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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: **JUN 11 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:
[REDACTED]

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,

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

DISCUSSION: The service center 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.

On the Form I-129 visa petition, the petitioner describes itself as a 30-employee software development firm for the travel industry¹ established in 2001. In order to employ the beneficiary in a full-time position to which it assigned the job title "Computer Software Engineer" at a salary of \$62,500 per year the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, concluding that the evidence of record failed to establish that the proffered position qualifies for classification as a specialty occupation.

The record of proceeding contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B, a brief, and supporting documentation.

Upon review of the entire record of proceeding, we find that the evidence of record does not overcome the director's grounds for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. FACTUAL AND PROCEDURAL HISTORY

The Labor Condition Application (LCA) that the petitioner submitted in support of the petition was certified for use with a job prospect within the "Computer Systems Analysts" occupational classification, SOC (O*NET/OES) Code 15-1121, and a Level I prevailing wage rate. The LCA also reflects that, as mentioned above, the petitioner assigned "Computer Software Engineer" as the position's job title.

The petitioner stated on both the Form I-129 and the LCA that it would pay the beneficiary a salary of \$62,500 per year. The petitioner maintains that its gross annual income was \$18 million and its net annual income was \$1.7 million.

In its March 21, 2013 letter, the petitioner described the proffered position as follows:

At this time, [redacted] Inc. [the petitioner] seeks to utilize the professional services of Mr. [redacted] [the beneficiary] to serve as Computer Software Engineer at our headquarters in Centennial, Colorado. As such, Mr. [redacted] will handle

¹ The petitioner provided a North American Industry Classification System (NAICS) Code of 541519, "Other Computer Related Services." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "541519 Other Computer Related Services," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited May 19, 2014).

priority problem tickets by interacting with Business Analysts and Developers to gather and analyze clear problem details, and ensuring that technical issues are distinguished as "working as coded" or "working as designed." He will develop solutions in minimal turnaround time, and execute coding, unit testing, and integration testing of the solution on a priority basis. He will implement technical fixes and provide load support to ensure that fixes are loaded onto critical production environments. Further, Mr. [REDACTED] will ensure minimal response time in checking problem symptoms, suggesting actions to lessen damage caused, and fixing problems. He will log all verbal and written communications in order to document actions taking during production problems for future problems for future review.

Furthermore, as Computer Software Engineer, Mr. [REDACTED] will interact with Business Analysts and Technical Architects to ensure that requirements are clearly understood for new enhancements. He will also perform estimation and detail design preparations for new projects. He will review submitted Problem Ticket Reports, ensuring that reported solutions are efficient and adhere to best coding practices, and routing any issues, including version contentions, to Developers. He will provide Problem Ticket Reports to appropriate parties, track turnaround time, and forward defects and suggestions to Developers. He will also coordinate communications to discuss and clarify business requirements, track project health, and provide load support. As Computer Software Engineer, Mr. [REDACTED] will review and route technical queries and concerns from Developers, and track responses and turnaround time. He will ensure that Developers have access to development areas, provide Weekly Status Reports regarding problem tickets, and attend Status Meetings to discuss health of problem tickets with customers....

Based on the foregoing, we wish to utilize Mr. [REDACTED]'s professional services so that he may serve as Computer Software Engineer at our headquarters in Centennial, Colorado....

The petitioner also stated that the position "requires at least a Bachelor's degree in Computer Science or Engineering, or a related field...."

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on July 9, 2013. The petitioner was asked to submit probative evidence to establish that it had sufficient specialty occupation work that was immediately available upon the beneficiary's entry into the United States through the entire requested H-1B validity period. The director outlined some of the types of specific evidence that could be submitted.

In an August 29, 2013 letter attached to counsel's September 6, 2013 response to the director's RFE, the petitioner stated that that the beneficiary would "use his technical and functional knowledge to engage in the following day-to-day duties":

Business Requirement Gathering:

- Interacting with the client team to understand their business needs, and to develop solutions;
- Reviewing the customer's existing and past records/documentation to develop an understanding of their business processes;

Prioritizing and documenting requirements:

- Categorizing and prioritizing client needs;
- Defining the scope of the current engagement by identifying system functionalities that will be delivered;

System Analysis and documentation:

- Performing feasibility studies and Gap analysis to offer creative solutions to the client's technical problems;
- Business process mapping from existing practices to proposed solutions;
- Conducting some market research and analysis to evaluate the system and solutions;
- Creating various process documents (e.g. Business Requirement Documents, System Requirement Specifications, Functional Design documents, etc.).
- Documenting the requirements in forms of use cases, activity flow diagrams, sequence diagrams, and storyboarding;

Project Team Membership

- Serving the project team in different phases of the project, including discovery, solution generation, design, development and deployment;

Development of Solutions:

- Assisting in, and directly performing, testing activities (e.g. Functional, User Acceptance, etc.);
- Documenting technical specifications and delivering training to the team if required; and

- Looking for future business opportunities and developing a cordial relationship with the client team....

All of [the beneficiary's] compensation will be paid by [REDACTED], and not by any third party. Such benefits will include medical insurance, fuel allowances, reimbursements, and initial relocation benefits. All of these costs and benefits will be paid directly by [REDACTED].

In performing all of his work at our U.S. office, Mr. [REDACTED] will report to an [REDACTED] project Manager. He will be subject to an Annual performance Review by [REDACTED] management, to evaluate his demonstrated competencies and deliverables within his respective [REDACTED] team. During his employment with [REDACTED] our company will provide Mr. [REDACTED] periodic trainings, to keep him abreast in his skills....

At no time will he be placed at any third-party or customer site, and he will not work at the direction of anyone outside of the [REDACTED] organization.

Additionally, counsel submitted documentation to support the petitioner's position that it had sufficient specialty occupation work that was immediately available upon the beneficiary's entry into the United States through the entire requested H-1B validity period. Such evidence included:

- A Master Services Agreement (MSA) by and between [REDACTED] (the parent company of [REDACTED]) and [REDACTED] Inc., today known as [REDACTED]
- An Extension Amendment, the Second Extension Amendment, and the Third Extension Amendment to the Master Services Agreement. The Third Extension Amendment "shall continue until March 31, 2013 ('the Expiration Date')."
- An SOW Change Request concerning the project upon which the beneficiary will work.

Before proceeding further, upon consideration of the totality of all of the petitioner's duty descriptions, position descriptions, explanations, and assertions, as well as the complete complement of documents submitted in support of the petitioner's specialty occupation claim, we find that the evidence in the record of proceeding does not establish relative complexity, specialization and/or uniqueness as distinguishing aspects of either the proposed duties or the position that they are said to comprise.

While the petitioner and counsel may claim otherwise, the record's descriptions of the proffered position and its duties do not elevate them above positions within the Computer Systems Analysts occupational group that are not so specialized, complex, and/or unique as to require either a person with at least bachelor's degree in a specific specialty, or the equivalent, or application of knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty. 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. 1972)).

The record's description of the proffered position and its duties do comport with general duties of the Computer Systems Analysts occupational group. However, as evident in the list of duties quoted above, the record of proceeding presents the proposed duties in terms of relatively abstract and generalized functions. They lack sufficient detail and concrete explanation to establish the substantive nature of the work and associated applications of specialized knowledge that their actual performance would involve within the context of the petitioner's particular business operations. Take for example the following duty description:

Serving the project team in different phases of the project, including discovery, solution generation, design, development and deployment[.]

The evidence of record contains neither substantive explanation nor documentation showing the range and volume of such "discovery, solution generation, design, development and deployment" that the beneficiary would have to produce or provide to the project team. Likewise, the record does not illuminate the substantive work and associated applications of specialized knowledge that would be involved in serving the project team in the manner referenced above.

The duties of the proffered position, and the position itself, are described in relatively generalized and abstract terms that do not relate substantial details about either the position or its constituent duties. Further, we find that the petitioner has not supplemented the job and duty descriptions with documentary evidence establishing the substantive nature of the work that the beneficiary would perform, whatever practical and theoretical applications of highly specialized knowledge in a specific specialty would be required to perform such substantive work, and whatever correlation may exist between such work and associated performance-required knowledge and attainment of a particular level of education, or educational equivalency, in a specific specialty.

Thus, we conclude that, as generally described as all of the elements of the constituent duties are, they do not - even in the aggregate - establish the nature of the proffered position or the nature of the position's duties as more complex, specialized, and/or unique than positions or their associated duties within the claimed Computer Systems Analysts occupational group that can be performed by a person without a least a bachelor's degree in a specific specialty, or the equivalent, and that do not require the application of knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty.

Additionally, we note that the petitioner has failed to establish that the petition was filed for non-speculative work for the beneficiary that existed as of the time of the petition's filing for the entire period requested.

Next, we note that counsel's response to the RFE asserted that the beneficiary's professional services would be required in-house on imminent ' [REDACTED] projects for at least the next three years."

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In support of counsel's contention, a copy of the MSA between the Petitioner and [REDACTED] Inc. – today known as [REDACTED] – and three extension amendments to that MSA continuing the MSA until March 31, 2013, were submitted.

Now, on appeal, the petitioner submits a "Fifth Extension Amendment to Master Services Agreement,"³ that appears to continue that MSA between the Petitioner and [REDACTED] until September 30, 2016. At the time the H-1B was submitted, in April 2013, the evidence of record only established that the petitioner and [REDACTED] had an extension amendment until March 2013. Further, the Change Request to Work Plan for Full-Time Equivalent between [REDACTED] and the petitioner, signed in July 2013, after the H-1B petition for the beneficiary was filed, states:

Work Plan Service Expiration Date: 6/30/13

Change Request Service Expiration Date: Date extended to: 9/30/13

Briefly describe change: Extend contract to 9/30/13, as more fully set out on Attachment A.

Aside from the above-noted aspects of the record, we also find that the MSA documentation that has been submitted into the record of proceeding does not establish the extent, if any, that the beneficiary would actually perform the services that the petitioner attributes to the proffered position. Neither the MSA nor the related extension-documents present the client's requirements with sufficient specificity to show that the petitioner's performance obligations under the MSA would require the petitioner to fill and utilize the particular Systems Analysts position that is the subject of this petition.

In this regard we have noted that the MSA documents indicate that the client commits to purchasing a minimum number of FTEs from the petitioner (with "FTE" being a term of art defined at paragraph 1.35 of the March 22, 2005 MSA as meaning "a full[-]time employee or the equivalent, i.e., one or more persons working at an aggregate of 1800 hours per year"). However, none of the MSA documents specify duties that match those that the petitioner ascribed to the proffered position. Also, none of those documents state that the petitioner's performance obligations under the MSA would involve the position proffered in this petition.

We further find that the MSA documents indicate that any particular services to be provided under coverage of the MSA would be specified in MSA exhibits or in related Statements of Work (SOWs). However, the MSA submitted into the record is not accompanied by any exhibits or other type of addendum that may have been part of the MSA document as executed by the petitioner and its client.

As that March 22, 2005 MSA stands in the record, it does not evidence a contractual commitment to any particular services. On the other hand, we see that the MSA encompasses the possibility of a wide variety of possible services that might come within its Exhibits or related SOWs but yet not include the services that the petitioner states that the proffered position would provide. After all, not only do the

³ The record of evidence does not contain a copy of the Fourth Extension Amendment to Master Services Agreement purportedly dated February 7, 2013 and referenced in the "Fifth Extension Amendment to Master Services Agreement" document.

MSA and MSA-related documents before us not mention the position that is the subject of this petition or its constituent services, but the MSA's third paragraph suggests that the client could be looking to the petitioner for a variety of services not included within the scope of the proffered position. The suggestion resides in that "Whereas" purpose-related paragraph's identifying the petitioner as:

[I]n the business of, and [having] expertise in, information technology outsourcing; specifically, but not exclusively, the provision of applications development, enhancement, management, maintenance, data processing, and support services.

Additionally, we do not see any SOWs in the record that specify performance of the duties that the petitioner claims that the beneficiary would perform if the petition were approved.

Thus, we conclude that the record of proceeding provides an inadequate factual basis for us to even determine that, at the time of the petition's filing, the petitioner had secured for the beneficiary definite, non-speculative work conforming to the petition's description of the proffered position.

USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Further, as noted above, 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. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Thus, the petitioner has not demonstrated that it would have non-speculative employment for the beneficiary for the period requested on the H-1B petition, specifically October 1, 2013 until August 15, 2016.⁴

⁴ The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the

II. SPECIALTY OCCUPATION

We will now directly address our determination that the evidence of record does not establish the proffered position as a specialty occupation.

At the outset, for the reasons just discussed above regarding the lack of an adequate factual foundation to establish that the beneficiary would in fact perform the duties of the proffered position as described in the petition, it follows that the petitioner has not established a specialty occupation position. Because, as explained above, a petition's approval may not be based upon speculative employment, the appeal must be dismissed and the petition must be denied. However, in the interests of a comprehensive and informative decision, we shall also now address other evidentiary deficiencies that preclude the petitioner from prevailing in this appeal.

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

We recognize the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.⁵ As noted above, the petitioner submitted an LCA in support of this position certified for a job offer as a computer software engineer, within the "Computer Systems Analysts" occupational classification

The *Handbook's* discussion of the duties and educational requirements of computer systems analysts states, in pertinent part, the following:

Computer systems analysts typically do the following:

- Consult with managers to determine the role of the IT system in an organization

alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

⁵ The *Handbook*, which is available in printed form, may also be accessed online at <http://www.bls.gov/ooh>. The references to the *Handbook* are from the 2014-15 edition available online.

- 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:

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#tab-2> (accessed May 20, 2014).

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

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.

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.

* * *

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.

Id. at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (accessed May 20, 2014).

These statements from the *Handbook* do not indicate that a bachelor's degree or the equivalent, in a specific specialty, is normally required for entry into this occupation. With regard to the *Handbook's* statement that "most" computer systems analysts possess a bachelor's degree in a computer-related field, it is noted that the first definition of "most" in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of systems analyst positions require at least a bachelor's degree or a closely related field, it could be said that "most" system analyst 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. 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

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language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." § 214(i)(1) of the Act.

Additionally, with regard to positions that do require attainment of a bachelor's degree or equivalent, the *Handbook* indicates that a bachelor's degree in a specific specialty or the equivalent is not normally required: the *Handbook* states that technical degrees are not always required, and that many computer systems analysts have liberal arts degrees and gained their programming or technical expertise "elsewhere."

Furthermore, the materials from DOL's Occupational Information Network (O*NET OnLine) do not establish that the proffered position satisfies the first criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A), either. O*NET OnLine is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a requirement for a given position, as O*NET OnLine's Job Zone designations make no mention of the specific field of study from which a degree must come. As was noted previously, we interpret 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. The Specialized Vocational Preparation (SVP) rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. Therefore, O*NET OnLine information is not probative of the proffered position being a specialty occupation.

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

In support of the assertion that the proffered position qualifies as a specialty occupation, the petitioner now submits a letter, dated November 5, 2012, from [REDACTED] Senior Vice President, Government Relations, [REDACTED] to the Director of the Vermont Service Center. As shall now be discussed, that letter merits no probative weight.

That Mr. [REDACTED] characterizes its organization as "a leading policy organization with many member companies that depend upon IT consultants," and his letter is basically a position statement that USCIS should recognize 22 listed position types (some of them with varied job titles) as positions that "with rare exceptions, require a bachelor's degree or equivalent in a related field as [a] minimum education requirement." The letter references no research, surveys, U.S. Labor Department documents, industry studies, or any authoritative resource of any type for its position.

As such, the letter is conclusory. It provides no analytical and factual basis for its statement of opinion.

Further, there is no evidence in the record that either the author or his Industry Council is recognized as an authority on the issue upon which the letter opines. And we accord no weight to the letter's self-endorsing but statement that [REDACTED] is in the perfect position to offer insight on the degree requirements for IT roles" by virtue of its being "a leading policy organization with many member companies that depend on IT consultants to develop new products and services, as well as assist their customers in the implementation and maintenance of IT infrastructures, products and services in the United States."

Further still, while the proffered position's general type is included within the letter's list, the letter makes no pretense of addressing the particular position that is now before us on appeal. It naturally follows that there is no indication anywhere in the letter that Mr. [REDACTED] possesses any knowledge of the proffered position, this petitioner's particular business operations, how the duties of the position would actually be performed in the context of the petitioner's business enterprise, or the level-entry wage that the petitioner intends to pay.

Consequently, we do not find Mr. [REDACTED]'s letter in any way helpful, and it is not probative evidence towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). There is an inadequate factual foundation established to support the opinion and we find that the opinion is not in accord with other information in the record. We, in our discretion, may use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). As a reasonable exercise of its discretion we discount the advisory opinion letter as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

For efficiency's sake, we hereby incorporate the above discussion and analysis regarding the opinion letter into each of the bases in this decision for dismissing the appeal.

Finally, as noted previously, the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation (that is, Level I), which signifies that the beneficiary is only expected to possess a basic understanding of the occupation.⁶

⁶ The *Prevailing Wage Determination Policy Guidance* (available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf (last visited May 6, 2014)) issued by DOL states the following with regard to Level I wage rates:

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

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

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Further, as reflected in this decision's earlier discussion, the letter from Mr. [REDACTED] of [REDACTED] fails to establish that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

Nor do the ten job-vacancy announcements submitted into the record on appeal satisfy the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). First, counsel has not submitted any evidence to demonstrate that these advertisements are from companies "similar" to the petitioner in size, scope, and scale of operations, business efforts, expenditures, or other fundamental dimensions. Second, the petitioner has not established that these ten positions are "parallel" to the proffered

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 [emphasis in original].

The proposed duties' level of complexity, uniqueness, and specialization, as well as the level of independent judgment and occupational understanding required to perform them, are questionable, as the petitioner submitted an LCA certified for a Level I, entry-level position. The LCA's wage-level is appropriate for a proffered position that is actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, by submitting an LCA with a Level I wage rate, the petitioner effectively attests that the beneficiary is only required to possess a basic understanding of the occupation; that she will be expected to perform routine tasks requiring 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.

position.⁷ Nor has the petitioner established that the job-vacancy announcements require a bachelor's degree, or the equivalent, in a specific specialty.⁸ Nor does the petitioner submit any evidence regarding how representative these advertisements are of the industry's usual recruiting and hiring practices with regard to the positions advertised. Again, the advertisements submitted by the petitioner do not establish that the petitioner has met this prong of the regulations. Thus, 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.

Therefore, the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not 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.

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

In this particular case, the petitioner has failed to credibly demonstrate that the duties the beneficiary will perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

The record of proceeding does not contain sufficient evidence to establish relative complexity or uniqueness as aspects of the proffered position, let alone that the position is so complex or unique as to require the theoretical and practical application of a body of highly specialized knowledge such that a person with a bachelor's in a specific specialty or its equivalent is required to perform that position. Rather, the petitioner has not distinguished either the proposed duties, or the position that they comprise, from generic computer-systems-analysis work, which, the *Handbook* indicates, does not necessarily require a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

⁷ For example, it is noted that work experience is required for these ten positions. However, as noted above, the petitioner indicated by the wage-level in the LCA that its proffered position is a comparatively low, entry-level position relative to others within its occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation. It is therefore difficult to envision how these attributes assigned to the proffered position by the petitioner by virtue of its wage-level designation on the LCA would be parallel to these positions described in these job vacancy announcements.

⁸ For example, Job ID 386 does not specify any education requirement. Job ID 299886 only references a 4 year degree. NDN requires a bachelor's degree, but does not mandate that it be *in a specific specialty*.

The petitioner therefore failed to establish how the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with a bachelor's degree, or the equivalent, in a specific specialty.

As the evidence of record therefore fails to establish that the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with at least a bachelor's degree in a specific specialty or its equivalent, the petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) either.

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

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. Additionally, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position.

Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. *See* § 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 at 387. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in a specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proposed 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.

As the record of proceeding contains no evidence regarding the petitioner's recruiting and hiring of any other computer software engineers⁹, there is no evidence for consideration under this criterion. As the record of proceeding does not demonstrate that the petitioner normally requires at least a bachelor's degree in a specific specialty or its equivalent for the proffered position, it does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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

In reviewing the record of proceeding under this criterion, we reiterate earlier discussion regarding the *Handbook's* entries for positions falling within the "Computer Systems Analysts" occupational category. Again, the *Handbook* does not indicate that a bachelor's degree in a specific specialty, or the equivalent, is a standard, minimum requirement to perform the duties of such positions; and the record indicates no factors, such as supervisory responsibilities, that would elevate the duties proposed for the beneficiary above those discussed in the *Handbook*. As reflected in this decision's earlier discussion of the duty descriptions in the petitioner's letters of support, the proposed duties as described in the record of proceeding contain no indication of specialization and complexity such that the knowledge they would require is usually associated with any particular level of education in a specific specialty. As generically and generally as they were described, the duties of the proposed position are not presented with sufficient detail and explanation to establish the substantive nature of the duties as they would be performed in the specific context of the petitioner's or end-client's particular business operations. Also as a result of the generalized and relatively abstract level at which the duties are described, the record of proceeding does not establish their nature as so specialized and complex as to require knowledge usually associated with at least a bachelor's degree in a specific specialty, or the equivalent. We incorporate into the analysis of this criterion this decision's earlier comments and findings with regard to the generalized level at which the duties are described in the record. The evidence of record does not develop the duties in sufficient detail to establish their nature as so specialized and complex that their performance would require knowledge usually associated with the attainment of at least a bachelor's degree in a specific specialty.

Additionally, as discussed in detail above, both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, by the submission of an LCA certified for a wage-level I, the petitioner effectively attests that the proposed duties are of relatively low complexity as compared to others within the same occupational category. This fact is materially inconsistent with the level of complexity required by this criterion.

⁹ The petitioner has failed to establish that the advertisements submitted by counsel on appeal are representative of the proffered position in the case at hand. The job titles referenced in the submitted advertisements are for "Technical Lead" and all require experience.

As earlier noted, the *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

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 [emphasis in original].

The pertinent guidance from the Department of Labor, at page 7 of its *Prevailing Wage Determination Policy Guidance* describes the next higher wage-level as follows:

Level II (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

The above descriptive summary indicates that even this higher-than-designated wage level is appropriate for only "moderately complex tasks that require limited judgment." The fact that this higher-than-here-assigned, Level II wage-rate itself indicates performance of only "moderately complex tasks that require limited judgment," is very telling with regard to the relatively low level of complexity imputed to the proffered position by virtue of its Level I wage-rate designation.

Further, we note the relatively low level of complexity that even this Level II wage-level reflects when compared with the two, still-higher LCA wage levels, neither of which was designated on the LCA submitted to support this petition.

The aforementioned *Prevailing Wage Determination Policy Guidance* describes the Level III wage designation as follows:

Level III (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. . . .

The *Prevailing Wage Determination Policy Guidance* describes the Level IV wage designation as follows:

Level IV (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

Here we again incorporate our earlier discussion and analysis regarding the implications of the petitioner's submission of an LCA certified for the lowest assignable wage-level. As already noted, by virtue of this submission, the petitioner effectively attested to DOL that the proffered position is a low-level, entry position relative to others within the same occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II).

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

As the petitioner has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation.

III. CONCLUSION AND ORDER

For the reasons discussed above, we conclude that the evidence of record does not satisfy 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.

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