficient information regarding the organizations to conduct a meaningfully substantive comparison of the their business operations to the petitioner. The letters do not provide information regarding which specific aspects or traits (if any) it shares with the petitioner. Notably, the petitioner and counsel failed to provide any supplemental information to establish that the organizations are similar to the petitioner. Thus, from the onset, this prong of the regulations has not been established by Mr. [REDACTED]

While the writers claim that the duties of the proffered position are similar to their programmer analyst jobs, they failed to provide any specific job duties and day-to-day responsibilities for their positions. There is no information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, there is insufficient information regarding the duties and responsibilities of the position to determine

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<sup>17</sup> 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 these 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 parallel positions for companies that are similar to the petitioner and in the same industry require a bachelor's or higher degree in a specific specialty, or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the 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, or its equivalent, for entry into the occupation in the United States.

whether it is the same or parallel to the proffered position. Moreover, the AAO observes that the writers did not provide any documentary evidence to corroborate that they currently or in the past employed individuals in parallel positions to the proffered position, nor did they provide any documentation to substantiate the claimed academic requirements. The writers have failed to submit any probative evidence of their recruitment and hiring practices. Thus, the letters do not establish that the proffered position qualifies as a specialty occupation.

Upon a complete review of the record, the petitioner has not established 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. 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 does not claim 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. Nevertheless, the AAO reviewed the record of proceeding to determine eligibility under this criterion of the regulations.

The record of proceeding contains information regarding the proffered position and the petitioner's business operations, including a letter from [REDACTED] between the petitioner and [REDACTED] products, the petitioner's lease agreement, organizational charts, the petitioner's offer of employment letter to the beneficiary, printouts from the petitioner's website, as well as the petitioner's financial documents (e.g., tax returns for 2010 and 2011, payroll documents). However, upon review of the record of proceeding, the AAO finds that the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position.

That is, the petitioner failed to demonstrate how the duties of the position as described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While related courses may be beneficial or in some cases even required to perform certain duties of a programmer analyst position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the LCA indicates a wage level based upon the occupational classification "Computer Programmers" at a Level I (entry level) wage, which is the lowest of four assignable wage levels.



The wage level of the proffered position indicates that (relative to other positions falling under this occupational category) the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique, as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."<sup>18</sup>

Therefore, the evidence of record does not establish that this position is significantly different from other positions such that it refutes the *Handbook's* information to the effect that a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty, is acceptable for computer programmer positions. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique than positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO observes that the petitioner has indicated that the beneficiary's academic credentials and professional experience will assist her in carrying out the duties of the proffered position. However, as previously mentioned, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent). The petitioner does not sufficiently explain or clarify which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Upon review of the record of proceeding, the AAO finds that the petitioner has failed to establish the proffered position as satisfying the second prong of the criterion at 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 a petitioner demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position, as well as any other evidence provided in support of this criterion.

To merit approval of the petition under this criterion, the record must establish that the imposition of a degree requirement by the petitioner (or, in this case, by the client) is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the

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<sup>18</sup> For additional information on wage levels, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

While a petitioner (or client) may state 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 the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. See *id.* at 388.

In response to the director's RFE, the petitioner provided a list of its programmer analysts.<sup>19</sup> In

<sup>19</sup> The AAO notes that the petitioner has provided inconsistent information regarding its employees in the proffered position. The petitioner provided an organizational chart with the H-1B petition, indicating that it has 6 programmer analysts. Thereafter, in response to the RFE, the petitioner submitted a list of employees and their titles, which indicates that it employs 11 programmer analysts. However, the organization chart, submitted with the RFE response, indicates the petitioner employs 12 programmer analysts. Further, three employees (specifically, [REDACTED] who appear on the list do not appear in the organizational chart submitted in response to the RFE. In addition, the list does not include four employees (specifically, [REDACTED] and [REDACTED] from the organizational chart. No explanation was provided by the petitioner.



addition, the petitioner submitted copies of their degrees and diplomas. Notably, eight of the diplomas submitted by the petitioner were from foreign educational institutions, and the petitioner did not provide academic credential evaluations to establish that these foreign degrees are equivalent to a U.S. bachelor's degree in a specific specialty.

Further, the petitioner submitted copies of six of the eleven employees' Form W-2s for 2011. The Form W-2s indicate that these individuals' earnings range from \$39,375.02 to \$93,521.46. Thus, it appears that not all of the employees are working at the same level and/or performing the same duties as the proffered position.

Moreover, while the petitioner claimed that it currently employs programmer analysts, the petitioner failed to provide the job duties and day-to-day responsibilities of the employees that it claimed serve in positions that are the same as the proffered position.<sup>20</sup> The petitioner did not provide any information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, the petitioner has failed to establish that the duties and responsibilities of these individuals are the same as the beneficiary's in the proffered position.

In addition, the petitioner submitted copies of its newspaper advertisements in the [REDACTED] that appeared on July 3, 2011 and July 10, 2011. Notably, the text states that a "Bach's + 5 yrs exp/Master's + 6 mts - 2 yrs (Comp Sci, Engg, Bus. Admin, Math, MIS or Sci.)" is required for the programmer analyst position. As previously discussed *supra*, the petitioner has provided inconsistent information within the record of proceeding as to the requirements of the proffered position. With regard to the job advertisements, the petitioner has not established that these prerequisites reflect the requirements of the instant position. For instance, the other documents in the record (i.e., letters of support, itinerary, client letter), do not indicate that a bachelor's degree and five years of experience or a master's degree and six months to two years of experience is necessary to perform the duties of the proffered position.<sup>21</sup>

Moreover, as previously discussed, since there must be a close correlation between the required "body of highly specialized knowledge" and the position, a minimum entry requirement of a degree in disparate fields 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).

Upon review of the record, the petitioner has not provided sufficient probative evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the

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<sup>20</sup> In the organizational chart submitted with the petition, the petitioner stated that [REDACTED] job title is QA and testing analyst and that [REDACTED] job title is senior programmer analyst. In the second organizational chart, the petitioner states that both individuals serve as programmer analysts.

<sup>21</sup> Further, it appears that such requirements would necessitate the petitioner to designate the proffered position at a higher wage level on the LCA.

proffered position. Thus, the petitioner has not satisfied the third criterion of 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 the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

In the instant case, the petitioner and its counsel submitted documentation regarding the proffered position and the petitioner's business operations, including the documentation previously outlined. Upon review of the record of the proceeding, the AAO notes that relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as an entry-level position relative to others within the occupational category of "Computer Programmers." The petitioner designated the position as a Level I position (the lowest of four assignable wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is not credible that the petitioner's proffered position is one with specialized and complex duties compared to others within the occupation as such a position would likely be classified at a higher-level requiring a substantially higher prevailing wage.<sup>22</sup> For instance, as previously discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the duties of the position are 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. The AAO, therefore, concludes that the petitioner failed to satisfy 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.

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<sup>22</sup> If the proffered position were designated as a higher level position, the prevailing wage for the occupational category in [REDACTED], Missouri at that time would have been \$60,507 per year for a Level II position, \$74,339 per year for a Level III position, and \$88,171 per year for a Level IV position.



#### **IV. Conclusion and Order**

As stated above, the matter will be remanded to the director for review and issuance of a new decision.

**ORDER:** The director's January 2, 2013 decision is withdrawn. The matter is remanded to the director for action consistent with this decision.