



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **OCT 06 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:

SELF-REPRESENTED

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a four-employee "Computer Systems and Software Analysis and Consulting Services" business established in 2011. In order to employ the beneficiary in what it designates as a "Computer Systems Analyst" position, 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 on the ground that the petitioner failed to establish that there exists a reasonable and credible offer of employment.

The record of proceeding contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's notice of decision; and (5) the petitioner's Form I-290B, Notice of Appeal or Motion, and supporting documentation. We have reviewed the record in its entirety before issuing our decision.

Upon review of the entire record of proceeding, we find that the petitioner has failed to overcome the director's grounds for denying this petition. Accordingly, the appeal will be dismissed and the petition will remain denied.

I. STANDARD OF REVIEW

In the exercise of our administrative review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (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.

We conduct our review of service center decisions on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. As the evidentiary analysis of this decision pursuant to that standard will reflect, the record does not contain sufficient relevant, probative, and credible evidence that leads us to believe the claims that 1) the proffered position qualifies as a specialty occupation; and 2) that the petitioner has sufficient specialty occupation work that is immediately available upon the beneficiary's entry into the United States through the entire requested H-1B validity period, is "more likely than not" or "probably" true.

II. FACTUAL AND PROCEDURAL BACKGROUND

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position that it designates as a computer systems analyst, to work on a full-time basis at a salary of \$60,000 per year. In addition, the petitioner indicated that the beneficiary would be employed at the petitioner's business premises located at [REDACTED] and would not work off-site. The petitioner stated that the dates of intended employment are from October 1, 2013 to October 1, 2016.

The petitioner appended the requisite Labor Condition Application (LCA) to the petition, which indicates that the occupational classification for the position is "Computer Systems Analysts" SOC (ONET/OES) Code 15-1121, at a Level I (entry level) wage. The LCA was certified for a validity period beginning September 19, 2013 to September 19, 2016.

In a letter of support, dated April 1, 2013 the petitioner identified itself as "a global software development company" that provides the "full spectrum of software development services in both dedicated offshore centers and at customer sites." As a computer systems analyst, the petitioner indicated that the beneficiary's duties will be as follows:

[A]nalyze, design and implement Web-based applications. He will be responsible for extracting and defining user requirements. Furthermore, [the beneficiary] will

identify where modifications to existing processes are required. He will also design new processes as necessary. In each situation, [the beneficiary] will perform comprehensive testing of any improved or newly developed applications prior to their implementation. His technical environment will include Java, MySQL, Java Script, HTML, and SQL Server/Management Studio, among others.

In support of the petition, the petitioner provided an undated document titled "International Travel Agency Business Plan" which identified a specific project [REDACTED].¹ In the "Executive Summary" portion of the business plan, the petitioner stated that the "[REDACTED] project will be a sole proprietorship owned and operated by [the petitioner]," and described [REDACTED] as "a small organization." As described in the "Mission" portion of the business plan, [REDACTED] is a travel agency providing consulting and custom travel arrangements and packages. The plan further elaborates that [REDACTED] will be "a full service agency [that] sells standard travel agency goods and services, including airfare and travel packages," as well as offering additional services such as "assistance with passports, [and] providing access to top-of-the-line equipment and supplies." The plan further describes [REDACTED] twofold "distribution strategy" as to: (1) "focus on the target market in the [REDACTED] area to whom it will sell directly"; and (2) "establish distribution capability on the World Wide Web."² The plan lists the sales objectives as to achieve sales of \$200,000 in the first year of operations, and \$500,000 by the third year of operations.

In a section entitled "Company Locations and Facilities," the business plan states that [REDACTED] "has identified three potential locations for office space," all of which are located in [REDACTED] Illinois. In a section entitled "Target Market Segment Strategy," the business plan states that [REDACTED] is located at the heart of the [REDACTED]. In a section entitled "Strategy and Implementation Summary," the business plan states that it is [REDACTED] "goal" to become "the [REDACTED] premier adventure travel agency." The business plan states in the same section that [REDACTED] will "[p]rovide unparalleled service to the people of [REDACTED] in order to gain repeat business and build trust." In a section entitled "Future Services," the business plan states that [REDACTED] "may in the future open agencies at additional locations."

The personnel plan, as explained in a section entitled "Organizational Structure," will begin with two part-time and two full-time positions. Specifically, these positions are: a General Manager/Accountant position, held by [REDACTED]; a Marketing and Advertising Director/President and Technical Director position, held by [REDACTED] and two "full-time experienced developers from abroad."³ The business plan states that the above "personnel plan

¹ The petitioner also refers to [REDACTED] as simply [REDACTED]."

² The business plan confusingly states that [REDACTED] plans to engage in direct sales in addition to internet sales, but also states that one of its goals over the next three years is to "[a]chieve 100% of sales from the Internet."

³ We assume that [REDACTED] are the two part-time employees referenced by the petitioner, as the petitioner stated that it will hire two full-time developers.

depicts [REDACTED] anticipated head count for the start up year. [REDACTED] does not anticipate the need to significantly increase personnel in the first 2-3 years." The Executive Summary of the business plan explains that the "founder and development team of [REDACTED] project are experienced travel industry professionals along with web-site developers and designers." It further states that the petitioner expects to have a "stable work-load for the [REDACTED] project for at least 2-3 Computer Systems Analysts in 2011-2012 with the possibility of growing the team to the size of 4-7 in 2012-2014."

The director issued an RFE on November 12, 2013, requesting evidence to establish that, if the beneficiary will work on a project at the petitioner's location, there will be sufficient specialty occupation work for the beneficiary to perform for the duration of the requested H-1B validity period. The director provided a list of the types of evidence that could be submitted.

In response to the director's RFE, the petitioner submitted a letter dated December 17, 2013. The petitioner described the project the beneficiary will be assigned to as the development of a "full service travel agency engine, specializing in adventure travel packages arranged through our [REDACTED] website." The petitioner explained that the [REDACTED] website will initially use the [REDACTED] booking engine, and will transition out of the [REDACTED] booking engine into the Sabre Booking system in late 2013. The petitioner also stated that "the full development of our CRS (Computerized Reservation System) and the required transitions between booking engines will require full-time computer systems specialists dedicated to bringing the site into competition with other major web-sites." The petitioner explained its need to hire the beneficiary to work on the project in the United States, stating that its President, [REDACTED] is "already occupied with other software and web applications development projects," while the "team in the Ukraine is also occupied with project work."

The petitioner explained that the development of [REDACTED] is already underway. It stated: "[c]urrently some of the draft design mockup exists and is to be finalized soon as well as the architecture of the project, which is going to be part of the tasks for [the beneficiary] as a Computer Systems Analyst." The petitioner stated further that the beneficiary "will be working on system development, including primarily our [REDACTED] CRS system, to work to integrate this system with web applications, and their related databases." Specifically, the beneficiary will be responsible for the following tasks:

- Analyze, design and implement Web-based applications: develop CRS and web applications as identified by supervisor and management through packaged customized applications and design, implement, maintain and enhance existing Web applications and all internal systems; 35%
- Extracting and defining user requirements: perform complete testing of Web applications unit and system, and conduct all user acceptance testing and report results; 15%
- Identify where modifications to existing processes are required: design and implement user-driven templates, databases and interfaces for ease of use, develop database-driven Web interfaces for rapid, real-time information sharing,

- and develop external Web portals allowing users to input and retrieve accurate information; 33%
- Interaction with project team and customers: working closely with QA team on test cases and unit testing and interface with Business and IT resources of clients for requirements and follow-up; 12%
 - Training Project Team Members: introducing newest technologies and sharing best practices; 5%

Following the list of specific tasks, the petitioner provided a narrative explanation of the project management and skills required to perform the duties as follows:

I, [REDACTED] will manage the project as a Project Manager and [the beneficiary] and other Computer Systems Analysts will work as a team of Senior IT professionals, who are required to have Specialized knowledge in software applications and web development . . . including but not limited native and web applications for Mobile and Tablet devices, SQL relational database management and development, . . . ability to research and debug software and learn and setup new software when needed, for example how to setup and use, communicate with the travel reservation system, customize certain solutions [*sic*].

The petitioner goes on to state that the list of knowledge is "mostly everything essential that any Computer Systems Analysts would need for this project [REDACTED]"

The petitioner submitted a document entitled "Specific Work Duties," listing specific tasks to be performed and the number of hours estimated for each particular task. The tasks included items such as: researching requirements to the project, proposal design and architecture development, preparing QA Test plan, discussion about initial design of web pages, creating mock-ups, designing workflow and diagrams, setup for the travel reservation systems, and breaking the project into smaller parts and assigning them to specific developers. The total number of estimated hours for the initial start-up of the referenced project is 11,650 hours. The list does not indicate who will perform the listed tasks, or when the listed tasks are scheduled to begin and be completed.

The petitioner submitted an employment offer letter to the beneficiary dated October 1, 2013. The beneficiary was offered a salary of \$60,000 for the position of Computer Systems Analyst on "the petitioner's] Web Development Team." The employment letter set out the agreement of the parties indicating, in part:

Employer shall employ Employee as a Computer Systems Analyst to (i) perform software development and maintenance; (ii) develop strategies and methods to assist the Employer in providing products and services to its clients and; (iii) such other matters as the Employer may reasonably request, not inconsistent with the services specified herein.

The employment letter further states:

TRAVEL. Employee acknowledges that travel will be necessary to perform the services contemplated hereunder and Employee agrees to travel to and within the U.S. upon the request of the Employer. For assignment longer than six (6) month Employer will pay for relocation of the Employee and his family [sic].

An undated acceptance letter was attached to the employment offer and signed by the beneficiary and the president of the petitioner.

The petitioner also submitted an organizational chart showing the Owner & President, [REDACTED] located in the United States and Ukraine, at the top. Reporting directly to the President are the following: (1) the "[c]urrent US Team," consisting of two Computer Systems Analysts; (2) the Chief Technology Officer, [REDACTED] located in Ukraine; (3) the Chief Financial Officer, [REDACTED] located in the United States and Ukraine; and (4) the "Future US Team," consisting of the beneficiary and two other individuals, all of whom are identified as Computer Systems Analysts. Reporting to the Chief Technology Officer in the Ukraine are a Lead Developer, three Computer System Analysts/Developers, and a QA Tester. Underneath the Chief Financial Officer is an accounting employee in the Ukraine, and an Accounting Consultant (contractor) in the United States.

The petitioner provided draft mock-ups of the [REDACTED] project containing the following notation: "© 2009 All rights reserved, [REDACTED]"

Upon review, the director denied the petition determining that the petitioner had not established that there exists a reasonable and credible offer of employment.

On appeal, the petitioner submits a brief dated February 2, 2014. In the brief, the petitioner asserts that the director "misapplies the regulations governing workers in a specialty occupation and adds extra-regulatory requirements."⁴ The petitioner addresses each of the four criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner also asserts that it has provided evidence showing "sufficient specialty occupation work for the beneficiary" and states that the director "misunderstood the nature of the Petitioner's business." The petitioner reiterates that it will employ the beneficiary "in-house," working on the development of the petitioner's proprietary travel reservation system, [REDACTED]

In support of the appeal, the petitioner submits, *inter alia*, a letter on the letterhead of [REDACTED] signed by [REDACTED] HR Generalist, providing a list of duties for its position of

⁴ Much of the petitioner's brief dated February 2, 2014 does not appear to address the director's actual decision of denial dated January 9, 2014. The brief discusses errors of law or fact made by the director in his decision; however, the brief provides quotations and reasoning not found in the director's decision. For example, the petitioner quotes the director as stating, *inter alia*, that "[a]lthough you assert that you normally require a baccalaureate degree...your reasoning is problematic when viewed in light of the statutory definition of specialty occupation." However, this language does not appear anywhere in the director's decision.

computer systems analyst and claiming that [REDACTED] requires a minimum of a bachelor's degree in computer science or a related field or equivalent experience for its computer systems analysts. The petitioner also submits a letter, with no letterhead, signed by [REDACTED] who indicates he was previously employed with [REDACTED]. Mr. [REDACTED] provides an identical list of duties for the position of computer systems analyst as set out in the [REDACTED] letter and provides the verbatim conclusion that "we require a minimum of a bachelor's degree in computer science or a related field or equivalent experience" for computer systems analyst positions. In addition, both of these letters identically state that the position "requires an advanced understanding of the interaction between databases, web applications and other system infrastructure" and is "specialized and complex" in nature.

The petitioner submits copies of advertisements for "similar positions similar to Petitioner's proffered position."

The petitioner submits a letter dated February 2, 2014 from its President, [REDACTED] addressing why the proffered position requires a professional with a bachelor's degree or higher in computer science or a related field, and reaffirming that the beneficiary will be working on its [REDACTED] project. Mr. [REDACTED] states that this project will require "over 11,000 hours of work to reach its full operating capacity," but does not further elaborate how these duties will be delegated.

The petitioner submits a document entitled "Architectural Design and API Specifications for Travel reservations engine," containing numerous references to [REDACTED]. The petitioner does not provide any pertinent explanation regarding this document, such as who created this document, for whom this document was created, and for what purpose(s) this document serves.

The petitioner submits an [REDACTED] "Travel Agency Reports" listing the agency name as [REDACTED] and the agent name as [REDACTED]. The petitioner explains that these are commission statements from [REDACTED] for travel services sold by the petitioner through [REDACTED] which the petitioner states is its other travel agency website while the [REDACTED] site is not yet running. The petitioner explained that [REDACTED] is its trial, prototype travel reservation engine that it has utilized for the past three years. The petitioner asserts that once the [REDACTED] project is developed and completed, [REDACTED] will redirect to the [REDACTED] web site. The petitioner does not provide any further explanation of its business relationship with [REDACTED].

The petitioner submits several work orders, statements of work, subcontract agreements, and similar documentation between the petitioner and various companies, in which the petitioner agreed to assign its employees, to perform services for the contracting companies and/or their clients. These staff and services to be provided by the petitioner include a "Mobile Web Developer" to coordinate and participate in "the design, development, and testing of the iOS based applications and mobile web sites," a Javascript Mobile Application Developer to "develop code from scratch- Java scripting skills," and a Senior .NET Developer. Of particular note, the petitioner submitted its

⁵ [REDACTED] is also spelled as [REDACTED] by the petitioner.

work order from [REDACTED], valid from March 14, 2013 through June 30, 2013, for [REDACTED] as the contractor who will perform web development duties. The Professional Services Independent Contractor Agreement appended to the work order states that the contractor "will perform all work for [REDACTED] primarily at the premises of the client."

Finally, the petitioner submits a letter from [REDACTED] confirming that the petitioner has "successfully reserved a local business presence with us at our [REDACTED] as of 10/25/11" at the petitioner's address listed on the Form I-129. Attached is an unsigned Virtual Office Client Service Agreement, indicating that the petitioner has a "Local Business Identity Virtual Office Address" package which provides the following: professional business address, mail receiving and forwarding, use of address, dedicated onsite mailbox, mail forwarding, lobby greeter, local presence and drop off/pick up point for clients and packages, access to private day offices and/or conference rooms at hourly rates, access to a worldwide network of meeting spaces, use of meeting room reservation platform, and complimentary access to cyber café with wireless internet, coffee/tea bar, etc. Neither document indicates that the petitioner has actual, physical office space at its business address.

III. SPECIALTY OCCUPATION

A. The Law

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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [(1)] 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 requires [(2)] 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, the 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 rely simply upon a proffered position's title. The specific duties of the 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 beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 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.

B. Bona Fide, Credible Offer of Employment

We will first address the director's ground for denial, particularly, whether the petitioner has made a bona fide, credible offer of employment to the beneficiary. This consideration is necessarily preliminary to, and logically even more foundational and fundamental than the issue of whether a proffered position qualifies as a specialty occupation. In this matter, the evidence of record does not support a finding that the petitioner has made a bona fide, credible offer of employment to the beneficiary.

For H-1B approval, the petitioner must demonstrate a legitimate need for an employee exists and to substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. It is incumbent upon the petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or the equivalent, to perform duties at a level that requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.

Upon review of the record of proceeding, there are numerous inconsistencies and discrepancies in the petition and supporting documents which undermine the petitioner's credibility with regard to the services the beneficiary will perform, as well as the actual nature and requirements of the proffered position. When a petition includes numerous errors and discrepancies, those inconsistencies raise serious concerns about the veracity of the petitioner's assertions. In turn, these inconsistencies undermine the legitimacy of the petitioner's offer of employment to the beneficiary.

More specifically, the petitioner submitted an LCA in support of the instant petition that designated the proffered position under the occupational category of "Computer Systems Analysts" - SOC (ONET/OES) code 15-1121. The petitioner stated in the LCA that the wage level for the proffered position was a Level I (entry-level) position, with a prevailing wage of \$60,000 per year. The LCA was certified on March 26, 2013 and signed by the petitioner on April 1, 2013.

Despite the petitioner's categorization of the proffered position as a computer systems analyst, the petition contains numerous references to a position related to development, or, web development and design. First, the petitioner provided a business plan in the initial documents submitted with the petition. The development team, as explained in the Executive Summary, is to be comprised of "experienced travel industry professionals along with web-site developers and designers." The business plan also indicated that the organizational structure will start with a General Manager/Accountant, a Marketing and Advertising Director/ President and Technical Director, and two full-time experienced "developers" from abroad.

Additionally, in response to the RFE, the petitioner provided a more detailed description of the beneficiary's duties, which include "[a]nalyze, design and implement Web-based applications: develop CRS and web applications," "perform complete testing of Web applications unit and system," "design and implement user-driven templates, databases and interfaces," and "develop database-driven Web interfaces." The petitioner also provided a letter from its President stating that the beneficiary and other Computer Systems Analysts require "[s]pecialized knowledge in software applications and web development." These tasks described appear to relate primarily to web design and development.⁶

In the work orders submitted for the record, the work orders show that the petitioner's president and other employees are working for third party companies primarily as web developers. At least two of the work orders were ongoing when the petition was filed. Accordingly, it appears that part, if not all, of the petitioner's business is providing web development services for third party companies. Upon review of the nature of the petitioner's business and its descriptions of the proffered position as a web developer, the record before the director suggests that the proffered position is more likely than not that of a web developer.⁷

⁶ According to O*Net Online, the duties for a web developer include the following: design, build, or maintain web sites, using authoring or scripting languages, content creation tools, management tools, and digital media; perform or direct web site updates; and write, design, or edit web page content, or direct others producing content. See O*NET OnLine Summary Report for "15-1134.00 - Web Developers," <http://www.onetonline.org/link/summary/15-1134.00> (last visited Oct. 1, 2014). Similarly, DOL's *Occupational Outlook Handbook (Handbook)* describes the duties of a web developer as including: create and debug applications for a website; and write code for the site, using programming languages such as HTML or XML. See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-2015 ed., "Web Developers," <http://www.bls.gov/ooh/computer-and-information-technology/web-developers.htm#tab-2> (last visited Oct. 1, 2014).

⁷ If the petitioner seeks to employ a beneficiary in two distinct occupations, the petitioner should file two separate petitions, requesting concurrent, part-time employment for each occupation. While it is not the case here, if a petitioner does not file two separate petitions and if only one aspect of a combined position qualifies as a specialty occupation, USCIS would be required to deny the entire petition as the pertinent regulations do not permit the partial approval of only a portion of a proffered position and/or the limiting of the approval of a petition to perform only certain duties. See generally 8 C.F.R. § 214.2(h). Furthermore and as is the case here, the petitioner would need to ensure that it separately meets all requirements relevant to each occupation and the payment of wages commensurate with the higher paying occupation. See generally 8 C.F.R. § 214.2(h); U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy*

The petitioner did not provide any detailed evidence of the job duties the beneficiary specifically would perform in relation to the [REDACTED] project. While the petitioner asserts that there are over 11,000 hours of work to reach the project's operating capacity, it has not explained how many of those hours would be assigned to the beneficiary, or which of the particular duties would be assigned to him. The detailed list provided by the petitioner does not identify who will be performing each listed task. The business plan does not provide any description and timeline with respect to the proffered position and the intended employment dates requested on the Form I-129. Notably, while the petitioner submitted several work orders and similar documentation, none of them specifically mention the beneficiary. We note that the business plan references "2011-2012" and "2012-2014," but does not describe, in detail, the extent of the project and its timeline with respect to the proffered position and the intended employment dates requested on the Form I-129.

Furthermore, while the petitioner repeatedly asserts that the beneficiary will be employed in-house on its [REDACTED] project and will not work off-site, his employment letter from the petitioner specifically states that "travel will be necessary to perform the services contemplated hereunder." 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).

The evidence of record lacks sufficient, credible evidence demonstrating that [REDACTED] is a bona fide project which actually exists and is being developed by the petitioner. For instance, the petitioner repeatedly depicts [REDACTED] as an in-house "project" consisting of developing a travel engine website. The petitioner further asserts that all work on this "project" will take place on-site at the petitioner's business premises located at the address listed on the Form I-129, specifically, [REDACTED]. However, there are several references to [REDACTED] as being an altogether separate business entity located separately from the petitioner.⁸ The petitioner's business plan describes [REDACTED] as a "sole proprietorship" as well as a "small organization." It describes [REDACTED] as not only being a travel reservation *engine*, but "a full service *agency*" that will "sell directly" to its target customers, in addition to providing online sales and services (emphasis added). It further states that [REDACTED] is "located at the heart of the [REDACTED]" or alternatively, that it will be located in the [REDACTED] area.⁹

Guidance, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf. Thus, filing separate petitions would help ensure that the petitioner submits the requisite evidence pertinent to each occupation and would help eliminate confusion with regard to the proper classification of the position being offered.

⁸ This statement assumes *arguendo* that the petitioner has physical premises at [REDACTED] the address listed on the Form I-129. However, for reasons that will be discussed *infra*, the petitioner has not established that it has physical premises at this address.

⁹ The petitioner confusingly states that [REDACTED] is located in the [REDACTED] while also stating that it "has identified three potential locations for office space" for [REDACTED] Illinois.

Further, none of the several work orders and similar documentation submitted specifically mention [REDACTED]. The petitioner has not submitted any detailed timeline with respect to its development goals for [REDACTED]. As previously noted, the petitioner did not explain how the claimed 11,000 plus hours of work needed to reach the project's operating capacity would be delegated among its employees, nor is there any information as to when these tasks are scheduled to begin and to be completed. Notably, one of the specific tasks is to create mock-ups of [REDACTED] but the petitioner has submitted evidence that it has already created these mock-ups as early as 2009. The petitioner did not submit any documentation demonstrating its progress on [REDACTED] from 2009 to the date of filing the instant petition, April 8, 2013. The petitioner's business plan is undated and does not describe, in detail, the petitioner's timeline with respect to developing the project. While the business plan references "2011-2012" and "2012-2014," it does not state when development first began. Moreover, in section 5.6 entitled "Milestones," the plan states that "[REDACTED] important milestones are detailed in the following table." However, no such table is included in the business plan. Overall, the record is simply devoid of any explanation and evidence of when the [REDACTED] project began or will begin, if at all, and how the petitioner plans to develop this project.

We acknowledge the document entitled "Architectural Design and API Specifications for Travel reservations engine." However, we cannot find that this document has any relevance to establishing the bona fides of [REDACTED]. There is no explicit mention of [REDACTED] within this document. In fact, there is no explanation at all regarding this document, such as who created this document, for whom this document was created, and the purpose served by this document.¹⁰

Finally, the evidence of record contains insufficient evidence establishing how the petitioner will staff and support the development of [REDACTED]. For instance, the business plan indicated that [REDACTED] will begin operations with two part-time positions - (1) the General Manager/Accountant, and (2) the Marketing and Advertising Director/President and Technical Director – and two full-time developer positions. The business plan specifically stated that "[REDACTED] does not anticipate the need to significantly increase personnel in the first 2-3 years." However, the petitioner asserts that [REDACTED] will be a "full service" travel agency that offers a wide range of services, including selling "standard travel agency goods and services, including airfare and travel packages," as well as offering additional services such as customized travel adventure packages, assistance with passports, and providing "access to top-of-the-line equipment and supplies." The plan also states that [REDACTED] will provide direct sales, in addition to its internet sales. The plan lists the sales objectives to achieve sales of \$200,000 in the first year of operations, and \$500,000 by the third year of operations. The record is devoid of any explanation as to who would perform the direct sales, customer service, and other operational duties inherent to operating a full service travel

¹⁰ We also note that this document contains numerous references to [REDACTED] booking engine. The petitioner has not explained in any detail its business relationship to [REDACTED]. To the contrary, the petitioner asserted that it will initially use the [REDACTED] booking engine, and then transition to the [REDACTED] booking system.

agency.¹¹ We note the petitioner has already been selling travel services through its prototype engine, [REDACTED], yet there are no sales or customer service personnel depicted in the petitioner's organizational chart.

Furthermore, the petitioner has not demonstrated that it has actual physical premises in the United States from which to support its claimed in-house development of [REDACTED]. The petitioner's business address listed on the Form I-129 is a virtual office, as confirmed by the evidence from [REDACTED]. The petitioner has not explained how it could support the in-house employment of the beneficiary, as well as the in-house development of the [REDACTED] project which will purportedly be initially staffed by at least four different employees, through its virtual office arrangement. Significantly, the petitioner initially stated that it provides the "full spectrum of software development services *in both dedicated offshore centers and at customer sites* (emphasis added)." The petitioner did not state that it provides software development services at its United States premises, if one exists.

We also highlight the petitioner's assertion that [REDACTED] will be the Project Manager for [REDACTED]. However, according to the petitioner's organizational chart, Mr. [REDACTED] is also the petitioner's owner and President. He will also be the direct supervisor for approximately seven employees (including the beneficiary), who are located in both the United States and Ukraine. In addition, he is obligated to perform services for other ongoing projects. Specifically, the petitioner stated in response to the RFE that Mr. [REDACTED] is "already occupied with other software and web applications development projects." The current work order from [REDACTED] obligates Mr. [REDACTED] to provide web development services for a third-party client, and specifies that he "will perform all work for [REDACTED] primarily at the premises of the client." The petitioner's business plan indicates that Mr. [REDACTED] position is part-time. Moreover, the "Management Summary" portion of the business plan states that [REDACTED] will be the General Manager, but then states underneath in the "Organizational Structure" portion that [REDACTED] will be the General Manager. As such, we must question the credibility of the petitioner's claims regarding how it will manage the [REDACTED] project, considering Mr. [REDACTED] numerous other obligations, the claimed staffing needed for the [REDACTED] project, and the petitioner's lack of physical office space.

In this matter, the lack of clarity regarding the beneficiary's actual tasks and job responsibilities, the inconsistent characterizations of the proffered position, and the lack of credible evidence regarding the bona fides of the petitioner's claimed in-house [REDACTED] project, all fail to support the petitioner's claim that it has a bona fide, credible offer of employment to the beneficiary. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). Thus, we conclude that the record of proceeding provides an inadequate factual basis for us to determine that, at the time of the petition's filing, the petitioner had

¹¹ We acknowledge the petitioner's claims that the founder and development team of [REDACTED] "are experienced travel industry professionals along with web-site developers and designers." However, this still does not explain who will perform operational duties such as sales and customer service.

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. 248.¹² Moreover, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. 8 U.S.C. 1361 (Section 291 of the Act). The petitioner has thus not established that, at the time the petition was submitted, it had secured work for the beneficiary that would entail performing the duties as described in the petition and that was reserved for the beneficiary for the duration of the period requested.

C. Whether the Proffered Position Qualifies for Classification as a Specialty Occupation

When determining whether a position is a specialty occupation, USCIS looks at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera.

¹² The agency made clear long ago that speculative employment is not permitted in the H-1B program. 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).

The regulation at 8 C.F.R. § 214.2(h)(9)(i)(B) also contemplates that speculative employment is not permitted stating that a "petition may not be filed. . . earlier than 6 months before the date of **actual need** for the beneficiary's services or training. . ."

Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, 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."

Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through at least a baccalaureate degree in a specific discipline.

Based on the provided evidence, we do not find that it establishes 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 may claim that the nature of the proposed duties and the position that they are said to comprise elevate them above the range of usual Computer Systems Analyst positions and duties by virtue of their level of specialization, complexity, and/or uniqueness, the evidence of record does not support these claims. 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)).

As evident in the job description quoted above, the record of proceeding presents the duties comprising the proffered position in terms of relatively abstract and generalized functions. More specifically, 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 require within the context of the petitioner's particular business operations. Take for example the following duty description:

Analyze, design and implement Web-based applications: develop CRS and web applications as identified by supervisor and management through packaged customized applications and design, implement, maintain and enhance existing Web applications and all internal systems.

The evidence of record contains neither substantive explanation nor documentation showing the range and volume of applications that the beneficiary would be responsible for analyzing, designing, and implementing. Likewise, the record does not clarify the substantive work and associated applications of specialized knowledge that would be involved in the referenced duty. Overall, the evidence of record fails to adequately convey the substantive nature of the work to be performed by the beneficiary.

The failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A),

because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation.

The material deficiencies in the evidentiary record are decisive in this matter and they conclusively require that the appeal be dismissed. However, we will continue our analysis in order to apprise the petitioner of additional deficiencies in the record that would also require dismissal of this appeal. Assuming for the sake of argument that the proffered duties as generally described by the petitioner in its initial letter and in response to the RFE would in fact be the duties of a computer systems analyst, we will analyze this occupation and the evidence of record to determine whether the position of a computer systems analyst as generally described would qualify as a specialty occupation.

We now turn to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty.

Factors we consider when determining these criteria include: whether the U.S. Department of Labor's *Handbook*, on which we routinely rely for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

We will now look at the *Handbook*, an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹³ In the chapter on computer systems analysts, the *Handbook* provides the following overview of the occupation:

¹³ All of our references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

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

The *Handbook* lists the typical duties of a computer systems analyst as:

- Consult with managers to determine the role of the IT system in an organization
- Research emerging technologies to decide if installing them can increase the organization's efficiency and effectiveness
- Prepare an analysis of costs and benefits so that management can decide if information systems and computing infrastructure upgrades are financially worthwhile
- Devise ways to add new functionality to existing computer systems
- Design and develop new systems by choosing and configuring hardware and software
- Oversee the installation and configuration of new systems to customize them for the organization
- Conduct testing to ensure that the systems work as expected
- Train the system's end users and write instruction manuals¹⁴

* * *

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

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

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

¹⁴ The petitioner's general description of duties does not include the majority of the "typical" duties ascribed to the occupation of a computer systems analyst. However, as the petitioner attested on the LCA and the Form I-129 that the proffered position is a computer systems analyst, we will continue our analysis of a computer systems analyst position.

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

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-2015 ed., "Computer Systems Analysts," <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-2> (last visited Oct. 1, 2014).

The duties described by the petitioner in this matter depict a broad range of duties. Although the record suggests that the proffered position more closely aligns with that of a web developer, if the proffered position is in fact a computer systems analyst, it appears it would be a general purpose computer systems analyst or a programmer analyst position. As determined above, the record is deficient in establishing the actual nature of the proffered position. There is simply not enough information regarding the actual duties of the proffered position to accurately assess and analyze the proffered position.

However, regarding the education and training of a computer systems analyst, the *Handbook* reports:

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.

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

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

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-2015 ed., "Computer Systems Analysts," <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited Oct. 1, 2014).

Here, although the *Handbook* indicates that most systems analysts have a bachelor's degree in a computer or information science field it also indicates that some employers hire workers with

business or liberal arts degrees. The *Handbook* reports that "[m]any analysts have liberal arts degrees and have gained programming or technical expertise elsewhere." Accordingly, the *Handbook* does not support the proposition that a bachelor's degree in a specific discipline is the minimum requirement necessary to enter into the occupation. In addition, although most systems analysts get a degree in a computer or information science subject "most" is not indicative that a computer systems analysts position normally requires at least a bachelor's degree, or its equivalent, in a specific specialty (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I)). The first definition of "most" in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of computer systems analysts positions require at least a bachelor's degree in computer or information science, it could be said that "most" computer systems analysts 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 generally described and limited 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 language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." Section 214(i)(1) of the Act.

The *Handbook's* report does not establish that a computer systems analyst position requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act.¹⁵

We acknowledge the petitioner's claims that USCIS has previously approved H-1B cases for the proffered position of computer systems analyst. In response to the RFE, the petitioner submitted copies of H-1B supporting letters, approval notices, and degree evaluations as evidence that USCIS has previously approved H-1B visas submitted by the petitioner for the proffered position. However, the petitioner did not submit copies of the underlying petitions and all supporting evidence submitted in support therein. As such, there are minimal underlying facts to be analyzed and, therefore, no determinations can be made regarding what facts, if any, are analogous to the facts in this proceeding.

Nevertheless, if the previous nonimmigrant petitions were approved based on the same unsupported

¹⁵ Of note, the *Handbook's* chapter on web developers reports generally: "[t]he typical education needed to become a web developer is an associate's degree in web design or related field. Web developers need knowledge of both programming and graphic design." U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-2015 ed., "Web Developers," <http://www.bls.gov/ooh/computer-and-information-technology/web-developers.htm#tab-4> (last visited Oct. 1, 2014). Accordingly, the *Handbook* does not support the proposition that a web developer qualifies for classification as a specialty occupation.

assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 597. It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988).

Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petition, we would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S.Ct. 51 (2001).

Additionally, the petitioner's reliance on a copy of USCIS' Fiscal Year 2012 Annual Report to Congress on the Characteristics of H1B Specialty Occupation Workers is misguided. The report, referring to 8 C.F.R. § 214.2(h)(4)(ii), states that specialty occupations "may" include computer systems analysts and programmers, among other occupations. However, a review of the regulation does not include a specific reference to computer systems analysts and programmers. Moreover, the report discusses the characteristics of broad categories of occupations. When making a determination in regard to a specific case, the AAO and USCIS address the actual duties of the specific employment supplied by the petitioner in order to analyze and ascertain whether the proffered 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. As discussed above, the petitioner has not provided in sufficient detail this necessary information.

The petitioner's submission of an article on the best technology jobs which includes information on the occupation of a computer systems analyst, likewise, does not establish specific standard educational requirements for the position. Rather, this article tracks the *Handbook's* report that a variety of paths may qualify an individual for a position as a computer systems analyst.

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

Next, we will review the record of proceeding regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to

the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

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 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1102).

Here and as already discussed, the evidence of record does not establish that the proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference our previous discussion on the matter.

The petitioner submitted copies of job advertisements in support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations. However, upon review of the documents, we find that the petitioner's reliance on the job announcements is misplaced.

In the Form I-129 petition, the petitioner describes itself as a global software development company established in 2011, with 4 employees. The petitioner claims that it has a gross annual income of \$533,800. Although requested in the Form I-129 petition, the petitioner did not state its net annual income.

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

We reviewed the job advertisements submitted by the petitioner. The petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised.¹⁶ Further, as they are only

¹⁶ USCIS "must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. at 376. As just discussed, the petitioner has failed to establish the relevance of the job advertisements submitted to the position proffered in this case. Even if their relevance had been established, the petitioner still fails to demonstrate what inferences, if any, can be

solicitations for hire, they are not evidence of the employers' actual hiring practices.

Upon review of the documentation, the evidence of record fails to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

Specifically, the advertisements include positions with [REDACTED] (in the transportation industry); [REDACTED] (a member of the Fortune 100 Largest Companies); [REDACTED] (a staffing agency for an unspecified end client); [REDACTED] (in the manufacturing industry); [REDACTED] (in the utilities, gas, electric, industrial, accounting, finance industries); and [REDACTED]

The advertisements appear to be for organizations that are not similar to the petitioner, and the petitioner has not provided any probative evidence to suggest otherwise. Further, the petitioner provided advertisements which do not contain information regarding the employers' industry or business operations. Consequently, the record lacks sufficient information regarding these advertising employers to conduct a legitimate comparison of the organizations to the petitioner. The petitioner has not provided information regarding which aspects or traits (if any) it shares with the advertising organizations.

Additionally, the petitioner has not established that the advertisements are for parallel positions. It is not possible to determine important aspects of the job, such as the day-to-day responsibilities, complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received from the advertisements submitted. Accordingly, it is unclear whether the duties and responsibilities of these positions are the same or parallel to the proffered position.

We note that some of the advertised positions may be for more senior positions. For example, the petitioner provided job postings for a Senior Associate, Systems Analyst position at [REDACTED], a Senior System Analyst position at [REDACTED], a position at [REDACTED] requiring at least seven years of related experience, and a position at [REDACTED] requiring at least five years of related experience. The petitioner, however, designated the proffered position in the LCA as a Level I (entry-level) position. Thus, the petitioner effectively attests that the proffered position is not a senior position. Therefore, the petitioner has not sufficiently established that the duties and responsibilities of the advertised positions are parallel to the proffered position.

The two letters submitted from the Human Resources generalist at [REDACTED] and from [REDACTED] a former employee of [REDACTED] include identical lists of duties and provide a

drawn from these few job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the same industry. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995).

verbatim conclusion of educational requirements for their claimed computer systems analysts. The use of identical language and phrasing across the letters suggest that the language in the letters is not the authors' own. *Cf. Surinder Singh v. BIA*, 438 F.3d 145, 148 (2d Cir. 2006) (upholding an adverse credibility determination in asylum proceedings based in part on the similarity of the affidavits); *Mei Chai Ye v. U.S. Dept. of Justice*, 489 F.3d 517, 519 (2d Cir. 2007) (concluding that an immigration judge may reasonably infer that when an asylum applicant submits strikingly similar affidavits, the applicant is the common source). Moreover, other than listing the job duties and making claims that the position "requires an advanced understanding of the interaction between databases, web applications and other system infrastructure" and is "specialized and complex" in nature, this letter does not explain in any factual detail why this position requires a bachelor's degree in computer science or a related field. These letters contain no more than conclusory assertions and, therefore, are not entitled to probative value.

We may, in our discretion, 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).

We have reviewed all of the advertisements and the industry letters submitted in support of the petition. However, we find the submitted evidence to be insufficient to demonstrate that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry for parallel positions in organizations similar to the petitioner. Thus, the evidence of record does not establish that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry for positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

We will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

We have reviewed the record in its entirety, and find that the record lacks sufficient documentation to support a claim that the proffered position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. That is, the petitioner has not developed or established complexity or uniqueness as attributes of the proffered position (through the job duties, the petitioner's (or client's) business operations or by any other means) that would require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent.

More specifically, the petitioner failed to demonstrate how the duties described require the theoretical and practical application of a body of highly specialized knowledge such that a

bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficient probative evidence to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The lack of complexity or uniqueness is further evidenced by the LCA submitted by the petitioner in support of the instant petition. As referenced above, the petitioner designated the proffered position as a Level I (entry-level) position on the LCA. This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.¹⁷ That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results. Based upon the wage level, the beneficiary is only required to have a basic understanding of the occupation.

Additionally, given the *Handbook's* indication that computer systems analysts positions do not normally require at least a bachelor's degree in a specific specialty, or the equivalent, for entry, 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* contain such a requirement.¹⁸

¹⁷ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is describes as follows:

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

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

¹⁸ It is noted that the petitioner would have been required to offer a significantly higher wage to the beneficiary in order to employ him at a Level II (qualified), a Level III (experienced), or a Level IV (fully competent) level. U.S. Dep't of Labor, Foreign Labor Certification Data Center, Online Wage Library, FLC

The petitioner has indicated that the beneficiary's educational background will assist him in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not sufficiently explain or clarify at any time in the record which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Upon review of the record of proceeding, the petitioner has failed to establish the proffered position as satisfying this prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that an employer demonstrate that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. USCIS usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position when analyzing this criterion.

To merit approval of the petition under this criterion, the record must establish that the imposition of a degree requirement by the petitioner (or, in this case, by the client) is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

While a petitioner (or client) may believe or otherwise assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

With respect to this criterion, the petitioner submitted employment letters, approval letters, and foreign education evaluations for employees that it asserts are computer systems analysts.

However, for the reasons discussed earlier in this decision, without copies of the actual petitions and the underlying supporting evidence for these petitions, no substantive determinations can be made to determine what facts, if any, were analogous to those in this proceeding. For the sake of efficiency, we reiterate and incorporate our earlier discussion regarding the little probative value of prior approvals by the service center director, especially when eligibility has not been demonstrated.

Even if the petitioner had been able to establish that it normally requires at least a bachelor's degree in a specific specialty or its equivalent for the proffered position, we would still find that the petitioner failed to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) because the record does not, as indicated above, establish that its degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position, a determination which is strengthened by the petitioner's submission as the supporting LCA one that was certified for the lowest wage-level, which is appropriate for a comparatively low, entry-level position relative to others within its occupation.

Accordingly, the evidence of record is not sufficient to establish that the petitioner normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent.

The petitioner asserts that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. However, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. While the petitioner submitted job descriptions of the proffered position, it must be noted that the petitioner failed to adequately describe the substantive nature of the work that the beneficiary will perform within the client's business operations on a day-to-day basis. Moreover, as discussed above there is conflicting evidence substantiating the petitioner's assertions.

Here, we incorporate our earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupational category of "Computer Systems Analysts." The petitioner designated the position as a Level I position (the lowest of four assignable wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation."¹⁹ Again, without further evidence, it is not credible that the petitioner's

¹⁹ For additional information regarding wage levels as defined by DOL, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a substantially higher prevailing wage. As previously discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

Upon review of the record, the evidence of record does not establish that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. Therefore, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

IV. CONCLUSION

An application or petition that fails to comply with the technical requirements of the law may be denied by this office 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 this office abused its 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.