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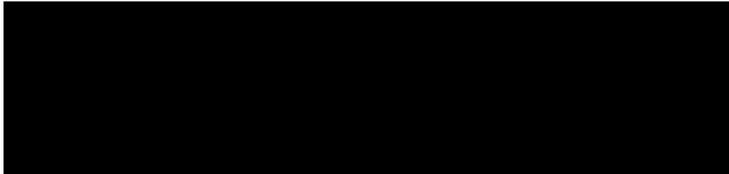
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

D2



FILE: WAC 08 147 52325 Office: CALIFORNIA SERVICE CENTER Date: APR 06 2010

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a corporation that provides Information Technology (IT) products and services. To employ the beneficiary in a position that it designates as Computer Specialist/Programmer Analyst, the petitioner endeavors 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 based upon her determination that the petitioner failed to establish a reasonable basis for U.S. Citizenship and Immigration Services (USCIS) to “expect that the petitioner will comply with the terms and conditions as shown on the present Form I-129.” The director cited two major factors leading her to this determination. One was the director’s noting that USCIS records indicated that the petitioner has an “unusual pattern of H-1B petition filings” based upon its filing “an extraordinarily high number of petitions in relation to the number of employees that it claims on [the present] petition.” The other factor was the director’s determination that State quarterly wage reports for the year 2007 and related Forms W-2 submitted into the record indicated that the petitioner had paid a number of its H-1B beneficiaries less than it was obligated to pay them according to its attestations in the related Forms I-129 and Labor Condition Applications (LCAs).

The AAO finds that the documentary evidence submitted on appeal is sufficient to overcome the director’s concerns over the difference between the number of the petitioner’s H-1B filings and the lesser number of current workers reported on the present Form I-129. Accordingly, the pattern of the petitioner’s H-1B filings is withdrawn as a basis for denying the petition.

However, as will now be discussed, the AAO also finds that the evidence of record does not establish that the petitioner would comply with the terms and conditions of employment contained in the Form I-129 and the related LCA. Accordingly, the AAO will not disturb the director’s decision to deny the petition on this ground.

The director’s decision includes a table with the following columns for each of 14 H-1B beneficiaries working for the petitioner:¹ (1) the beneficiary’s last and first name; (2) the related Form I-129 receipt number; (3) as “Stated Annual Wages,” the compensation listed for the beneficiary on the Form I-129; (4) the wages reported for the beneficiary in the State quarterly wage reports filed in each quarter of 2007; and (5) under the heading “Total 2007,” two figures, namely, (a) the total wages reported on the quarterly wage reports for the beneficiary for 2007, followed by

¹ The AAO notes that the director mistakenly assigned two rows of identical information to the beneficiary whose last name begins with “A” and whose first name begins with “C”. So, the table’s 15 rows actually address 14 beneficiaries.

(b) the total wages reported on the beneficiary's Form W-2 for the same period. Referring to the information contained in the table, the director's decision states, in part:

From this it appears that the petitioner's statements with regards to the proffered wage, and[/]or hours worked, were not true and correct for each of the aforementioned beneficiaries. It shall be further noted that USCIS has taken notice [of] the fact that the petitioner has stated on the LCA that they are not H-1B dependant nor are they a willful violator; the petitioner[']s claim contradicts the evidence.²

Among the documents submitted on appeal to address the issue of the hours worked by and the wages paid to the beneficiaries named in the director's table are copies of: letters from a number of the beneficiaries requesting or confirming unpaid leaves during 2007; additional Forms W-2; passport entry and exit stamps; payroll stubs indicating payments to several beneficiaries in January or February 2008 for work performed in December 2007; and additional quarterly wage reports from North Carolina and California.

On appeal, the petitioner submits a table as a summary of the record's wage and hours information as supplemented by the relevant documentary evidence submitted on appeal. This table consists of 14 columns for each of the beneficiaries identified in the director's table.³ The most pertinent columns for this appeal are those identifying (1) the date H-1B status began; (2) the last day of H-1B employment; (3) the annual wages stated in the related petition; (4) the actual wages paid in each quarter of 2007; (5) the total wages paid the beneficiary for all four quarters of 2007; (6) the total wages reflected on the related Forms W-2; and (7) the periods of unpaid vacation or leave extended to the beneficiary during 2007. In a letter dated November 1, 2008, the petitioner addresses the wage and hours evidence as expanded upon by the documents submitted on appeal, and it contends that the totality of the evidence now in the record establishes that the petitioner has met and even exceeded its wage obligations to all of the beneficiaries cited by the director.

For the reasons discussed below, the AAO finds that the evidence submitted on appeal is not sufficient to favorably resolve the issue of the petitioner's intention to comply with its H-1B wage obligations. Accordingly, the decision of the director will not be disturbed. The appeal will be dismissed, and the petition will be denied.

Based upon its review of the entire record of proceedings as expanded upon by the documents submitted on appeal, the AAO finds that the State wage reports submitted into the record indicate

² The petitioner's failure to address the director's comments about the inaccuracy of the petitioner's statement that it is not H-1B dependent bears negatively on the credibility of the petitioner's attestations about complying with its H-1B wage obligations.

³ The table mistakenly assigns the number 8 to two different beneficiaries, namely, the last one listed on the table's first page, and the first beneficiary listed on the second page. Thus, the table assigns only 13 numbers to the 14 beneficiaries actually listed.

that the petitioner has not complied with its wage obligations with regard to at least four H-1B beneficiaries.

The primary rules governing an H-1B petitioner's wage obligations appear in the Department of Labor (DOL) regulations at 20 C.F.R. § 655.731 (What is the first LCA requirement, regarding wages?). Based upon the excerpts below, the AAO finds that this regulation generally requires that the H-1B employer fully pay the LCA-specified H-1B annual salary (1) in prorated installments to be disbursed no less than once a month, (2) in 26 bi-weekly pay periods, if the employer pays bi-weekly, and (3) within the work year to which the salary applies.

The pertinent part of 20 C.F.R. § 655.731(c) reads:

(c) *Satisfaction of required wage obligation.* (1) The required wage must be paid to the employee, cash in hand, free and clear, when due. . . .

(2) "Cash wages paid," for purposes of satisfying the H-1B required wage, shall consist only of those payments that meet all the following criteria:

(i) Payments shown in the employer's payroll records as earnings for the employee, and disbursed to the employee, cash in hand, free and clear, when due, except for deductions authorized by paragraph (c)(9) of this section;

(ii) Payments reported to the Internal Revenue Service (IRS) as the employee's earnings, with appropriate withholding for the employee's tax paid to the IRS (in accordance with the Internal Revenue Code of 1986, 26 U.S.C. 1, et seq.);

(iii) Payments of the tax reported and paid to the IRS as required by the Federal Insurance Contributions Act, 26 U.S.C. 3101, et seq. (FICA). The employer must be able to document that the payments have been so reported to the IRS and that both the employer's and employee's taxes have been paid except that when the H-1B nonimmigrant is a citizen of a foreign country with which the President of the United States has entered into an agreement as authorized by section 233 of the Social Security Act, 42 U.S.C. 433 (i.e., an agreement establishing a totalization arrangement between the social security system of the United States and that of the foreign country), the employer's documentation shall show that all appropriate reports have been filed and taxes have been paid in the employee's home country.

(iv) Payments reported, and so documented by the employer, as the employee's earnings, with appropriate employer and employee taxes paid to all other appropriate Federal, State, and local governments in accordance with any other applicable law.

(v) Future bonuses and similar compensation (i.e., unpaid but to-be-paid) may be credited toward satisfaction of the required wage obligation if their payment is assured (i.e., they are not conditional or contingent on some event such as the employer's annual profits). Once the bonuses or similar compensation are paid to the employee, they must meet the requirements of paragraphs (c)(2)(i) through (iv) of this section (i.e., recorded and reported as "earnings" with appropriate taxes and FICA contributions withheld and paid).

* * *

(4) For salaried employees, wages will be due in prorated installments (e.g., annual salary divided into 26 bi-weekly pay periods, where employer pays bi-weekly) paid no less often than monthly except that, in the event that the employer intends to use some other form of nondiscretionary payment to supplement the employee's regular/pro-rata pay in order to meet the required wage obligation (e.g., a quarterly production bonus), the employer's documentation of wage payments (including such supplemental payments) must show the employer's commitment to make such payment and the method of determining the amount thereof, and must show unequivocally that the required wage obligation was met for prior pay periods and, upon payment and distribution of such other payments that are pending, will be met for each current or future pay period. . . .

(5) For hourly-wage employees, the required wages will be due for all hours worked and/or for any nonproductive time (as specified in paragraph (c)(7) of this section) at the end of the employee's ordinary pay period (e.g., weekly) but in no event less frequently than monthly.

Beneficiary number 1 in the petitioner's table has stated annual wages of \$57,762; began working in H-1B status on February 12, 2007; has no leave reported for the first quarter of 2007; and was paid only \$765 during the First Quarter (January through March) of that year. The amount paid conflicts with the amount owed the beneficiary as a prorated part of his or her salary at quarterly and monthly rates of pay of \$14,440.50 and \$4,813.50, respectively.

The stated annual wages for the table's beneficiary number 2 is \$45,000, which equates to \$11,250.00 per quarter, or \$3,750 per month. This person, who began working in H-1B status on January 2, 2007, was on leave for one month (March) in the First Quarter of 2007, but received only \$7,001.00, as opposed to \$7,500.00, which is the pro rata pay for two-thirds of a quarter. Further, in the Second Quarter (April through June) the beneficiary worked throughout June and all but the first four days of May. However, in this quarter she received only \$3,583.00, which is less than a month's wages.

Another aspect of the appeal's discussion of this beneficiary's wages merits special comment, as it exhibits at least a misunderstanding of an employer's wage obligations to its salaried H-1B beneficiaries. The petitioner asserts that the beneficiary was paid in excess of his 2007 salary because, as indicated by two payroll stubs submitted on appeal, "in keeping with [the] Petitioner's normal payroll cycle, [the] Beneficiary was paid [\$]4,468.80 (\$2,352[.00] + \$2,116.80) in wages for December 2007 in January/February 2008 for two payroll cycles in December 2007." The petitioner further states:

As such, [the] beneficiary was paid a total of \$48,888[.00] for 2007 even though the wages paid for December 2007 will be reflected in [the] beneficiary's Form W-2 in 2008 – something that is extremely common in the industry since very few persons[,] relatively speaking, are actually paid on 31 December 2008 [sic] for work rendered during that month. Beneficiary was then actually paid far higher than the amount she was entitled to per the prevailing wage. Therefore, [the] petitioner submits, it must be held that [the] Petitioner did in fact meet its obligation to pay the prevailing wage with regard to [the] beneficiary.

The AAO finds that the petitioner's assertion that payment of a portion of a beneficiary's annual salary can be deferred to another year conflicts with the regulations at 20 C.F.R. § 655.731. As reflected in the excerpts below, the AAO finds this regulation generally requires that the H-1B employer fully pay the LCA-specified H-1B annual salary within the work year to which the salary applies. Additionally, the petitioner does not cite any statute, regulation, or precedential decision supporting its assertion that its payments to the beneficiary in 2008 for work performed in 2007, and which the petitioner will report on the beneficiary's Form W-2 for 2008, should be included in the beneficiary's 2007 wages for purposes of evaluating the petitioner's compliance with its wage obligations for that year. The burden to establish eligibility in this matter remains solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The annual wage for beneficiary number 8 is \$60,700, which equates to \$15,126.75 per quarter, or \$5,042.25 per month. According to the petitioner's table, in 2007 this beneficiary worked an entire quarter (from October 1 through the end of the year), with no leave, and was paid a total of \$12,399 in 2007. This amount is approximately \$2,727.75 less than was due the beneficiary in 2007. The AAO notes the pay-stub copies submitted on appeal that reflect payment of an additional \$5,040.00 to the beneficiary by checks issued in January and February 2008 for work performed in December 2007.⁴ However, for the reasons already outlined in the discussion regarding wages paid to beneficiary number 2, the AAO accords no weight to the petitioner's assertion, which conflicts with the relevant DOL regulations and is made without reference to any supporting statute, regulation, or precedential decision, that its payments in 2008 for work performed in 2007 should be treated as 2007 wages for purposes of evaluating the petitioner's compliance with its wage obligations for that year.

Beneficiary number 13 began H-1B work for the petitioner on October 16, 2007 and worked the remaining weeks of October and all of November and December of 2007, at an annual salary of \$54,766.00, which equates to \$13,691.50 per quarter, or \$4,563.83 per month. The \$9,388.00 total

⁴ The payroll stubs indicate that a check for \$2,520 was issued on January 17, 2008 (for the period "12/01/07 to 12/15/07") and on February 1, 2008 (for the period "12/16/07" to "12/31/07") for a total of \$5,040.00.

wages that this person received in 2007 is less than the petitioner was obligated to pay the beneficiary. On appeal, the petitioner acknowledges that its pay documents for 2007 appear to indicate that the beneficiary was paid less than the obligated wage, but, as with beneficiaries 2 and 8, the petitioner asserts, without citing any supporting authority, that it satisfied its obligation by paying the beneficiary "for the last three weeks of 2007 only in January 2008 in the normal cycle pertaining to this Beneficiary in the amount of \$2,292." For the reasons already discussed, the AAO again accords no weight to the petitioner's repetition of the contention that payments in 2008 should be credited to a beneficiary's 2007 salary for purposes of determining compliance with H-1B wage obligations.

The aspects of the record discussed above indicate that the petitioner has not recognized its obligation to pay its salaried H-1B beneficiaries the wage rate specified on the LCA on a regular basis and without reduction, suspension, or delay except in certain limited circumstances that do not appear in this record of proceeding. *See* 20 C.F.R. § 655.731(c) (Satisfaction of required wage obligation). For this reason, the AAO will not disturb the director's decision.

Beyond the decision of the director, the AAO also finds that the petitioner has failed to establish that the proffered position is a specialty occupation. For this reason also, the petition must be denied.

The AAO analyzes this issue according to the statutory and regulatory framework below.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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

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

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a 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, the position must 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, 8 U.S.C. § 1184(i)(1), 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) (hereinafter referred to as *Defensor*). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

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.

Based upon its review of the entire record including the matters submitted on appeal, the AAO concludes that the petitioner failed to establish that the beneficiary would perform specialty occupation services for the period sought in the petition. As will be discussed below, the AAO bases this conclusion on its evaluation of the evidence of record related to the proposed duties and the knowledge required to perform them. The AAO finds this evidence insufficient to satisfy any of the criteria at 8 C.F.R. 214.2(h)(4)(iii)(A), that is, as either (a) a particular position for which the normal minimum requirement for entry would be at least a bachelor's degree, or its equivalent, in a specific specialty (criterion 1); (b) one parallel to those for which organizations in the petitioner's industry that are similar to the petitioner commonly require at least a bachelor's degree, or its equivalent, in a specific specialty (the first alternative prong of criterion 2); (c) a particular position shown to be so complex or unique that it can be performed only by an individual with a degree (the second alternative prong of criterion 2); (d) one for which the employer normally requires at least a bachelor's degree, or its equivalent, in a specific specialty (criterion 3); or (e) one with specific duties so specialized and complex that their performance requires knowledge usually associated with the attainment at least a bachelor's degree in a specific specialty (criterion 4).

The AAO finds that the duties that the petitioner describes for the proffered position generally comport with those of a Programmer Analyst as generally described in the "Computer Systems Analysts" chapter of the 2010-2011 edition of the Department of Labor's *Occupational Outlook Handbook (Handbook)*, which the AAO recognizes as an authoritative source on the duties and educational requirements of the occupations that it addresses.⁵

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which assigns specialty occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

As indicated above, the job duties described in the record of proceeding generally comport with the Programmer Analyst occupational category as discussed in the chapter on Computer Systems Analysts in the 2010-2011 edition of the *Handbook*. However, that chapter's section on Training, Other Qualifications, and Advancements indicates that neither computer analyst positions generally

⁵ For example, paragraph 3 of Exhibit A of the Employment Agreement states:

Duties: Develop full-life-cycle object oriented software, [s]oftware design, [p]rogramming, including analysis; design of [d]atabase applications and application's [sic] specifications; [c]onvert project specifications and statements of problems and procedures to detailed logical flow charts for coding into computer languages and write computer programs to store, locate, and retrieve specific documents[;] software development life cycle including requirement gathering, designing, implementing, documenting, bug fixing and testing of software applications[;] locate and retrieve specific documents, data and information using objects oriented languages, relational data management systems, RDBMS, Oracle, SQL Loader, PL/SQL, Autosys Scheduler, SQL, TOAD [and] ERWIN.

nor the subset of programmer analyst positions normally require at least a bachelor's degree, or the equivalent, in a specific specialty closely related to the position's duties. That section reads:

Training requirements for computer systems analysts vary depending on the job, but many employers prefer applicants who have a bachelor's degree. Relevant work experience also is very important. Advancement opportunities are good for those with the necessary skills and experience.

Education and training. When hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor's degree. For more technically complex jobs, people with graduate degrees are preferred. For jobs in a technical or scientific environment, employers often seek applicants who have at least a bachelor's degree in a technical field, such as computer science, information science, applied mathematics, engineering, or the physical sciences. For jobs in a business environment, employers often seek applicants with at least a bachelor's degree in a business-related field such as management information systems (MIS). Increasingly, employers are seeking individuals who have a master's degree in business administration (MBA) with a concentration in information systems.

Despite the preference for technical degrees, however, people who have degrees in other areas may find employment as systems analysts if they also have technical skills. Courses in computer science or related subjects combined with practical experience can qualify people for some jobs in the occupation.

Employers generally look for people with expertise relevant to the job. For example, systems analysts who wish to work for a bank may need some expertise in finance, and systems analysts who wish to work for a hospital may need some knowledge of health management. Furthermore, business enterprises generally prefer individuals with information technology, business, and accounting skills and frequently assist employees in obtaining these skills.

Technological advances come so rapidly in the computer field that continuous study is necessary to remain competitive. Employers, hardware and software vendors, colleges and universities, and private training institutions offer continuing education to help workers attain the latest skills. Additional training may come from professional development seminars offered by professional computing societies.

Other qualifications. Employers usually look for people who have broad knowledge and experience related to computer systems and technologies, strong problem-solving and analytical skills, and the ability to think logically. In addition, the ability to concentrate and pay close attention to detail is important because computer systems analysts often deal with many tasks simultaneously. Although these workers sometimes work independently, they frequently work in teams on large projects.

Therefore, they must have good interpersonal skills and be able to communicate effectively with computer personnel, users, and other staff who may have no technical background.

Advancement. With experience, systems analysts may be promoted to senior or lead analyst. Those who possess leadership ability and good business skills also can become computer and information systems managers or can advance into executive positions such as chief information officer. Those with work experience and considerable expertise in a particular subject or application may find lucrative opportunities as independent consultants, or they may choose to start their own computer consulting firms.

As evident above, the *Handbook* does not indicate that programmer analyst positions normally require at least a bachelor's degree in a specific specialty. The *Handbook* only indicates that employers often seek or prefer at least a bachelor's degree level of education in a technical field for this type of position; and, more importantly, the evidence of record regarding the particular position proffered here does not demonstrate requirements for the theoretical and practical application of such a level of highly specialized computer-related knowledge. Thus, it is incumbent on the petitioner to provide sufficient evidence to establish not only that the beneficiary would perform the services of a programmer analyst, but that he would do so at a level that requires the theoretical and practical application of at least a bachelor's degree level of knowledge in a computer-related specialty. This the petitioner has failed to do.

The AAO finds that neither the duty descriptions nor any other evidence of record distinguish the proffered position from those computer systems analyst positions which do not require at least a bachelor's degree or the equivalent in a specific specialty closely related to their duties. The record's duty descriptions are generalized and generic and they are not supplemented by any documentation establishing that, as practiced in actual performance in the proffered position, they would require at least a bachelor's degree in a specific specialty. While the record's duty descriptions include many technical acronyms and IT product names, the petitioner provides no documentation that their implementation would require at least a bachelor's degree in an IT or computer-related specialty.

As the evidence of record does not indicate that this petition's particular position is one that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first alternative prong assigns specialty occupation status to a proffered position whose asserted requirement for at least a bachelor's degree in a specific specialty is common to positions in the petitioner's industry 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 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a U.S. bachelor's or higher degree, but such a degree in a specific specialty that is directly related to the specialty occupation claimed in the petition.

As reflected in this decision's earlier comments, the *Handbook* does not indicate that a programmer analyst position as so generally described in this petition would require at least a bachelor's degree in a specific specialty. Thus, the *Handbook* does not support a favorable finding under this criterion. The AAO also notes that the record does not include submissions from a professional association or from individuals or other firms in the petitioner's industry attesting to routine employment and recruiting practices.

As the evidence of record does not establish a bachelor's degree or higher in a specific specialty as an industry-wide requirement for positions substantially similar to the one proffered in this petition, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner also failed to 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 evidence of record does not develop relative complexity or uniqueness as an aspect of the position. The information about the position and the duties comprising it is limited to generalized functional descriptions and is not supplemented by documentation that specific projects to which the beneficiary would be assigned are so complex or unique as to satisfy this criterion.

Next, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), by establishing that the employer normally requires a degree or its equivalent for the position. To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. This petition's record of proceeding does not contain such evidence.⁶

⁶ It is important to note that, to satisfy this criterion, the record must also establish that a petitioner's historical imposition of a degree requirement in its recruiting and hiring is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. This requirement resides in section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), which defines the term "specialty occupation" as requiring both "(A) theoretical and practical application of a body of highly specialized knowledge," and "(B)

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

The record's duty descriptions indicate that, as with the programmer analysis occupational category in general, the duties of the proffered position would be specialized and complex. However, the evidence of record fails to document that the position duties' are so specialized and complex as to require the level of knowledge required by this criterion. Consequently, the AAO can reasonably determine no more than that the duties of the proffered position generally comport with those of the programmer analyst occupation as described in the *Handbook*. The educational requirements for positions in this occupation are so varied, however, that there is no basis for the AAO to find the degree association required by this criterion.

For the reasons discussed above, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For this reason also, the petition will be denied.

Also beyond the decision of the director, the AAO finds that the petition must also be denied for the additional reason that it appears that, at Section F-1 of the LCA, Form 9035E, the petitioner wrongly identified itself as "not H-1B dependent."

As already noted at footnote 2, the petitioner did not address the director's comment that the evidence of record contradicts the petitioner's assertion that it is not H-1B dependent. Further, the AAO finds that the July 21, 2008 list of current employees submitted in response to the RFE, which

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 petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor*, 201 F. 3d at 387-388. The critical element is not the title of the position or 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. To interpret the regulations any other way would lead to absurd results: if USCIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. To satisfy this third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) in the context of the present petition, which involves the beneficiary's performing work on particular projects, the petitioner must establish that performance of those projects requires the theoretical and practical application of at least a bachelor's degree level of knowledge in a particular specialty.

lists 45 H-1B temporary workers among a total workforce of 68 persons, indicates that the petitioner is H-1B dependent according to the DOL regulation at 20 C.F.R. § 655.736(a)(1)(iii), which includes in the definition of the term an employer that (A) has at least 51 full-time equivalent employees in the United States and (B) employs H-1B nonimmigrants in a number that is equal to at least 15 percent of the number of such fulltime employees.

The regulation at 20 C.F.R. § 655.736(g)(1) states, in pertinent part, that “an LCA which does not accurately indicate the employer’s H-1B-dependency status . . . shall not be used to support H-1B petitions or requests for extensions.” Accordingly, the petitioner’s false entry on the LCA with regard to H-1B dependency invalidates the LCA for use with the present petition. Consequently, the petition must be denied as unsupported by a corresponding LCA, as required by the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) and 8 C.F.R. § 214.2(h)(4)(i)(B)(1).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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