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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

DATE: **JUL 01 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 (hereinafter "director") denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

I. PROCEDURAL AND FACTUAL BACKGROUND

On the Form I-129 visa petition, the petitioner describes itself as a Software Development and IT Services firm with 233 employees in the United States, established in 2005. In order to employ the beneficiary in what it designates as a Software Quality Assurance Engineer 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 it would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director's basis for denial was erroneous and contended that the petitioner satisfied all evidentiary requirements.

As will be discussed below, the AAO has determined that the director did not err in her decision to deny the petition on the specialty occupation issue. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

II. THE LAW

The issue before the AAO is whether the petitioner has demonstrated that the proffered position qualifies as a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

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

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 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), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See*

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

To determine whether a particular job qualifies as a specialty occupation, USCIS does not 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 AAO notes that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. The court held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

III. EVIDENCE

The period of employment requested on the visa petition is June 13, 2013 to June 5, 2016. The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a Software Quality Assurance Engineer position, and that it corresponds to Standard Occupational Classification (SOC) code and title 15-1799, Computer Occupations, All Other from the Occupational Information Network (O*NET). We observe that the classification of Computer Occupations, All Other has recently been assigned a new SOC code, 15-1199, and that a summary report at 15-1199.01 addresses Software Quality Assurance Engineer and Tester positions more specifically. The LCA further states that the proffered position is a Level I, entry-level, position. The location of the proposed employment is [REDACTED] in San Francisco, California.

With the visa petition, counsel submitted evidence that the beneficiary received an otherwise unspecified bachelor's degree and a master's degree in computer science, both from [REDACTED]. An evaluation in the record states that the beneficiary's Indian degrees are equivalent to a U.S. bachelor's degree in mathematics and computer science.

Counsel also submitted: (1) a Preferred Vendor Agreement, dated [REDACTED], 2008, executed by the petitioner and official of [REDACTED]; (2) an undated document headed "Itinerary"; (3) a copy of an Employer-Employee Agreement, signed by the beneficiary and the petitioner's human resources manager; (4) an undated letter from a human resources assistant at [REDACTED] and (5) a letter, dated [REDACTED] 2013, from the petitioner's human resources manager;

The [REDACTED] 2008 Preferred Vendor Agreement sets out terms pursuant to which [REDACTED] may utilize the services of the petitioner's workers. Among the terms of that agreement, the petitioner agrees not to reveal to [REDACTED] clients, for whom the petitioner's workers are performing services, that the petitioner, rather than [REDACTED], employs those workers. The petitioner also agrees not to remove its employees from projects to which they have been assigned unless either [REDACTED] or its client agrees. That agreement states that its term is one year, commencing on [REDACTED] 2008, unless it is renewed, modified, or extended in writing by both parties. The record does not contain any renewal, modification, or extension of that agreement.

The document headed Itinerary indicates that the beneficiary will be assigned through vendor [REDACTED] to work for client [REDACTED] in San Francisco, California but does not indicate the period of time during which the beneficiary will work at that location. It states the following as the duties the beneficiary will perform while on that assignment:

- Analysis of business requirements & functional specifications.
- Perform white box testing (API testing), black box testing, integration testing, regression testing, database testing, system testing and support user acceptance testing with business users.
- Develop test plans, test strategy, test cases and test scripts.
- Build test tools and frameworks for the application.
- Develop automation framework for Unit, Functional, Regression and Performance testing.
- Build automation framework using Page Object Model principles.
- Develop automation scripts and tools using Java, Selenium 2.0, JUnit, TestNG, Maven, PERL SQL etc.
- Develop and execute SQL scripts to create test data for functional testing.
- Write complex SQL queries to perform the database testing.
- Develop test suites using TestNG.
- Develop build scripts using Maven for batch execution and integrate them with Continuous Integration System (TeamCity)
- Log defects in JIRA and coordinate with the developer to resolve the defects.

The beneficiary's employment agreement is undated. However, it was submitted with a cover letter that is dated [REDACTED] 2013. Among its terms, the beneficiary agrees to be assigned, or reassigned, to any location in the United States at the petitioner's discretion and the beneficiary agrees that the petitioner may assign her additional work. The agreement also states, "[The petitioner] solicits regular feedback from the client about the work product of [the beneficiary] and includes feedback in regular performance evaluations for [the beneficiary]."

The letter from [REDACTED] human resources assistant reiterates the duty description stated in the itinerary. It also states:

Pursuant to the agreement between [the petitioner] and [REDACTED] [the beneficiary] will start working at [REDACTED] performing the above mentioned duties from June 20th, 2013 to May 20th, 2014 (extendable for more duration according to project demand).

The petitioner's human resources manager's [REDACTED] 2013 letter also reiterates the duty description provided in the itinerary. It confirms that the beneficiary will work at the [REDACTED] location in San Francisco. As to the term during which she will work on that project, it states:

[The beneficiary] is expected to work on the end-client project for the period of time noted on the Form I-129, with possible future extension/renewal. Please see the enclosed Vendor Letter, and other supporting documentation.

On June 26, 2013, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation. The director outlined the specific evidence to be submitted.

In response, counsel submitted (1) an undated letter from the human resources manager of [REDACTED] (2) an undated letter from the petitioner's human resources manager; (3) an undated document headed, Statement of Work for Resource; (4) an organizational chart of the petitioner's operations; (5) five vacancy announcements placed by the petitioner; (6) nine vacancy announcements placed by other companies; (7) a document headed, "Exhibit A"; (8) a letter, dated [REDACTED] 2013, from the senior manager, alternative workforce, of [REDACTED] and (9) counsel's own letter, dated July 15, 2013.

The undated letter from [REDACTED] human resources manager states that the beneficiary "is on a contract assignment between [the petitioner and [REDACTED]]." As to the term of that contract assignment, that letter states: "Normally, we extend each SOW every 12 months. Because of the nature of the project, we expect that the SOW for [the beneficiary] should be extended for 6 Months beyond June 27th, 2014." That letter also reiterates the duty description previously provided and states, "The above mentioned duties require a candidate to hold at least a Bachelor's Degree in Computer Science or in a directly and closely related field."

The undated letter from the petitioner's human resources manager provides a duty description consistent with the other descriptions provided and lists classes that the performance of those duties would require. It also states:

As related in the initial H-1B application package, [the petitioner] has never hired, and would never hire, an individual for this position who does not possess at least a Bachelor's degree and significant professional experience, or the equivalent in Computer Science, or a related technical field"

The petitioner's human resources manager also cited the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* for the proposition that:

A minimum requirement of a Bachelor's degree and significant professional experience in Computer Science, or a related technical field, is the standard for this position.

The document headed Statement of Work for Resource was signed by the beneficiary and the petitioner's human resources manager, though the document and signatures are undated. It reiterates the duty description previously provided. It states, "Project Details: Software QA Engineer and [redacted] and that the work will be performed at the San Francisco location of [redacted]. It also states, "The term of Statement of Work will be governed by the Temporary Service agreement between [redacted] and [the petitioner]." The record does not contain a Temporary Service agreement ratified by those three parties.

The organizational chart provided designates 55 of the petitioner's employees as "QA," which apparently stands for Quality Assurance. An additional 12 are designated WB QA, the meaning of which is unknown to the AAO. One position is designated QA Engineer. The organizational chart suggests that at least 55 of the positions are positions parallel to the proffered position.

The petitioner's vacancy announcements are for QA Analyst, QA Lead (Automation)(Full-Time), QA Engineer With Teradata, Java With QA Exp, and QA Lead (Automation). Those vacancy announcements will be addressed further below. The nine vacancy announcements placed by other companies will also be addressed below.

The document headed Exhibit A appears to be a work order to place the beneficiary at [redacted] for twelve months beginning on June 20, 2013. It was signed by an operations manager of [redacted] on June 3, 2013 and ratified by the petitioner's resource manager on June 11, 2013.

The July 11, 2013 letter from the senior manager of [redacted] states that [redacted] is an [redacted] company, and that the beneficiary will be assigned to work for that company at the San Francisco location. It states the following as the duties of the proffered position:

- Actively participate in software development lifecycle (scope, design, implement, validate, deploy, test), including design and code reviews, test development, test automation, etc.)
- Identify, analyze, report bugs and drive issues to resolution
- Build automation scripts using Selenium WebDriver.
- Collaborate with Development, Product Management, and QE team members to understand requirements and create innovative testing solutions that meet market needs with respect to functionality, performance, scalability, reliability, realistic implementation schedules, and adherence to testing goals and principles
- Participated in test planning, test case design and test script walkthroughs.
- Records and tracks defects uncovered during the execution of tests scripts. Drives defect towards resolution; proposes and designs retest cases, scripts and data.
- Utilized tools and methodologies to improve individual effectiveness and to increase efficiencies in the QA process.
- Provide timely and accurate status, defect information and appropriate metrics to facilitate QA reporting.
- Self-driven to work with technologies like web services and applications using Java, J2EE and Open source technologies.
- Design and execute API level tests for Java applications, integration tests for web services, and user-level tests for web applications.
- Driving successful test automation implementations including development of automated test frameworks, jUnit, SOA testing, and Selenium WebDriver/TestNG.
- Strong knowledge of Java application development and testing of user interface applications, web services, and databases, including usability, accessibility, performance, browser compatibility, and fault tolerance.

As to the duration of the beneficiary's work at [REDACTED] that letter states: "We anticipate the need for [the beneficiary's] services from June 24th, 2013 until June 23rd, 2014, with possible extension up to 12 months." It further states, "All employment decisions, including but not limited to work assignment, work supervision, promotion, discharge, remuneration, and performance review, rest solely with [the petitioner]."

In his July 15, 2013 letter, counsel discussed the evidence presented and asserted that it shows that petitioner is the beneficiary's prospective employer and that the proffered position qualifies as a specialty occupation position. He cited the *Handbook*, O*NET, and the proffered position's specific vocational preference (SVP) level classification as additional evidence that the proffered position qualifies as a specialty occupation position. As to the duration of the beneficiary's work for StubHub, counsel stated:

PLEASE NOTE that normal industry standard is for 6-12 month duration on Purchase Orders to be continuously renewed until project completion as indicated in End-Client and Vendor letters.

The director denied the petition on July 30, 2013, finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent. On appeal, counsel again asserted that the evidence submitted demonstrates that the proffered position qualifies as a specialty occupation position.

IV. ANALYSIS

To determine whether the proffered position qualifies as a specialty occupation position, the AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) 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 *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry 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 will first address the requirement under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I): A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. The AAO recognizes the *Handbook*, cited by counsel and the petitioner's human resources manager, as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ The petitioner claims in the LCA that the proffered position corresponds to SOC code and title 15-1799, Computer Occupations, All Other, from O*NET. The AAO observes that the *Handbook* describes the occupation of "Computer Systems Analysts" as follows:

What Computer Systems Analysts Do

Computer systems analysts study an organization's current computer systems and procedures and design information systems solutions to help the organization operate more efficiently and effectively. They bring business and information technology (IT) together by understanding the needs and limitations of both.

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2014 – 2015 edition available online.

Duties

Computer systems analysts typically do the following:

- Consult with managers to determine the role of the IT system in an organization
- Research emerging technologies to decide if installing them can increase the organization's efficiency and effectiveness
- Prepare an analysis of costs and benefits so that management can decide if information systems and computing infrastructure upgrades are financially worthwhile
- Devise ways to add new functionality to existing computer systems
- Design and develop new systems by choosing and configuring hardware and software
- Oversee the installation and configuration of new systems to customize them for the organization
- Conduct testing to ensure that the systems work as expected
- Train the system's end users and write instruction manuals

Computer systems analysts use a variety of techniques to design computer systems such as data-modeling, which create rules for the computer to follow when presenting data, thereby allowing analysts to make faster decisions. Analysts conduct in-depth tests and analyze information and trends in the data to increase a system's performance and efficiency.

Analysts calculate requirements for how much memory and speed the computer system needs. They prepare flowcharts or other kinds of diagrams for programmers or engineers to use when building the system. Analysts also work with these people to solve problems that arise after the initial system is set up. Most analysts do some programming in the course of their work.

Most computer systems analysts specialize in certain types of computer systems that are specific to the organization they work with. For example, an analyst might work predominantly with financial computer systems or engineering systems.

Because systems analysts work closely with an organization's business leaders, they help the IT team understand how its computer systems can best serve the organization.

In some cases, analysts who supervise the initial installation or upgrade of IT systems from start to finish may be called IT project managers. They monitor a project's progress to ensure that deadlines, standards, and cost targets are met. IT project

managers who plan and direct an organization's IT department or IT policies are included in the profile on computer and information systems managers.

Many computer systems analysts are general-purpose analysts who develop new systems or fine-tune existing ones; however, there are some specialized systems analysts. The following are examples of types of computer systems analysts:

Systems designers or **systems architects** specialize in helping organizations choose a specific type of hardware and software system. They translate the long-term business goals of an organization into technical solutions. Analysts develop a plan for the computer systems that will be able to reach those goals. They work with management to ensure that systems and the IT infrastructure are set up to best serve the organization's mission.

Software quality assurance (QA) analysts do in-depth testing of the systems they design. They run tests and diagnose problems in order to make sure that critical requirements are met. QA analysts write reports to management recommending ways to improve the system.

Programmer analysts design and update their system's software and create applications tailored to their organization's needs. They do more coding and debugging than other types of analysts, although they still work extensively with management and business analysts to determine what business needs the applications are meant to address. Other occupations that do programming are computer programmers and software developers.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Computer Systems Analysts," <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm> (last visited June 30, 2014).

The duties attributed to the proffered position in all of the descriptions provided indicate that the beneficiary's duties will almost exclusively involve testing and debugging software. In addition, the proffered position requires understanding of the business requirements and specifications of the software under development. The AAO finds that the proffered position is a computer systems analyst position and, more particularly, a software quality assurance (QA) analyst as described in the Computer Systems Analyst chapter of the *Handbook*.

The *Handbook* states the following about the educational requirements of computer systems analysts positions:

How to Become a Computer Systems Analyst

A bachelor's degree in a computer or information science field is common, although not always a requirement. Some firms hire analysts with business or liberal arts degrees who have skills in information technology or computer programming.

Education

Most computer systems analysts have a bachelor's degree in a computer-related field. Because these analysts also are heavily involved in the business side of a company, it may be helpful to take business courses or major in management information systems.

Some employers prefer applicants who have a master of business administration (MBA) with a concentration in information systems. For more technically complex jobs, a master's degree in computer science may be more appropriate.

Although many computer systems analysts have technical degrees, such a degree is not always a requirement. Many analysts have liberal arts degrees and have gained programming or technical expertise elsewhere.

Many systems analysts continue to take classes throughout their careers so that they can learn about new and innovative technologies and keep their skills competitive. Technological advances come so rapidly in the computer field that continual study is necessary to remain competitive.

Systems analysts must understand the business field they are working in. For example, a hospital may want an analyst with a background or coursework in health management, and an analyst working for a bank may need to understand finance.

Advancement

With experience, systems analysts can advance to project manager and lead a team of analysts. Some can eventually become information technology (IT) directors or chief technology officers. For more information, see the profile on computer and information systems managers.

Important Qualities

Analytical skills. Analysts must interpret complex information from various sources and be able to decide the best way to move forward on a project. They must also be able to figure out how changes may affect the project.

Communication skills. Analysts work as a go-between with management and the IT department and must be able to explain complex issues in a way that both will understand.

Creativity. Because analysts are tasked with finding innovative solutions to computer problems, an ability to "think outside the box" is important.

Id. at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited June 30, 2014).

The *Handbook* makes clear that computer systems analyst positions do not, as a category, require a minimum of a bachelor's degree or the equivalent, as it indicates that many systems analysts have a liberal arts degree and programming knowledge, rather than a degree in a specific specialty directly related to systems analysis.

Where, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies this criterion by a preponderance of the evidence standard, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." In this case, the *Handbook* does not support the proposition that the proffered position satisfies 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), and the record of proceeding does not contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion in this occupational category would be sufficient in itself to establish that a bachelor's or higher degree in a specific specialty or its equivalent "is normally the minimum requirement for entry into [this] particular position."

Further, the petitioner has designated the proffered position as a Level I position on the LCA, indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. 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. The classification of the proffered position as a Level I position does not support the assertion that it is a position that cannot be performed without a minimum of a bachelor's degree in a specific specialty or its equivalent, especially as the *Handbook* suggests that some systems analyst positions do not require such a degree.

Further still, the AAO finds that, to the extent that they are described in the record of proceeding, the duties that ascribed to the proffered position indicate a need for a range of technical knowledge in

the computer/IT field, but do not establish any particular level of formal, postsecondary education leading to a bachelor's or higher degree in a specific specialty as minimally necessary to attain such knowledge.

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively 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 (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) located in organizations that are similar to the petitioner.

In determining whether there is 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).

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other reliable and authoritative source, indicates that there is a standard, minimum entry requirement of at least a bachelor's degree in a specific specialty or its equivalent.

Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

The petitioner did submit nine vacancy announcements in support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations. Specifically, the petitioner submitted advertisements for the following positions posted on the Internet:

1. QA Engineer for Randstad Technologies requiring a bachelor's degree in computer science or a related field and a minimum of four years testing interface engines;
2. Software – QA Engineer for the unidentified manufacturer of internal combustion components and systems requiring a bachelor's degree in computer science or a

- related field and a minimum of two years of related software quality assurance validation experience;
3. Quality Assurance Engineer – Automated Testing requiring a minimum of a bachelor's degree in "Computer Science, Math or other technical field" and a minimum of one year of experience doing software testing; one year of experience with Java programming; automated testing experience, and experience developing test cases, test plans and writing test scripts;
 4. Selenium/QA Engineer for DSC Resources, Inc. requiring a bachelor's degree in computer science or equivalent experience, a minimum of two years of experience developing automated browser-based tests, two years of software development experience, and experience creating test plans;
 5. QA Engineer – Cloud Server for WorldLink Incorporated requiring a bachelor's degree in computer science or software engineering and four years of "relevant QA experience" including four years of "Backend testing," and "Experience with distributed system testing, automated testing";
 6. QA Automation Engineer for The Coit Group requiring a bachelor's degree in computer science, engineering, or a related field, and a minimum of three years of manual and automation testing experience for Web and/or SaaS applications;
 7. QA Engineer for JK Group requiring a bachelor's degree in computer science, engineering, or equivalent job experience and a minimum of six years software testing experience with at least three in white or grey box testing, a minimum of one year working in an AGILE or Dynamic testing environment, experience with manual testing and test automation, experience with web-based technologies, and experience with Microsoft web development technologies;
 8. QA Engineer for Luna Data Solutions requiring a bachelor's degree in computer science "or equivalent experience" and a minimum of three years quality assurance team experience, a minimum of three years as a quality engineer using Java, JavaScript, or Flex, a minimum of two years Linux experience, a minimum of two years Windows experience, and a minimum of two years of Quality Assurance working on Virtualization systems; and
 9. Software Engineer, Quality Assurance for Informatica Corporation requiring a minimum of a bachelor's degree in computer science or "equivalent technical degree."

Each of the vacancy announcements submitted indicates that a bachelor's degree in computer science would be a sufficient educational qualification for the vacancies they announce. However, that is not the only acceptable educational preparation for those positions.

For instance, the first, second, and sixth vacancy announcements indicate that a bachelor's degree in a field related to computer science would be a sufficient educational qualification for the positions they announce. However, what subjects the hiring authority would consider to be sufficiently closely related to computer science is unknown to the AAO. 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" 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 either of two disparate fields, such as computer science and chemistry, for instance, would not meet the statutory requirement that the degree be "in *the* specific specialty." Section 214(i)(1)(B) (emphasis added). The AAO is unable to find, therefore, that the first, second, and sixth vacancy announcements state a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent.

Similarly, the third vacancy announcement states that its educational requirement could be satisfied by a bachelor's degree in computer science, mathematics, "or other technical field," and the ninth vacancy announcement states that it requires a minimum of a bachelor's degree in computer science or an equivalent technical degree. The array of subjects that the hiring authorities would consider to be sufficiently technical or would consider to be equivalent to a degree in computer science was not stated. As such, the array of fields the hiring authorities would consider to be a sufficient qualification for the positions announced is unknown to the AAO, and the AAO cannot find that the third and ninth vacancy announcements state a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent.

The fourth vacancy announcement states an educational requirement that may be satisfied by a bachelor's degree in computer science "or equivalent experience." The seventh vacancy announcement states an educational requirement that may be satisfied by a bachelor's degree in computer science or engineering, "or equivalent job experience." The eighth vacancy announcement states that its educational requirement can be satisfied by a bachelor's degree in computer science or equivalent experience, but does not state what type and amount of experience would be considered equivalent to that bachelor's degree. Again, the AAO is unable to determine what amount and type of experience the hiring authorities would consider to be equivalent to a bachelor's degree. The AAO is unable to find that the fourth, seventh, and eighth vacancy announcements state a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent within the meaning of the salient regulation.

Further, the sixth vacancy announcement states an educational requirement that may be satisfied by an otherwise undifferentiated bachelor's degree in engineering. The field of engineering is a very broad category that covers numerous and various disciplines, some of which are only related through the basic principles of science and mathematics, e.g., petroleum engineering and aerospace engineering. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration or engineering, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). For this additional reason, the sixth vacancy announcement does not state a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent.

Further still, the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) pertains to organizations that are in the petitioner's industry and otherwise similar to the petitioner. For the petitioner to establish that an advertising organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, postings submitted by a petitioner are 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 advertising 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). In addition, how many of the organizations that posted the vacancy announcements provided are in the petitioner's industry is unknown to the AAO. For both reasons, the vacancy announcements provided have not been shown to have much weight in satisfying the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Yet further, most of the advertised positions require experienced candidates whereas the proffered position is an entry-level position for an employee who has only basic understanding of the occupation, as indicated on the LCA where the petitioner designated the proffered position as a Level I position. 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. For this reason, the AAO cannot find that the vacancy announcements provided are for positions parallel to the proffered position.

Finally, even if all of the vacancy announcements were for parallel positions with organizations similar to the petitioner and in the petitioner's industry and required a minimum of a bachelor's degree in a specific specialty or its equivalent, the petitioner has failed to demonstrate what statistically valid inferences, if any, can be drawn from nine announcements with regard to the common educational requirements for entry into parallel positions in similar organizations.²

Thus, based 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. The petitioner has not, therefore, satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

² USCIS "must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. at 376. As just discussed, the petitioner has failed to establish the relevance of the job advertisements submitted to the position proffered in this case. Even if their relevance had been established, the petitioner still fails to demonstrate what inferences, if any, can be drawn from these few job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the same industry. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995).

The petitioner also has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." A review of the record indicates that the petitioner has failed to credibly demonstrate that the duties the beneficiary will be responsible for or perform on a day-to-day basis entail such complexity or uniqueness as to constitute a position so complex or unique that it can be performed only by a person with at least a bachelor's degree in a specific specialty.

Specifically, the petitioner failed to demonstrate how the duties 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, although college degrees pertinent to systems analysis do exist, the petitioner did not show such a curriculum is necessary to perform the duties of the proffered position. While related courses may be beneficial, or even, as counsel asserted required, in performing certain duties of the proffered 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.

Therefore, the evidence of record does not establish that this position is significantly different from other positions in the occupation such that it refutes the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for such positions, including degrees not in a specific specialty. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent. As the petitioner fails to demonstrate how the proffered position is so complex or unique relative to other positions within the same occupational category that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next address the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which may be satisfied if the petitioner demonstrates that it normally requires a minimum of a bachelor's degree in a specific specialty or its equivalent for the proffered position.³

³ While a petitioner may believe or otherwise assert that a proffered position requires a 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 employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in a specific specialty or its equivalent. See *Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and 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").

The petitioner's human resources manager's undated letter states that the petitioner has never hired, and would never hire, anyone to fill the proffered position that does not possess a bachelor's degree. It does not state that the bachelor's degree must be in any specific specialty. Further, although the petitioner was established in 2005 and employs 233 people, including at least 55 that the organizational chart indicates are in the same position as the beneficiary, the petitioner provided no evidence pertinent to the people it employs, or has previously employed, in the proffered position.

As noted above, the petitioner submitted copies of vacancy announcements it posted on the Internet. As was observed, the proffered position was designated a Software Quality Assurance Engineer position on the visa petition, but the beneficiary's current position was designated merely "QA" on the petitioner's organizational chart. As such, whether positions that the petitioner's vacancy announcements designate QA Analyst, QA Lead (Automation) (Full-Time), QA Engineer With Teradata, Java With QA Exp, and QA Lead (Automation) are identical to the proffered position and have identical educational requirements is not obvious from the job titles of the positions the petitioner announced. In any event, the requirements of the petitioner's vacancy announcements are as follows:

1. The announcement of the QA Analyst position requires a bachelor's degree in computer science, electrical engineering or a related field or equivalent experience, and at least five years of experience in automation testing, load testing and regression testing.
2. The announcement of the QA Lead (Automation) (Full-Time) position requires a bachelor's degree in computer science, computer engineering, or a related field, and five years of experience working in a Test/QA environment.
3. The announcement of the QA Engineer With Teradata position requires a bachelor's degree in computer science, computer engineering, or a related field; three years of experience in planning, creation, execution, and analysis of functional and performance tests; and three years of experience in performing UI, API, and Device Certification in a data driven and/or enterprise environment.
4. The announcement of the Java With QA Exp position requires a bachelor's degree in computer science or equivalent education/work experience; three years of systems analysis experience; two years of experience with web services testing, three years of core SQL development experience working with T-SQL, writing queries, and reports writing; four years of development experience in Java or an equivalent language; and two years of web development experience.
5. The announcement of the QA Lead (Automation) position requires "Degree or equivalent experience in Computer Science, Computer Engineering or related

field," and a minimum of five years of experience working in a Test/QA environment.

The petitioner's vacancy announcements do not show that the petitioner normally requires a minimum of a bachelor's degree in a specific specialty or its equivalent for the proffered position. First, the vacancy announcements do not indicate a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent. Second, they have not been shown to be for positions that are the same as the proffered position.

Further, as was noted above, the LCA submitted indicates that the proffered position is a Level I position, which is an entry-level position for an employee who has only basic understanding of the occupation. 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. All of the positions announced in the petitioner's vacancy announcements, however, require three to five years of very specific experience. Further, the second and fifth vacancy announcements contain "Lead" in their respective job titles, which suggests that they are announcements for supervisory and/or senior positions. For both reasons, the positions announced in the vacancy announcements provided do not appear to be identical to the proffered position, an entry level position with no supervisory duties. The vacancy announcements are, therefore, of little weight in demonstrating that the petitioner normally requires a minimum of a bachelor's degree in a specific specialty or its equivalent for the proffered position.

The evidence is insufficient to show that the petitioner normally requires a minimum of a bachelor's degree in a specific specialty or its equivalent for the proffered position and the petitioner has not, therefore, satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO will address the alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner establishes that the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent.

Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. The duties of the proffered position, such as analyzing business requirements of software under development; participating in software development; identifying, analyzing, and reporting flaws in software; and participating in resolving software flaws contain no indication that they are more specialized and complex than the duties of typical computer systems analyst positions.

Even the more concrete descriptions of the duties of the proffered position, such as developing test plans, test strategies, and test scripts; designing and building an automation framework; performing white box testing, black box testing, integration testing, regression testing, and database testing, etc. contain no indication of a nature 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 other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than the duties of computer systems analyst positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent.

Further, as was noted above, the petitioner filed the instant visa petition for a Level I position, a position for a beginning level employee with only a basic understanding of the position. This does not support the proposition that the nature of the specific duties of the proffered position is so specialized and complex that their performance is usually associated with the attainment of a minimum of a bachelor's degree in a specific specialty or its equivalent, directly related to the duties of the position, especially as the *Handbook* indicates that some computer systems analyst positions require no such degree.

For the reasons discussed above, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO notes that, on appeal, counsel cites to *Tapis Int'l v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000) and states the following:

According to the statutory definition and INS guidelines, a position may qualify as a specialty occupation if the employer requires a Bachelor's degree or its equivalent. For the 'equivalent' language to have any reasonable meaning, it must encompass not only skill, knowledge, work experience, or training, but also various combinations of academic and experience based training.

Specifically, the AAO notes that in *Tapis Int'l v. INS*, the U.S. district court found that while the former Immigration and Naturalization Service (INS) was reasonable in requiring a bachelor's degree in a specific field, it abused its discretion by ignoring the portion of the regulations that allows for the equivalent of a specialized baccalaureate degree. According to the U.S. district court, INS's interpretation was not reasonable because then H-1B visas would only be available in fields where a specific degree was offered, ignoring the statutory definition allowing for "various combinations of academic and experience based training." *Tapis Int'l v. INS*, 94 F. Supp. 2d at 176. The court elaborated that "[i]n fields where no specifically tailored baccalaureate program exists, the only possible way to achieve something equivalent is by studying a related field (or fields) and then obtaining specialized experience." *Id.* at 177.

The AAO agrees with the district court judge in *Tapis Int'l v. INS*, that in satisfying the specialty occupation requirements, both the Act and the regulations require a bachelor's degree in a specific specialty or its equivalent, and that this language indicates that the degree does not have to be a degree in a single specific specialty. 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) (emphasis added).

Moreover, the AAO also agrees that, if the requirements to perform the duties and job responsibilities of a proffered position are a combination of a general bachelor's degree and experience such that the standards at both section 214(i)(1)(A) and (B) of the Act have been satisfied, then the proffered position may qualify as a specialty occupation. The AAO does not find, however, that the U.S. district court is stating that any position can qualify as a specialty occupation based solely on the claimed requirements of a petitioner.

Instead, USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a baccalaureate or higher degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

In addition, the district court judge does not state in *Tapis Int'l v. INS* that, simply because there is no specialty degree requirement for entry into a particular position in a given occupational category, USCIS must recognize such a position as a specialty occupation if the beneficiary has the equivalent of a bachelor's degree in that field. In other words, the AAO does not find that *Tapis Int'l v. INS* stands for either (1) that a specialty occupation is determined by the qualifications of the beneficiary being petitioned to perform it; or (2) that a position may qualify as a specialty occupation even when there is no specialty degree requirement, or its equivalent, for entry into a particular position in a given occupational category.

First, USCIS cannot determine if a particular job is a specialty occupation based on the qualifications of the beneficiary. A beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. USCIS is required instead 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].").

Second, in promulgating the H-1B regulations, the former INS made clear that the definition of the term "specialty occupation" could not be expanded "to include those occupations which did not require a bachelor's degree in the specific specialty." 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991). More specifically, in responding to comments that "the definition of specialty occupation was too severe and would exclude certain occupations from classification as specialty occupations," the former INS stated that "[t]he definition of specialty occupation contained in the statute contains this requirement [for a bachelor's degree in the specific specialty or its equivalent]" and, therefore, "may not be amended in the final rule." *Id.*

In any event, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Tapis Int'l v. INS*. The AAO also notes that, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

The AAO also notes that counsel cites to *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*, 839 F. Supp. 2d 985 (S.D. Ohio 2012), for the proposition that "[t]he knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge."

The AAO agrees with the aforementioned proposition that "[t]he knowledge and not the title of the degree is what is important." 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). For the aforementioned reasons, however, the petitioner has failed to meet its burden and establish that the particular position offered in this matter requires a bachelor's or higher degree in a specific specialty, or its equivalent, directly related to its duties in order to perform those duties.

In any event, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Residential Fin. Corp. v. U.S. Citizenship & Immigration Services*.⁴ The AAO also notes that, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

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

The AAO further observes that the period of employment requested on the visa petition is June 13, 2013 to June 5, 2016.

The letter from [REDACTED] human resources assistant that was submitted with the visa petition states that the beneficiary was expected to work at the [REDACTED] location through May 20, 2014, with possible extensions if required by the project.

The undated letter from [REDACTED] human resources manager states that [REDACTED] expected the beneficiary's work at [REDACTED] to be extended through December 27, 2014. That letter does not explain the basis of that expectation, other than to say that it is "because of the nature of the project."

The July 11, 2013 letter from the senior manager of [REDACTED] states that [REDACTED] anticipated that the beneficiary would work at [REDACTED] through June 23, 2014, with extensions possible through June 23, 2015. In his July 15, 2013 letter, counsel asserted that "normal industry standard is for 6-12 month duration on Purchase Orders to be continuously renewed until project completion as indicated in End-Client and Vendor letters." In any event, the letter from [REDACTED] human resources assistant does not indicate that the beneficiary's work at [REDACTED] will continue beyond May 20, 2014. The letter from [REDACTED] human resources manager does not indicate that the beneficiary would work at that location beyond December 27, 2014. The senior manager at [REDACTED] stated that the work is anticipated to continue through June 23, 2014, but that it might be extended through June 23, 2015. It suggests that the beneficiary's work at [REDACTED] San Francisco location will not continue after that date.

⁴ It is noted that the district judge's decision in that case appears to have been based largely on the many factual errors made by the service center in its decision denying the petition. The AAO further notes that the service center director's decision was not appealed to the AAO. Based on the district court's findings and description of the record, if that matter had first been appealed through the available administrative process, the AAO may very well have remanded the matter to the service center for a new decision for many of the same reasons articulated by the district court if these errors could not have been remedied by the AAO in its *de novo* review of the matter.

The evidence submitted indicates that, if the visa petition were approved, the beneficiary's employment at the [REDACTED] location would not continue through the end of the period of requested employment on June 5, 2016. The record does not contain evidence sufficient to demonstrate what duties, if any, the beneficiary would perform upon the termination of her work at the [REDACTED] location. Even if the work at [REDACTED] had been demonstrated to be specialty occupation work and the visa petition were otherwise approvable, it could not be approved for any period during which the petitioner has not demonstrated that it has specialty occupation work for the beneficiary to perform.

V. ADDITIONAL ISSUE – U.S. EMPLOYER

The record suggests an additional issue that was not addressed in the decision of denial but that, nonetheless, also precludes approval of this visa petition.

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant in pertinent part as an alien:

subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . , who meets the requirements for the occupation specified in section 214(i)(2) . . . , and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1)

The term "United States employer" is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) *Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and*
- (3) Has an Internal Revenue Service Tax identification number.

(Emphasis added); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

The record is not persuasive in establishing that the petitioner will have an employer-employee relationship with the beneficiary.

Although "United States employer" is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted

that the terms "employee" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an "intending employer" who will file a Labor Condition Application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1) (2012). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2012). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of "United States employer" indicates in its second prong that the petitioner must have an "employer-employee relationship" with the "employees under this part," i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer's ability to "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer").

Neither the former Immigration and Naturalization Service (INS) nor U.S. Citizenship and Immigration Services (USCIS) defined the terms "employee" or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer." *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

The United States Supreme Court has determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

"In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

Darden, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 445 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. See generally 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.⁵

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that

⁵ While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

However, in this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-845 (1984).

Finally, it is also noted that if the statute and the regulations were somehow read as extending the definition of employee in the H-1B context beyond the traditional common law definition, this interpretation would likely thwart congressional design and lead to an absurd result when considering the \$750 or \$1,500 fee imposed on H-1B employers under section 214(c)(9) of the Act, 8 U.S.C. § 1184(c)(9). As 20 C.F.R. § 655.731(c)(10)(ii) mandates that no part of the fee imposed under section 214(c)(9) of the Act shall be paid, "directly or indirectly, voluntarily or involuntarily," by the beneficiary, it would not appear possible to comply with this provision in a situation in which the beneficiary is his or her own employer, especially where the requisite "control" over the beneficiary has not been established by the petitioner.

construing these terms in this manner would thwart congressional design or lead to absurd results. Cf. *Darden*, 503 U.S. at 318-319.⁶

Accordingly, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).⁷

Therefore, in considering whether or not one will be an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS must focus on the common-law touchstone of "control." *Clackamas*, 538 U.S. at 450; see also 8 C.F.R. § 214.2(h)(4)(ii) (defining a "United States employer" as one who "has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise *control* the work of any such employee" (emphasis added)).

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; see also *Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. See *Clackamas*, 538 U.S. at 445; see also *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); see also *Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant to control may affect the determination of whether an employer-employee relationship exists.

⁶ To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).

⁷ That said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. See, e.g., section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. See *Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).

Furthermore, when examining the factors relevant to determining control, USCIS must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. See *Darden*, 503 U.S. at 323-324. For example, while the assignment of additional projects is dependent on who has the *right* to assign them, it is the *actual* source of the instrumentalities and tools that must be examined, and not who has the *right* to provide the tools required to complete an assigned project. See *id.* at 323.

Lastly, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, . . . the answer to whether [an individual] is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

[REDACTED] human resources assistant asserted, in her undated letter, that the petitioner, "maintains/exercises the right to control and supervise [the beneficiary's] overall work at [REDACTED] site." [REDACTED] human resources manager made the same statement in her undated letter. The Senior Manager, Alternative Workforce of [REDACTED] stated, in her [REDACTED] 2013 letter, "All employment decisions, including but not limited to work assignment, work supervision, promotion, discharge, remuneration, and performance review, rest solely with her employer."

To the contrary, however, the petitioner agreed that it would not remove an employee from a project to which [REDACTED] assigned him or her without permission from [REDACTED] or its client. It is [REDACTED] and its client, and not the petitioner, that determines whether the beneficiary may be removed from the project at [REDACTED]

Further, the petitioner intends to provide the beneficiary to [REDACTED] which will provide the beneficiary to work at the [REDACTED] location in San Francisco.⁸ There is no indication that a supervisor will accompany the beneficiary from the petitioner to work in the [REDACTED] location. The record contains no evidence showing who has control of the project or projects at [REDACTED] location. Whether [REDACTED] is designing the software and parsing out duties to technical personnel, or whether that responsibility will be undertaken by [REDACTED] or by some other company has not been revealed.

⁸ The record does not contain any indication that [REDACTED] will provide the beneficiary directly to [REDACTED]. The complete chain of contracts pursuant to which the beneficiary would be assigned to work at the [REDACTED] location was not provided. There may, in fact, be intervening contractors.

Under these circumstances, the AAO finds that the petitioner failed to demonstrate that it would assign the beneficiary's tasks and supervise her performance of them. Her duties will be assigned by the entity controlling the software development project or projects at [REDACTED] and her performance of those duties will be supervised by that same entity. That the petitioner would not directly supervise the beneficiary is confirmed by a clause in the beneficiary's employment contract that indicates that the petitioner "solicits regular feedback from the client about the work product of [the beneficiary] and includes feedback in regular performance evaluations for [the beneficiary]."

Given that the petitioner may not reassign the beneficiary without permission from either [REDACTED] or its client, and that the petitioner would not assign the beneficiary's tasks and would not directly supervise her performance of them, the AAO finds that the petitioner is not the beneficiary's prospective employer within the meaning of the tests outlined above, and that the petitioner does not have standing to file the instant visa petition. The visa petition will be denied for this additional reason.

VI. CONCLUSION

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

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

The director's decision will be affirmed and the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.