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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: **SEP 19 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office on appeal. 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 4-employee "Computer Systems and Software Analysis and Consulting Services" company established in [REDACTED]. In order to employ the beneficiary full-time 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 each of two separate and independent grounds, namely: (1) that the evidence of record failed to establish that the proffered position qualifies for classification as a specialty occupation; and (2) that the evidence of record failed to demonstrate that the petitioner has sufficient specialty occupation work for the requested period of intended employment.

The record of proceeding before this office contains the following: (1) the Form I-129 and supporting documentation; (2) the director's requests for additional evidence (RFEs), issued on June 6, 2013 and October 4, 2013; (3) the petitioner's responses to the RFEs; (4) the director's letter denying the petition; and (5) the Notice of Appeal or Motion (Form I-290B), a brief, and supporting documentation.

## I. STANDARD OF REVIEW

As a preliminary matter and in light of counsel's references to the requirement that U.S. Citizenship and Immigration Services (USCIS) apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate 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). 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 appellate review 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*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determinations in this matter were correct. 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 petitioner has not established that its claims are "more likely than not" or "probably" true. 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 the petitioner's claims are "more likely than not" or "probably" true.

## II. FACTUAL AND PROCEDURAL HISTORY

As noted above, the petitioner stated on the Form I-129 that it has been doing business as a computer systems and software analysis and consulting services company since 2011, that it currently employs 4 individuals, and that it has a gross annual income of \$533,800. The net income was not provided by the petitioner.

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

The petitioner's April 1, 2013 letter of support, which was filed with the Form I-129, described the proffered position as follows



**Job Description**

As a Computer Systems Analyst with [the petitioning company], [the beneficiary] will analyze, 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 .NET, ASP, MySQL, Java Script, HTML, and SQL Server/Management Studio, among others.

The petitioner further stated that "this is not an itinerary H-1B in that [the beneficiary] will be assigned to work at our offices at [REDACTED] [The petitioner] is the actual employer in that we retain the authority to pay, hire, fire, and supervise [the beneficiary] and control his work product."

The director found the initial evidence insufficient to establish eligibility for the benefit sought and issued an RFE on June 6, 2013. The petitioner was asked to submit probative evidence to establish that the petitioner had sufficient specialty occupation work that was immediately available upon the beneficiary's entry into the United States through the entire required H-1B validity period. The director outlined some of the types of specific evidence that could be submitted.

In response to the RFE, the petitioner stated the following regarding the availability of specialty occupation work for the beneficiary:

**Sufficient Work for Beneficiary**

Through our partnerships with local travel service companies, avia4us.com development is underway. Initially, the website will use the [REDACTED] booking engine, although we also start receiving direct orders, and eventually plan to move out of the [REDACTED] booking and start using [REDACTED] system directly. This transition is planned for late 2013.

We believe that the full development of our [REDACTED] 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. Then we will distinguish ourselves as specializing in adventure travel.

\* \* \*

Currently, 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 Analysts.



In addition, in response to the RFE the petitioner presented the following enhanced description of the position and its constituent duties:

While employed as Computer Systems Analyst, [the beneficiary] will be working on system development, including primarily our [redacted] to work to integrate this system with web applications, and their related databases. This will require [the beneficiary] to utilize his expertise in SQL relational database management and development, methodologies such as OOD (Object Oriented Design), OOP (Object Oriented Programming) and Architectural Design Patterns. Further, [the beneficiary] will rely on his expertise with HTML, CSS, ASP.NET, C#, MS SQL, and JavaScript. At all times he will work as a systems analyst from our office and under my direction as our projects dictate. The following chart describes the specific job duties, the percentage of time to be spent on each duty, level of responsibility and the hours per week of work he will be required to satisfy in this capacity:

\* \* \*

Analyze, design and implement Web-based applications: develop [redacted] 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

Execution  
14 hours per week  
35% of time

Extracting and defining user requirements: perform complete testing of Web applications unit and system, and conduct all user acceptance testing and report results

Execution  
6 hours per week  
15% of time

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

Execution  
13 hours per week  
33% of time

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  
5 hours per week  
12% of time

Training Project Members: introducing newest technologies and sharing best practices

Technical  
2 hours per week  
5% of time

The petitioner further stated that "it is standard in our industry that Computer Systems Analysts handling the level of complexity described above have at least a Bachelor's degree in Computer Science or a related field."

The director reviewed the petitioner's RFE response, but found it insufficient to establish eligibility for the benefit sought. The director issued a second RFE on October 4, 2013 requesting additional information about the petitioner's business and the proffered position.

The director reviewed the documentation submitted and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on December 28, 2013.

The petitioner thereafter filed a timely appeal, which is the matter now before us for a decision.

### III. THE SPECULATIVE NATURE OF THE WORK

Based upon a complete review of the record of proceeding, we find that the evidence fails to establish 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. For this reason, the petition must be denied.

On the Form I-129, the petitioner requested H-1B approval for the beneficiary for the period of October 1, 2013 to October 1, 2016. The petitioner stated that the beneficiary would be focusing his efforts on the avia4us project, a project that will require "over 11,000 hours of work to reach its full operating capacity."

In support, the petitioner submitted a document entitled "Specific Work Duties," outlining the task descriptions and the number of hours estimated (11650 hours) for the referenced project. In addition, the petitioner submitted a document entitled "Architectural Design and API Specifications for Travel reservations engine." Further, the petitioner submitted a document entitled "International Travel Agency Business Plan Executive Summary." Finally, the petitioner submitted a "mock-up of the [REDACTED]"

The petitioner went on to state that while the beneficiary will be focused on the [REDACTED] project, the petitioner also currently has numerous ongoing service agreements with companies and "these projects provide our analysts with ample work."

The petitioner did not provide any detailed evidence of the job duties the beneficiary specifically would perform in relation to the avia4us.com project. In other words, while the petitioner asserts that there are over 11,000 hours of work to reach the project's operating capacity, it is unclear how many of those hours would be assigned to the beneficiary. Nor has it been established that the duties referenced in the document pertain to specialty occupation work.

In addition, the documentation provided does not establish that, at the time of the instant H-1B filing, there was sufficient specialty occupation work to be done by the beneficiary were the H-1B approved. While the petitioner references "over 11,000 hours of work," we note that the business plan provided, entitled "International Travel Agency Business Plan Executive Summary" references "2011-2012" and "2012-2014" but at no time does it 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.

Nor does the business plan submitted by the petitioner establish the need for a computer systems analyst. As noted in the paragraph entitled "Organizational Structure," [REDACTED] will begin operations with 2 part-time and 2 full-time positions. The positions are as follows: General Manager, Accountant [REDACTED] and "Marketing and Advertising Director, President and Technical Director: [REDACTED] . . . In addition, the company will hire 2 full-time experienced developers from abroad. . . . The personnel plan depicts [REDACTED] anticipated head count for the startup year. [REDACTED] does not anticipate the need to significantly increase personnel in the first 2-3 years."<sup>1</sup>

Furthermore, with respect to the contracts submitted on appeal between the petitioner and other companies, including [REDACTED]

[REDACTED] to establish the existence of available work for the beneficiary, we find that these contracts are insufficient to corroborate the availability of work for the beneficiary for the requested period of employment. These contracts and the accompanying work orders do not identify the beneficiary and notably fail to specify what the beneficiary would do and where the beneficiary would work

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<sup>1</sup> This document also notes that the "[c]ompany is expecting to have a stable work-load for the 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." However, this information appears to be inconsistent with the petitioner's claim in the same document that the avia4us.com project does not anticipate the need to significantly increase personnel in the first 2-3 years. 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).



pursuant to such contracts. We thus find that the petitioner has failed to establish that the petition was filed on behalf of the beneficiary for non-speculative work, existing at the time of the petition filing, for the entire period requested.

The record of proceeding in this matter provides an inadequate factual basis to determine that, at the time of the petition's filing, the petitioner had secured for the beneficiary definite, non-speculative work conforming to the petition's description of the proffered position.

USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248.<sup>2</sup> 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.

#### IV. SPECIALTY OCCUPATION

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<sup>2</sup> 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. . ."

We will now address the director's determination that the proffered position is not a specialty occupation. Based upon a complete review of the record, the evidence fails to establish that the position as described constitutes a specialty occupation. For this additional reason, the appeal will be dismissed and the petition will be denied.

A. Law and Interpretation

To meet the petitioner's burden of proof with regard to the proffered position's classification as an H-1B 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.



B. Preliminary Findings Regarding the Position and its Duties, as Described in the Record of Proceeding

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. 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. The petitioner has not done so here.

Based on the evidence that is provided, 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. For example the petitioner provides the following duty description:

Analyze, design and implement Web-based applications: develop [redacted] 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.

However, 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.

The petitioner also indicates the beneficiary will:

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

The petitioner, however, does not explain or clarify how this generally described duty corresponds to the occupation of a computer systems analyst position as attested on the LCA. Further, the petitioner does not detail the actual tasks and responsibilities associated with this function so that we may ascertain that it corresponds to the petitioner's business and the project to which the beneficiary purportedly will be assigned.

In this matter, the petitioner has provided a broad range of duties for the proffered position. The lack of clarity regarding the beneficiary's actual tasks and job responsibilities fail to support the petitioner's claim that the proffered position is a specialty occupation. In addition, upon review of the nature of the petitioner's business and the specific project to which it claims the beneficiary would be assigned, the petitioner has failed to submit evidence that it employs sufficient technical team members to support the beneficiary in the actual launch and development of the petitioner's new web-based travel systems and relieve the beneficiary from primarily performing non-specialty occupation duties. 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 *supra*. The record is insufficient to establish that the beneficiary will perform tasks which comprise primarily specialty occupation duties.

Based upon a complete review of the record of proceeding, we find that the petitioner has failed to establish (1) the substantive nature and scope of the beneficiary's employment; (2) the actual work that the beneficiary would perform; (3) the complexity, uniqueness and/or specialization of the tasks; and/or (4) the correlation between that work and a need for a particular educational level of highly specialized knowledge in a specific specialty. Consequently, this precludes a determination that the petitioner's proffered position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions.

In this regard, the lack of evidence substantiating the duties and responsibilities of the position undermine the petitioner's claim that the beneficiary would perform in the proffered position of computer systems analyst. The petitioner fails to provide a sufficient factual basis to convey the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire three-year period requested. The record does not persuasively support a claim that the work the petitioner generates will require the theoretical and practical application of any



particular educational level of highly specialized knowledge in a specific performance specialty directly related to the demands of the proffered position.

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 appeal will be dismissed and the petition denied for this reason.

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.

#### C. Application of the Criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)

Having made the above preliminary findings, we turn now to the 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 discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which is satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition.

We recognize the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.<sup>3</sup> As noted above, the petitioner submitted an LCA in support of this position certified for a job offer falling within the "Computer System Analysts" occupational category.

The *Handbook's* discussion of the duties and educational requirements of the Computer System Analysts occupational group states, in pertinent part, the following:

Computer System Analysts typically do the following:

- Consult with managers to determine the role of the IT system in an organization
- Research emerging technologies to decide if installing them can increase the organization's efficiency and effectiveness

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<sup>3</sup> The *Handbook*, which is available in printed form, may also be accessed online at <http://www.bls.gov/ooh>. The references to the *Handbook* are from the 2014-15 edition available online.



- 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 systems end users and write instruction manuals<sup>4</sup>

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

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

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

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

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Computer System Analysts," <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-2> (last visited September 19, 2014).

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<sup>4</sup> 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.

If the proffered position is in fact a computer systems analyst position, 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.

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

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

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

\* \* \*

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

*Id.* at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited September 19, 2014).

These statements from the *Handbook* do not indicate that at least a bachelor's degree in a specific specialty or its equivalent is normally required for entry into this occupational category. First, the *Handbook's* statement that "most" computer systems analysts have a bachelor's degree in a computer-related field is not the same as stating that such a degree is a minimum entry requirement. Second, even if most computer systems analyst positions required such a degree, the first definition of "most" in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of systems analyst positions require at least a bachelor's degree or a closely related field, it could be said that "most" system analyst positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain 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.

Additionally, while the *Handbook* indicates that a bachelor's degree in a computer or information science field is common, the *Handbook* does not report that such a degree is normally a minimum requirement for entry. In fact, the *Handbook* continues by stating that some firms hire analysts with



business or liberal arts degrees who know how to write computer programs. According to the *Handbook*, many systems analysts have liberal arts degrees and have gained programming or technical expertise elsewhere. The *Handbook* reports that many analysts have technical degrees but does not specify a degree level (e.g., associate's degree, baccalaureate) for these technical degrees.

When reviewing the *Handbook*, it also must be noted that the petitioner designated the proffered position as a Level I (entry level) position on the LCA.<sup>5</sup> The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance."<sup>6</sup> A Level I wage rate is described as follows:

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

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

Thus, in designating the proffered position at a Level I wage, the petitioner has indicated that the proffered position is a comparatively low, entry-level position relative to others within the occupation. 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

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<sup>5</sup> Wage levels should be determined only after selecting the most relevant O\*NET code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

<sup>6</sup> Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.



monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results. Based upon the petitioner's designation of the proffered position as a Level I (entry) position, it does not appear that the beneficiary will be expected to serve in a senior or leadership role. As noted above, according to DOL guidance, a statement that the job offer is for a research fellow, worker in training or an internship is indicative that a Level I wage should be considered.

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.

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 actual duties of the specific employment supplied by the petitioner must be addressed 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.

Upon review, the record of proceeding does not contain persuasive evidence from any other relevant authoritative source establishing that the proffered position's inclusion within the computer system analyst 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."

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 at 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.

In the Form I-129, the petitioner stated that it is a computer systems and software analysis and consulting services company established in 2011, and has four employees. The petitioner stated its gross annual income as \$533,800. The petitioner did not report its net annual income. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 5415. According to the U.S. Census Bureau, NAICS is used to classify business establishments according to type of economic activity and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited September 19, 2014). The NAICS code specified by the petitioner is designated for "Custom Systems Design and Related Services," and is defined by the U.S. Department of Commerce, Census Bureau as follows:

This industry comprises establishments primarily engaged in providing expertise in the field of information technologies through one or more of the following activities: (1) writing, modifying, testing, and supporting software to meet the needs of a particular customer; (2) planning and designing computer systems that integrate computer hardware, software, and communication technologies; (3) on-site management and operation of clients' computer systems and/or data processing facilities; and (4) other professional and technical computer-related advice and services.

U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 541511 – Custom Computer Programming Services, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited September 19, 2014).

On appeal counsel submitted two letters in support of its claim that a bachelor's or higher degree in a specific specialty, or its equivalent, is common to its industry for similar organizations with parallel positions: 1) a January 22, 2014 letter from [REDACTED] HR Generalist of [REDACTED] in [REDACTED], Texas; and 2) a January 22, 2014 letter from [REDACTED] a former employee (from 2006 to 2008) of [REDACTED] Massachusetts. After providing their names, their current or



previous roles in the referenced companies, how many individuals are currently employed by the entity, and a general description of the services performed by the company, both stated the following<sup>7</sup>:

[W]e frequently hire[d] employees for this position [Computer Systems Analysts] as part of our business. Employees in the position of Computer Systems Analysts perform complex work, including the following:

- Configure hardware and software to the specifications of specific clients;
- Design and implement web-based applications;
- Maintain and improve existing applications and internal systems;
- Extract and refine user requirements;
- Determine proper role of IT systems in unique client situations;
- Keep abreast of new applications and technologies and implement where appropriate for company;
- Perform appropriate tests to ensure functionality of all systems;
- Design and run databases, templates and interfaces for clients.

The work performed by individuals in this position requires an advanced understanding of the interaction between databases, web applications and other system infrastructure. Because of the specialized and complex nature of this position, we require a minimum of a bachelor's degree in computer science or a related field or equivalent experience of our Computer Systems Analysts.

Upon review, we first find that the petitioner has failed to establish that it and the above-referenced companies share the same general characteristics. Without such evidence, the information is outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner to claim that the organizations are similar and in the same industry without providing a legitimate basis for such an assertion. Again, 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 *supra*.

Further, it is unclear whether the duties and responsibilities of the positions referenced in the letter are the same or parallel to the proffered position. The letters provide insufficient information

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<sup>7</sup> The use of identical language and phrasing in 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).

regarding the specific duties of the jobs to ascertain whether the positions are parallel to the proffered position. Notably, the petitioner did not supplement the record of proceeding to establish that the positions are parallel to the proffered position and located in organizations that are similar to the petitioner.

Finally, there is no documentary evidence in the record of proceeding that establishes that the practices that the above-referenced individuals attribute to the two companies referenced are representative of recruiting and hiring practices common to the industry with regard to positions parallel to the one proffered here that are found among organizations similar to this petitioner. Accordingly, we conclude that the above-referenced letters do not merit any probative weight towards satisfying the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor do the job-vacancy announcements submitted by counsel satisfy this alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). That is, neither the job-vacancy announcements themselves nor any other evidence within the record of proceeding establish that the advertisements submitted pertain to positions that are parallel to the proffered position, as required for evidence to merit consideration under the first alternative prong of this criterion. In this regard, we make several specific findings.

First, we note that under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the petitioner must establish that "the degree requirement is common to *the industry in parallel positions* among *similar organizations* (emphasis added)." As we noted above, for the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. The petitioner, however, did not submit evidence that the organizations advertising were similar to the petitioner. Upon review, 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. Notably, 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. Again, the language of this prong limits the range of relevant evidence to the petition-pertinent industry's practices (stating "[t]he degree requirement" as one that would be "common to the industry" as well as "in parallel positions among similar organizations.")

Furthermore while some of the advertisements bear the title "Computer Systems Analyst," the occupational group identified in the petitioner's certified LCA, it is the nature of the duties comprising the advertised positions that would determine whether those positions are in fact parallel to the proffered position. However, we find that the duty descriptions of the advertised positions are insufficient to establish that the advertised positions are substantially similar to the proffered position's duties as stated in the petitioner's letters. While we are unable to determine the duties of the advertised positions, they appear to be more senior than the proffered position. That is, several of the advertisements require extensive experience in addition to a degree.<sup>8</sup> As previously noted,

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<sup>8</sup> By way of example, the [REDACTED] advertisement for a "Computer Systems Analysts" states as one of its requirements "five years of progressive experience as a Programmer Analyst." The [REDACTED] advertisement for a "Computer Systems Analyst" states "Years of Experience: 5+ to 7



the petitioner has characterized the proffered position as a Level I (entry-level) position on the LCA. DOL guidance states that Level I positions are appropriate for a worker-in-training or an individual performing an internship.<sup>9</sup> Thus, the job-vacancy advertisements do not establish that the advertised positions are "parallel" to the proffered position.

The job advertisements do not establish that similar organizations to the petitioner routinely employ individuals with degrees in a specific specialty, in parallel positions in the petitioner's industry. Further, it must be noted that even if all of the job postings indicated that a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.<sup>10</sup>

As the submitted vacancy-announcements are not probative evidence towards satisfying this criterion, further analysis of their content is not necessary. 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

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Years." The [redacted] advertisement for a "Systems Analyst" states "Years of Experience 5+ to 7 years." The [redacted] advertisement for a "Systems Analyst" states as one of its requirements "5+ years of experience developing business solutions using Microsoft tools. Experience with Microsoft Visual Studio (2005, 2010, 2012) MS SQL Server (2005, 2008RS, 2012), C# and Visual Basic. Experience with Microsoft Windows Server operating systems." The experience that these job advertisements specify as hiring requirements suggests that they involve the application of greater occupational knowledge than the proffered position, a Level I position.

<sup>9</sup> For additional information regarding wage levels, see DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at [http://www.foreignlaborcert.doleta.gov/pdf/Policy\\_Nonag\\_Progs.pdf](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

<sup>10</sup> The petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these few job postings with regard to the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position (for organizations similar to the petitioner) required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

specialty, or its equivalent, is common (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) located in organizations that are similar to the petitioner.

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

The statements of counsel and the petitioner with regard to the claimed complex and unique nature of the proffered position are acknowledged. However, a review of the record of proceeding indicates that the petitioner has failed to credibly demonstrate the duties the beneficiary will be responsible for or 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. Furthermore, the petitioner has not established why a few related courses or industry experience alone is insufficient preparation for the proffered position. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it may believe are so complex and unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position. 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 sufficiently detailed information 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.<sup>11</sup>

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 qualifies as a specialty occupation. In the instant case, the petitioner does not establish which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from

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<sup>11</sup> This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. More specifically, the LCA indicates a wage level at a Level I (entry level) wage. As previously mentioned, the wage-level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

Upon review of DOL's instructive comments, we observe that the petitioner did not designate the proffered position as involving even "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II) when compared to other positions within the same occupation. See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).



those of similar but non-degreed or non-specialty degreed employment. The petitioner fails to demonstrate 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. Consequently, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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.<sup>12</sup>

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 degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation"). Here, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

To satisfy this criterion, the record must establish that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty or its equivalent as the minimum for entry into the occupation as required by section 214(i)(1) of the Act. According to the Court in *Defensor*, "To interpret the regulations any other way would lead to an absurd result." *Id.* at 388. If USCIS were constrained to recognize a

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<sup>12</sup> 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.

specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position – and without consideration of how a beneficiary is to be specifically employed – then any alien with a bachelor's degree in 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.*

With respect to this criterion, the petitioner submitted Forms I-797, Approval Notice, for employees that it asserts are employed as Computer Systems Analysts. The petitioner did not, however, submit copies of the prior H-1B petitions and the respective supporting documents with the exception of a degree evaluation for one of the employees.<sup>13</sup> Moreover, the petitioner does not provide documentation to demonstrate the day-to-day responsibilities of the position that it claims is the same as the proffered position. The petitioner did not provide any information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received for the approved petitions. Accordingly, it is unclear whether the duties and responsibilities of the position would be the same or similar to the proffered position. As the record of proceeding does not contain sufficient evidence of the prior petitions to determine whether they are the same position, including job description, there are no underlying facts to be analyzed and, therefore, no substantive reasons to explain why deference to the approval of the prior H-1B petitions is warranted.

The record also includes evidence of the petitioner's "potential" employees for the position of computer systems analyst, including an H-1B supporting letter and diploma evaluations for these candidates. The petitioner fails to provide documentation to demonstrate that these candidates were employed by the petitioner at the time the petition was filed, such as copies of pay records or Form W-2, Wage and Tax Statements. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future

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<sup>13</sup> Nevertheless, even if this evidence had been submitted and even if it had been determined that the facts in those cases were analogous to those in this proceeding, those decisions are not binding on USCIS. While 8 C.F.R. § 103.3(c) provides that this office's precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory 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. 593, 597 (Comm'r 1988). 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, this office's 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 petitions, 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).



date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Furthermore, the position descriptions provided for the potential candidates are vague, and do not provide enough information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, it is unclear whether the duties and responsibilities of any of these candidates would be the same or similar to the proffered position. Finally, without the inclusion of the LCA the petitioner cannot substantiate that the positions were for similar wage levels and salaries as the proffered position.

We reviewed the record of proceeding but find that the petitioner has not provided sufficient corroborating probative evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Moreover, we reiterate that the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty or its equivalent as the minimum for entry into the occupation as required by section 214(i)(1) of the Act. The petitioner has not provided this evidence. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

As reflected in this decision's earlier discussion, the proposed duties as described in the record of proceeding contain no indication of specialization and complexity such that the knowledge they would require is usually associated with any particular level of education in a specific specialty or its equivalent. As generically and generally as they were described, the duties of the proposed position are not presented with sufficient detail and explanation to establish the substantive nature of the duties as they would be performed in the specific context of the petitioner's particular business operations. Also as a result of the generalized and relatively abstract level at which the duties are described, the record of proceeding does not establish their nature as so specialized and complex relative to other positions within the same occupation as to require knowledge usually associated with at least a bachelor's degree in a specific specialty, or the equivalent. We incorporate into the analysis of this criterion this decision's earlier comments and findings with regard to the generalized level at which the duties are described in the record. The evidence of record does not develop the duties in sufficient detail to establish their nature as so specialized and complex that their performance would require knowledge usually associated with the attainment of at least a bachelor's degree in a specific specialty.

Additionally, 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.

For 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.

## V. CONCLUSION AND ORDER

For the reasons discussed above, we conclude that the evidence of record does not establish that (1) the proffered position qualifies for classification as a specialty occupation; and (2) the petitioner has sufficient work for the requested period of intended employment.

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 the AAO conducts 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.