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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: **OCT 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,

Michael T. Kelly
for 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 software product development and services company established in 1997. In order to newly employ the beneficiary in what it designates as a QA Engineer position at an annual salary of \$65,000 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, concluding that the evidence of record does not demonstrate that the beneficiary is qualified to perform the services of the type of specialty occupation claimed by the petitioner.

The record of proceeding before us 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, brief, and supporting documentation.

An issue beyond the director's decision: failure to establish a specialty occupation.

As a preliminary matter, we withdraw the following statement by the director, along with its implicit finding that the proffered position as presented in this record of proceeding is a specialty occupation position within the Computer Programmers occupational group:¹

Since the proffered position is a QA Engineer the beneficiary must possess a baccalaureate degree or higher, or its equivalent in the appropriate field of study such as computer science, management information systems, or information technology as shown in the Department of Labor's [*Occupational Outlook Handbook*].

Later we shall discuss why we reach this conclusion, which is based upon our independent, *de novo* review of the entire record of proceeding, including all of the submissions on appeal.² For now, we note that our discussion of the beneficiary qualification issue upon which the director denied the petition will show that the beneficiary would not qualify for service in the proffered position if the

¹ As reflected in the Labor Condition Application (LCA) submitted for the petition, the petitioner identified the proffered position as belonging to the Computer Programmers occupational group. We shall analyze the evidence in that light.

² We conduct appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that we identified this additional ground for denial. An application or petition that fails to comply with the technical requirements of the law may be denied by us 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).

evidence of record had established it as a specialty occupation – which is not the case. Also, however, the petitioner should bear in mind that a beneficiary's qualifications become relevant only if the position in question has been established as a specialty occupation. U.S. Citizenship and Immigration Services (USCIS) is required to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

Further, while the petitioner has not had the opportunity to address the failure of the evidence to establish the proffered position as a specialty occupation (as that was not a basis for the director's decision to deny the petition) that fundamental defect also precludes approval of the petition at this time.

The beneficiary qualification issue.

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

I. STANDARD OF REVIEW

In light of counsel's references to the "preponderance of the evidence standard" we affirm that, In the exercise of its administrative review in this matter, as in all matters that come within its purview, the AAO follows the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010), unless the law specifically provides that a different standard applies. In pertinent part, that decision states the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director 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.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. See *INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Id. at 375-76.

Again, the AAO conducts its review of service center decisions on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d at 145. In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Applying that standard as stated in *Matter of Chawathe*, however, we conclude that the director correctly determined that the evidence of record does not satisfy the beneficiary qualification requirements of the H-1B specialty occupation program.

Upon our review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that the evidence of record does not establish that the claim of the beneficiary's qualification to serve in the claimed specialty occupation is "more likely than not" or "probably" true. In other words, as the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads us to believe that it is "more likely than not" or "probably" true that the beneficiary qualifies to serve in the claimed specialty-occupation position in accordance with the pertinent statutory and regulatory requirements.

II. BENEFICIARY QUALIFICATION

We will now address the director's determination that the evidence in the record has not established that the beneficiary is qualified to perform the duties of the specialty occupation that the petitioner asserted for the proffered position. (For the sake of adjudicating the issue, we shall assume that the evidence of record had established the proffered position as a specialty occupation.)

In this matter, the petitioner is seeking the beneficiary's services as a computer programmer. While a computer programmer does not, by virtue of its classification, qualify as a specialty occupation, based on the information provided in the *Handbook*, a specialty occupation-level computer programmer would require a bachelor's or higher degree in computer science or a related field for entry into that position. See U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Computer Programmers," <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4> (last accessed September 8, 2014).

A. Law

The statutory and regulatory framework that we must apply in our consideration of the evidence of the beneficiary's qualification to serve in a specialty occupation follows below.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C)
 - (i) experience in the specialty equivalent to the completion of such degree, and
 - (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In implementing section 214(i)(2) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In addition, 8 C.F.R. § 214.2(h)(4)(v)(A) states:

General. If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H

classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

Therefore, to qualify an alien for classification as an H-1B nonimmigrant worker under the Act, the petitioner must establish that the beneficiary possesses the requisite license or, if none is required, that he or she has completed a degree in the specialty that the occupation requires. Alternatively, if a license is not required and if the beneficiary does not possess the required U.S. degree or its foreign degree equivalent, the petitioner must show that the beneficiary possesses both (1) education, specialized training, and/or progressively responsible experience in the specialty equivalent to the completion of such degree, *and* (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Therefore, absent (1) an actual U.S. bachelor's or higher degree from an accredited college or university, (2) a foreign degree determined to be equivalent to such a degree, or (3) a pertinent license, the only remaining avenue for the beneficiary to qualify for the proffered position is pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

Under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the petitioner must establish both (1) that the beneficiary's combined education, specialized training, and/or progressively responsible experience are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, *and* (2) that the beneficiary has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty. As clearly reflected in the content of the director's decision, the petitioner bases its beneficiary qualification claim upon a combination of the beneficiary's foreign education and work experience, that is, upon application of the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D) by the two evaluations of education and work experience that it submitted.

In order to equate a beneficiary's credentials to a U.S. baccalaureate or higher degree in the pertinent specialty, the provisions at 8 C.F.R. § 214.2(h)(4)(iii)(D) require one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSIS);

- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;³
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. . . .

B. Analysis

We shall now address the evidentiary deficiencies and defects that preclude us from concurring with counsel's contention that the preponderance of the evidence substantiates the beneficiary as qualified to serve in the claimed specialty occupation position.

Materially inconsistent evaluations of the beneficiary's foreign education and work experience

The petitioner submitted two sets of documents for consideration as evaluations of the U.S. educational equivalency of the beneficiary's education, training, and work experience.

- [REDACTED] evaluation

The first evaluation, which was submitted in response to the RFE, was prepared for the petitioner by Dr. [REDACTED] who signed his evaluation document as "Professor of Marketing / Former Graduate Program Chair, Department of Marketing" at the [REDACTED] Graduate School of Business at [REDACTED]. Dr. [REDACTED] entitled his submission "Evaluation of Training, Education, and Experience." Dr. [REDACTED] opens his document with a group of introductory phrases that summarize key aspects of his evaluation of the beneficiary's credentials as follows:

Country:	India
Degree:	Bachelor of Commerce
Issued by:	[REDACTED] Gorakhpur
Date of Completion:	2002
Degree:	Master of Business Administration

³ The petitioner should note that, in accordance with this provision, we will accept a credentials evaluation service's evaluation of *education only*, not training and/or work experience.

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Issued by: [REDACTED]
Date of Completion: 2002-2004

Qualifying Work Experience/Training: At Least Four Years Eight Months

Educational Equivalent in the United States:

**BACHELOR OF BUSINESS ADMINISTRATION DEGREE
CONCENTRATION: QUANTITATIVE BUSINESS ANALYSIS**

Dr. [REDACTED] concludes that, based on the beneficiary's foreign academic credentials and her "verified professional experience," the beneficiary possesses the equivalent of a U.S. bachelor's degree in Business Administration, with a concentration in Quantitative Business Analysis.

- Dr. [REDACTED]

Now on appeal, the petitioner introduces a new evaluation of the U.S. educational equivalency of the beneficiary's education, training, and work experience. The petitioner obtained this evaluation from Dr. [REDACTED] of the School of Design Strategies at [REDACTED]

Dr. [REDACTED] entitles his submission as "Expert Opinion Evaluation" on the beneficiary. Dr. [REDACTED] opens with the following introductory summaries:

Years of Qualifying Experience: More than four years
Field of Work Experience: Management Information Systems

Degree Equivalent Based on Academic Qualifications and Professional Experience:
BACHELOR OF SCIENCE IN MANAGEMENT INFORMATION SYSTEMS

Prepared by: Professor [REDACTED]

We disagree with counsel's characterization of the two evaluation documents as complimenting each other.⁴ In fact, we find that – as evident in comparing the summary statements quoted above – the conflicting assessments contained in the evaluations of Dr. [REDACTED] and Dr. [REDACTED] undermine the weight and credibility of both evaluations and thereby also defeat the petitioner's attempt to establish the beneficiary as qualified to serve in the specialty occupation position that they claim the proffered position to be.

The two evaluators reached distinctly different and substantively inconsistent conclusions. This unresolved inconsistency calls into question not only the depth and quality of the analyses that each

⁴ Counsel contends that the evaluation of Dr. [REDACTED] previously submitted already established the beneficiary's qualifications, and that the second evaluation, by Dr. [REDACTED] was submitted to further support the beneficiary's eligibility.

evaluator brought to bear in their evaluations, but also the accuracy and reliability of their ultimate conclusions about educational equivalency. And it is the petitioner's burden - not ours - to resolve those material inconsistencies - -- if indeed they can be resolved. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

As the petitioner's beneficiary-qualification claim relies in material part upon the [REDACTED] evaluations, their conflict with each other fatally undermines that claim. This aspect of the record is alone sufficient to require us to dismiss the appeal.

Erroneous standard applied by the experience-evaluations in recognizing work experience as equivalent to college credit.

Dr. [REDACTED] evaluation purports to apply a three-for-one rule which he sees as empowering an evaluator of work experience under 8 C.F.R. § 214.2(h)(4)(iii)(D)(I) to recognize any three years of work experience in a relevant specialized field as equivalent to attainment of one-year of college credit in that specialty at an accredited U.S. institution of higher learning. In relevant part, Dr. [REDACTED] states:

At the equivalency ratio of three years of work experience for one year of college training, promulgated by the United States Citizenship and Immigration Services ("USCIS") of the United States Department of Homeland Security, [the beneficiary] completed, in time equivalence, one year of the baccalaureate-level educational study required in connection with the attainment of a bachelor's degree, in addition to her completion of Bachelor of Commerce and Master of Business Administration Degrees at [REDACTED]

(Emphasis added.)

In the same vein, Dr. [REDACTED] evaluation document includes the following statement regarding his methodology for determining the educational-equivalency of the beneficiary's work experience:

Considering the equivalency ratio mandated by [USCIS] of three years work experience for one year of college training, [the beneficiary's] more than four years reflect the time equivalent of not less than one additional year of Bachelor's-level academic training in Management Information Systems. On the basis of the concentrated nature of her work experience and training in Management Information Systems, we hereby affirm that [the beneficiary's] experiential qualifications are comparable to university-level training in Management Information Systems.

(Emphasis added.)

Neither Dr. [REDACTED] nor Dr. [REDACTED] - nor the petitioner or its counsel - refer to any statute, regulation, or precedent decision as empowering an 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) "official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience" to determine the educational-equivalency of work experience upon a simple ratio of (a) three year's work experience in a specific field to (b) attainment of the equivalence of one year of college-level credit in that field. In fact, we see that both Dr. [REDACTED] and Dr. [REDACTED] appear to partially appropriate - and only minimally apply - the three-for-one ratio that the USCIS beneficiary-qualification regulations, at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), reserve exclusively for USCIS agency-determinations. However, that portion of the regulations requires substantially more than simply equating any three years of work experience in a specific field to attainment of a year's worth of college credit in that field or specialty.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) - which the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) introduces as one of the avenues towards establishing a beneficiary's qualifications - reads as follows:

A determination *by the Service* that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . *It must be clearly demonstrated* [(1)] that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; [(2)] that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; *and* [(3)] that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Deficient factual and analytical foundations for the evaluators' conclusions

As noted in our excerpt from the *Matter of Chawathe* precedent decision, the preponderance of the evidence standard requires examination of "each piece of evidence for relevance, probative value, and credibility" – and there is no exception or exemption for evaluations of education training, and, or experience. *See also Matter of Caron International, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988) (USCIS will reject an expert opinion or give it less weight if it is not in accord with other information in the record or if it is in any way questionable); *Matter of Sea, Inc.*, 19 I&N Dec. 817, 820 (Comm'r 1988) (The AAO may, in its discretion, use an evaluation of a person's foreign education as an advisory opinion; and where an opinion is not in accord with other information or is in any way questionable, the AAO may discount or give less weight to that evaluation.)

In the case before us, it appears that the factual core of each of the evaluation documents is the two-page September 19, 2013 "To Whomsoever It May Concern" letter from the Manager - Human Resources at the beneficiary's former employer in India, [REDACTED] which letter both evaluations paraphrase to identify the beneficiary's work experience. However, we note that the letter's content about the beneficiary's work for that employer is relatively abstract and only relates the beneficiary's employment in terms of generalized functions that the beneficiary had performed. We also note, for particular application to Dr. [REDACTED] pronouncement of equivalency to a year's college-level coursework in Management Information Systems, that the letter nowhere mentions that specialty – and yet Dr. [REDACTED] pronounces, without substantive explanation, that the beneficiary was engaged in management information systems work.

Both of the evaluations basically paraphrase the generalized functions presented in the former employer's letter and then, without any substantive analysis and without correlating any actual work of the beneficiary to coursework in the pertinent specialties about which they opine, pronounce their ultimate conclusions about the educational equivalency of the beneficiary's work experience. We find such evaluations perfunctory and unpersuasive. They lack factual and analytical content sufficient to persuade us that the evaluations in question are well founded and reliable. Thus, we find that - aside from and in addition to the other problems that we have identified with the evaluations – the evaluations in question have no probative value and do not merit deference.

As a matter of discretion, USCIS may accept expert opinion testimony. However, USCIS will reject an expert opinion or give it less weight if it is not in accord with other information in the record or if it is in any way questionable. *Matter of Caron International, Inc.*, 19 I&N Dec. at 795 (Comm'r 1988). USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought; the submission of expert opinion letters is not presumptive evidence of eligibility. *Id.*; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) ("[E]xpert opinion testimony, while undoubtedly a form of evidence, does not purport to be evidence as to 'fact' but rather is admissible only if 'it will assist the trier of fact to understand the evidence or to determine a fact in issue.'").

Further, the evidence of record does not corroborate that, at the time when they rendered their evaluations, Dr. [REDACTED] and Dr. [REDACTED] possessed the authority to grant college-level credit for training and/or experience at an accredited college or university which had a program for granting such credit based on an individual's training and/or work experience. No independent statements of Dr. [REDACTED] official credit-granting authority at an educational institution were presented with his evaluation dated October 29, 2013. Although the evaluation by Dr. [REDACTED] was accompanied by two letters contending that he had the authority to grant credit in accordance with the provisions of this section, none of these letters were written contemporaneously with his evaluation. Dr. [REDACTED] evaluation is dated February 16, 2014. The letter of support from the Dean of [REDACTED] is dated June 1, 2012. The second letter, from the Chair of the Management Department at [REDACTED] is dated March 3, 2013. Thus, there is no evidence to establish that Dr. [REDACTED] had the authority at the time he rendered his assessment to grant college-level credit for training and/or experience at an accredited college or university which had a program for granting such credit based on an individual's training and/or work experience.

Based on the above deficiencies, the record of evidence does not establish that the beneficiary is qualified to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

No evidence has been submitted to establish, and the petitioner does not assert, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(2), which requires submission of the results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSIS).

Nor does the beneficiary qualify under 8 C.F.R. § 214.2(h)(4)(iii)(D)(3) by virtue of an "evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials." The evaluations by both Dr. [REDACTED] and Dr. [REDACTED] – which, again, draw contradictory conclusions regarding the U.S. educational equivalency of the beneficiary - lie outside the scope of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). That criterion is framed only for consideration of "[a]n evaluation of education [not training and/or experience] by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials." However, neither evaluation is presented as developed by "a reliable credentials evaluation service which specializes in evaluating foreign educational credentials."

Nor has any evidence been submitted to establish, and the petitioner does not assert, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(4), which requires that the beneficiary submit evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty.

Consequently, the petitioner has failed to satisfy any of the criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(D)(1)-(4), and we will next perform a Service evaluation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

When USCIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-

level training the alien lacks. It must be "clearly demonstrated" [(1)] that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; [(2)] that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and [(3)] that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation⁵;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The evidence of record does not establish that the beneficiary's work experience included the theoretical and practical application of specialized knowledge required by the proffered position; that it was gained while working with peers, supervisors, or subordinates who held a bachelor's degree or its equivalent in the field; and that the beneficiary achieved recognition of her expertise in the field as evidenced by at least one of the five types of documentation delineated in 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(i)-(v).

There is no evidence in the record that the beneficiary has recognition of expertise in the industry, membership in a recognized association in the specialty occupation, or published material by or about the beneficiary. Thus, absent corroborating evidence as outlined in 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), we cannot conclude that the beneficiary's past work experience included the theoretical and practical application of a body of highly specialized knowledge in a field related to the proffered position or that the beneficiary has recognition of expertise in the industry.

⁵ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

In sum, the evidence of record does not satisfy the beneficiary-qualification requirements at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(i)-(v), either.

We note counsel's reference on appeal to a March 20, 2000 guidance memorandum by Michael D. Cronin and William R. Yates entitled "Educational and Experience Requirements for Employment-Based Second-Preference (EB-2) Immigrants." Counsel refers to this memorandum regarding its statements on "progressive experience," claiming that the beneficiary's professional work experience, as evaluated by Dr. [REDACTED] is progressively sophisticated as contemplated in this memorandum and thus highly technical in nature.

Counsel's reliance on this memorandum is misplaced as the memorandum is irrelevant to this proceeding. By its very terms, the memorandum was issued as an attempt to clarify educational and experience requirements for EB-2 immigrants and not H-1B nonimmigrants which is the subject of this petition. As such, it has no force and effect upon the present matter.

As the evidence of record does not establish that it is more likely than not that the beneficiary is qualified to perform the services of the claimed specialty occupation in accordance with the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D), the appeal will be dismissed and the petition will be denied. .

III. THE PROFFERED POSITION IS NOT A SPECIALTY OCCUPATION

As earlier promised, we shall now discuss in greater detail why we have withdrawn the director's finding that the proffered position is a specialty occupation. ,

Based upon a complete review of the record of proceeding, we find that the evidence fails to establish that the position as described constitutes a specialty occupation. For this additional reason, the petition must be denied.

As indicated above, the petitioner seeks to employ the beneficiary in a position that it describes as a "QA Engineer" on a full-time basis. The petitioner stated on both the Form I-129 and the LCA that it would pay the beneficiary an annual salary of \$65,000. The petitioner maintains that its gross annual income was \$36.7 million. No net annual income was provided.

In its April 1, 2013 letter, the petitioner described the proffered position as follows:

[The beneficiary] will be responsible for providing testing and Quality Assurance expertise for projects. Her specific duties include: preparing test plan/requirement documents, creating use case scenarios and writing test cases, traceability matrix and reports, managing small testing team including effort estimating, resource management, work allocation, automation tools, test management tools (Mercury Test Director/HP Quality Center) and assessment of defect (risks & mitigation) gap analysis of functional requirements, writing software requirements specification from business use case documents and conduction trainings, and use database validation using SOP queries & XML Testing.

We further note the petitioner's submission of a Labor Condition Application, certified for use with a job prospect within the "Computer Programmers" occupational classification, SOC (O*NET/OES) Code 15-1131, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels.

The director requested additional details regarding the proffered position in the RFE issued on August 28, 2013. The petitioner submitted a chart which outlined the duties associated with the proffered position as well as the percentages of time the beneficiary would devote to each particular duty. Specifically, the chart indicated that all duties had a difficulty level of "4," which the petitioner claims require a bachelor's degree to perform, and described the duties (in relevant part) as follows:

Preparing test plan/requirement documents. This activity will involve analyzing of customer requirements and understanding the system design through design documents. Identifying "Use Case" scenarios, performing test feasibility study of "Use Cases" and creating UML design. Test plan document is written using the UML design to facilitate testing. Test plan would cover breaking up testing into phases, detailing required resources, milestone timeline and scope. (15%)

Writing software requirements/functional specification from business use case documents and conducting trainings for new and existing members of the team to quickly ramp up of improve efficiency. Training may also be imparted to other customer or parallel teams using the same product. (10%)

Managing small testing team including effort estimating, resource management, work allocation, scheduling, monitoring, mentoring and guiding. (15%)

Creating detailed use case scenarios and writing detailed test cases and procedures/steps which could be followed by other team members to run the test. (15%)

Perform Manual test following the test procedure and Automation of these manual tests using automation test management tools (Mercury Test/HP Quality Center), thus creating Regression suites. (15%)

Database validations using SQL queries and XML Testing, Design SQL queries to validate the database schema and related traps and trigger procedure. Design database addition and deletion to perform adhoc testing in absence of frontend and to create exception scenarios not possible from Frontend. Similar testing is performed for XML schema for web based GUI. (10%)

Assessment and analysis of defect to pinpoint the root cause. Assessing risk and mitigation plan and perform GAP analysis of Functional requirements and defining

limitations in the release notes. Defect analysis would help developer save time by quickly able to pinpoint to the code segment where the problem lies. (10%)

Prepare reports such as Test Report, Defect Management & Analysis report and traceability matrix to ensure coverage, Test Completion & Summary Report. (10%)

To meet its burden of proof in establishing the proffered position as a specialty occupation, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

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

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

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

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

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or

- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

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

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

We note 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 legacy 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.

We will now discuss application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

We will first consider the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied by the petitioner establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is the normal 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.⁶ As noted above, the LCA that the petitioner submitted in support of this petition was certified for a job offer falling within the "Computer Programmers" occupational category.

The *Handbook* states the following with regard to the duties of computer programmers:

Computer programmers write code to create software programs. They turn the program designs created by software developers and engineers into instructions that a computer can follow. Programmers must debug the programs—that is, test them to ensure that they produce the expected results. If a program does not work correctly, they check the code for mistakes and fix them.

Duties

Computer programmers typically do the following:

- Write programs in a variety of computer languages, such as C++ and Java
- Update and expand existing programs
- Debug programs by testing for and fixing errors
- Build and use computer-assisted software engineering (CASE) tools to automate the writing of some code
- Use code libraries, which are collections of independent lines of code, to simplify the writing

⁶ The *Handbook*, which is available in printed form, may also be accessed online at <http://www.bls.gov/ooh>. Our references to the *Handbook* are from the 2014-15 edition available online.

- Programmers work closely with software developers, and in some businesses, their duties overlap. When this happens, programmers can do work that is typical of developers, such as designing the program. This entails initially planning the software, creating models and flowcharts detailing how the code is to be written, writing and debugging code, and designing an application or systems interface.

Some programs are relatively simple and usually take a few days to write, such as creating mobile applications for cell phones. Other programs, like computer operating systems, are more complex and can take a year or more to complete.

Software-as-a-service (SaaS), which consists of applications provided through the Internet, is a growing field. Although programmers typically need to rewrite their programs to work on different systems platforms such as Windows or OS X, applications created using SaaS work on all platforms. That is why programmers writing for software-as-a-service applications may not have to update as much code as other programmers and can instead spend more time writing new programs.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Computer Programmers," <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-2> (last visited September 8, 2014).

Upon review, we find that the duties of the proffered position correspond with the duties of computer programmers as described in the *Handbook*.

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

Most computer programmers have a bachelor's degree in computer science or a related subject; however, some employers hire workers with an associate's degree. Most programmers specialize in a few programming languages.

Id. at <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4> (last visited September 8, 2014).

The statements in the *Handbook* regarding entrance into this occupational category do not support a finding that a bachelor's degree, or the equivalent, in a specific specialty is normally required. First, the *Handbook* specifically states that, while most computer programmers have a bachelor's degree in computer science or a related subject, "some employers hire workers with an associate's degree." The *Handbook's* recognition that a bachelor's or higher degree is usually but not exclusively "required" by employers, strongly suggests that a bachelor's degree in a specific specialty, or the equivalent, is not a normal, minimum entry requirement for this occupation. Thus, the *Handbook* does not indicate that a minimum of a bachelor's degree in a specific specialty, or its equivalent, is normally required for this occupational category.

Accordingly, as the *Handbook* indicates that entry into the Computer Programmer occupational group does not normally require at least a bachelor's degree in a specific specialty or its equivalent, it does not support the proffered position as satisfying this first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). That is, in light of the *Handbook's* information on the range of acceptable educational credentials for entry into the Computer Programmers occupational group, a position's inclusion within this group is not in itself sufficient to establish that position as one for which a baccalaureate or higher degree in a specific specialty or its equivalent is normally a minimum requirement for entry.

Nor does the record of proceeding contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion within the Computer Programmers occupational group is sufficient in and of itself to establish the proffered position as, in the words of this criterion, a "particular position" for which "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

Moreover, in response to the RFE, the petitioner submitted a copy of its vacancy announcement for the proffered position, which states that the petitioner will accept a bachelor's degree in computer science, business administration, commerce, or any field of engineering.⁷ It must be noted that the petitioner's claimed entry requirement of at least a bachelor's degree in one of a variety of fields for the proffered position, without more, is inadequate to establish that the proposed position qualifies as a specialty occupation. 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 two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

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

Again, the petitioner claims that the duties of the proffered position can be performed by an

⁷ We note that the petitioner's letter dated October 8, 2013, submitted in response to the RFE, also includes "Math" as an acceptable field of study for entry into the proffered position.

individual with a bachelor's degree in business administration, commerce, computer science, or any field of engineering. The issue here is that it is not readily apparent that these fields of study are closely related or that the fields of business administration, commerce, and engineering are directly related to the duties and responsibilities of the particular position proffered in this matter. (We note, however, that a degree in computer science, on its face, would likely be directly related to the computer programmer duties of the proffered position).

Here, the petitioner, who bears the burden of proof in this proceeding, fails to establish either (1) that the fields identified as acceptable prerequisites are closely related fields or (2) that the fields of business administration, commerce, or engineering are directly related to the duties and responsibilities of the proffered position. Absent this evidence, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty or its equivalent under the petitioner's own standards. Accordingly, as the evidence of record fails to establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty* or its equivalent for entry into the particular position, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion.

As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

As the evidence of record fails to establish how these dissimilar fields of study form either a body of highly specialized knowledge or a specific specialty or its equivalent, the petitioner's assertion that the job duties of this particular position can be performed by an individual with a bachelor's degree in unrelated fields is tantamount to an admission that the proffered position is not in fact a specialty occupation.

Finally, it is noted that 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, which signifies that the beneficiary is only expected to possess a basic understanding of the occupation.⁸

⁸ The *Prevailing Wage Determination Policy Guidance* (available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf (last visited September 8, 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

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, we find 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 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. Nor are there any submissions from a professional association in the petitioner's industry stating 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 has the petitioner submitted any letters or affidavits from firms or individual in the industry attesting that such firms "routinely employ and recruit only degreed individuals."

In response to the RFE, the petitioner submitted five job vacancy announcements for positions it claimed were parallel to the proffered position in similar organizations. We note that all five

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 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.

postings are for the proffered position of QA Engineer, and further note that four out of the five postings require a bachelor's degree in computer science or a related field. However, the petitioner provides no evidence demonstrating that these companies are similar organizations to the petitioner, which is a software product development and services company. One of the postings states a mere preference for a bachelor's degree in computer science but indicates that a bachelor's degree in any field is acceptable. Given that the petitioner provides the same guidelines for candidates seeking employment as QA engineers with the petitioner, it cannot be found, from these five postings, that an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent exists among similar organizations in the petitioner's industry.

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, we find that 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 evidence of record does not 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 in a specific specialty or its equivalent. The record of proceeding does not contain evidence establishing 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 or higher degree in a specific specialty or its equivalent is required to perform the duties of that position. Rather, we find that, as reflected in this decision's earlier quotation of duty descriptions from the record of proceeding, the evidence of record does not distinguish the proffered position from other positions falling within the "Computer Programmers" occupational category, which, the *Handbook* indicates, encompasses positions that are performed by persons without at least a bachelor's degree in a specific specialty or its equivalent to enter those positions.

The statements of counsel and the petitioner with regard to the claimed complex and unique nature of the proffered position, such as the equation of these duties to the petitioner's own "level 4/bachelor's degree" requirement, are acknowledged. However, those assertions are further undermined by the fact that 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. We incorporate here by reference and reiterate our earlier discussion regarding the LCA and its indication that the petitioner would be paying a wage-rate that is only appropriate for a low-level, entry position relative to others within the occupation, as this factor is inconsistent with the level of relative complexity or uniqueness required to satisfy this criterion. Based upon the wage rate selected by the petitioner, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate indicates that the beneficiary will

perform routine tasks requiring limited, if any, exercise of independent judgment; that the beneficiary's work will be closely supervised and monitored; that she will receive specific instructions on required tasks and expected results; and that her work will be reviewed for accuracy.

Accordingly, given the *Handbook's* indication that positions located within the "Computer Programmers" occupational category are performed by persons without at least a bachelor's degree in a specific specialty, or the equivalent, it is not credible that a position involving limited, if any, exercise of independent judgment, close supervision and monitoring, receipt of specific instructions on required tasks and expected results, and close review *would* be so complex or unique that it could only be performed by a person with at least a bachelor's degree in a specific specialty or the equivalent.

The petitioner therefore has not established 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.⁹

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").

⁹ Any such assertion would be undermined in this particular case by the fact that the petitioner indicated in the LCA that its proffered position is a comparatively low, entry-level position relative to others within the same 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.

In response to the RFE, counsel for the petitioner asserted that the petitioner has previously employed three individuals in the proffered position, and contends that all three of these employees held at least a bachelor's degree in Engineering, Computer Science, or a related field. In support of these claims, the petitioner submitted copies of diplomas and paystubs for three individuals: [REDACTED] who holds a U.S. master's degree in telecommunication networks; [REDACTED] who holds a foreign bachelor's degree in computer science and engineering;¹⁰ and [REDACTED], who holds a foreign bachelor of engineering degree in computers.

While it appears from this documentation that these individuals hold at least a bachelor's degree and have been employed by the petitioner, there is no confirmation of the actual position in which the petitioner employed these individuals. Moreover, each of these persons possesses a degree in a different field. Absent additional and consistent documentary evidence to establish that the petitioner exclusively recruited and hired persons with degrees in specialties closely related, we cannot conclude that the petitioner normally requires a bachelor's degree in a specific specialty for entry into the proffered position. It is unclear how the petitioner's hiring of individuals with degrees in telecommunications networks, computer science and engineering, computers, and ultimately business administration, the degree held by the beneficiary, establishes the requisite hiring history mandated under this criterion.

Although the record of proceeding contains evidence that the petitioner has hired degreed individuals, it does not establish that it routinely hires individuals with a degree in a specific specialty for entry into the proffered position. Moreover, as previously noted, there is no evidence establishing the position title held by these employees. 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).

¹⁰ It is noted that the diploma accompanying this individual's paystubs is for [REDACTED], and no explanation regarding the name discrepancies has been provided.

Next, we find that 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.

We find that the record of proceeding provides does not provide substantive and objective explanations and documentary evidence sufficient to show why the nature of the proffered position's duties should be recognized as meeting the relative specialization and complexity requirements of this particular criterion. Consequently, the record's duty descriptions do not provide a basis for satisfying this criterion by showing that their nature is so specialized and complex that their performance would require knowledge usually associated with at least a bachelor's degree in a specific specialty, or the equivalent.

Additionally, we find that 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.

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. By virtue of this submission the petitioner effectively attested that the proffered position is a low-level, entry position relative to others within the 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. This aspect of the petition precludes its approval and makes the beneficiary's qualifications irrelevant. However, we will nonetheless also address the lack of sufficient evidence of record to establish the beneficiary is qualified to serve in a specialty occupation.

There is an additional impediment to approval of the petition, at least for the full period of employment for which it was filed. We find that the record of proceeding lacks sufficient documentation regarding the petitioner's business activities, and the actual work that the beneficiary would perform, to the claim that the petitioner has computer-programmer work, as described in the petition, for the period of employment requested in the petition. We note, for instance, that the petitioner did not submit a statement of work indicating that the beneficiary will work for the end client until September 24, 2016. Rather, the Statement of Work between the petitioner and [REDACTED] the claimed end-client and ultimate user of the beneficiary's services, states that the end date of the agreement is December 29, 2014. Although it indicates the possibility of extension, the record as constituted at the time of filing demonstrates an assignment for the beneficiary valid only through December 29, 2014. [REDACTED] need for the petitioner's (and the beneficiary's) services may end on December 29, 2014, and the record does not include any work product or other documentary evidence to confirm that the petitioner has other ongoing projects to which the beneficiary will be assigned.

The agency made clear long ago that speculative employment is not a basis for approving an H-1B petition. For example, 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 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).

IV. CONCLUSION

For the reasons discussed above, the appeal will be dismissed and the petition will be denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by us 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 we conduct appellate review on a *de novo* basis).

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

The petition will be denied and the appeal dismissed 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.