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U.S. Citizenship and Immigration Services
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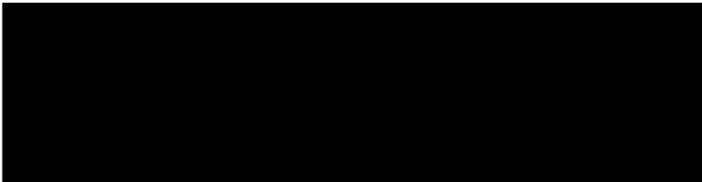


FILE: WAC 08 143 53192 Office: CALIFORNIA SERVICE CENTER Date: **APR 29 2010**

IN RE: Petitioner: 
Beneficiary:

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 factor 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 a number of the petitioner’s H-1B employees had been paid less than the wages that the petitioner attested that it would pay 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.

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 annual salary 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.

Among the documents submitted on appeal to address 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 a California Form DE-6 wage report for the final quarter of 2007.

On appeal, the petitioner submits a table as a summary of the record's wage 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.² 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; (4) the total wages paid the beneficiary for all four quarters of 2007; (5) the total wages reflected on the related Form(s) W-2; and (6) the periods of unpaid vacation or leave extended to the beneficiary during 2007. In a letter October 21, 2008, submitted on appeal, the petitioner 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 that the petitioner has not complied with its wage obligations with regard to at least five 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

² 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.

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 biweekly, 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 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 is less than 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 1, 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 – the pro rata wages 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 he or she received only \$3,583.00, which is less than a month's wages.

With regard to the table's beneficiaries 7, 8, and 14 the petitioner acknowledges that the wage documents submitted into the record indicate that these persons were paid less than the prorated annual salary amount that they were due for the year 2007. However, the petitioner asserts that it has actually exceeded the annual salary requirement for the year 2007 for each of these beneficiaries by wages that it paid in January and February 2008 for work done in the Fourth Quarter of 2007. The petitioner submits copies of January and February 2008 pay stubs for the amounts it claims as satisfying its 2007 salary obligations, and the stubs record the amounts as payments for the Fourth Quarter of 2008. However, the AAO finds that the petitioner's assertion that payment of a portion of a beneficiary's annual salary in the present matter can be deferred to another year conflicts with the regulations at 20 C.F.R. § 655.731. As reflected in the excerpts above, 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 beneficiaries in 2008 (which the petitioner will report on the beneficiary's Form W-2 for 2008) should be added to those

beneficiaries' 2007 wages for purposes of evaluating the petitioner's compliance with its annual salary obligations for that year. 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 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 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, 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), U.S. Citizenship and Immigration Services (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.³

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), 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.

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 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

³ 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, JAVA, JSP, [and] Servlets.

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 programmer 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.

It is worth noting that neither the documents memorializing the employment agreement between the petitioner and the beneficiary, the document on the petitioner's hospital information system (HIS) project, nor any other documentary evidence specifically assigns the beneficiary to any particular project. In this regard, the AAO notes that the petitioner's assertion that the beneficiary would be assigned to its HIS project is unpersuasive, in that the documentation on that project does not identify the beneficiary or the proffered position (Computer Specialist/Programmer Analyst) as part of the resource categories upon which the petitioner will use for the project. In any event, the record's information about the HIS project does not include any substantive evidence of a requirement for any particular level of education in a body of highly specialized knowledge in a particular 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.⁴

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 a certain degree of specialization and complexity, but neither they nor any evidence of record establishes that the proposed duties are more specialized and complex than duties of programmer analyst positions not requiring at least a bachelor's degree in a specific specialty. 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 programmer analyst positions are so varied, as noted in this decision's earlier discussion of the relevant *Handbook* observations, that, absent documentation showing the requisite association between the knowledge required for the proffered position and at least a bachelor's degree in a specific specialty, there is no basis in the record for the AAO to find the degree association required by this criterion.

⁴ 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) 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.

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.

An additional and independent basis requiring denial of the petition resides in this statement at paragraph number 2 of the Corporation Employment Agreement signed by the beneficiary on February 26, 2008: "The title of the position and the duties may be changed at Company's [i.e., the petitioner's] discretion at any time." By indicating that the petitioner intends to change the title, nature and scope of the proffered position at any time if it so desires, this term of the employment agreement undermines the credibility of the material attestations of the petition and the related LCA regarding the position in which the beneficiary would be employed for the three-year period requested in the petition. For this reason also, the petition must be denied.

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.