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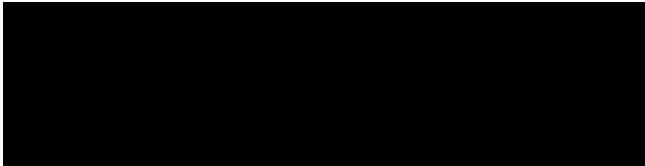
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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FILE: WAC 08 145 53455 Office: CALIFORNIA SERVICE CENTER Date: **FEB 04 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:
[Redacted]

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 Prew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. Although a subsequent motion to reopen and reconsider was granted, the director affirmed her initial decision to deny the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner describes itself as a computer consulting and software development firm. To employ the beneficiary in what it designates a Systems Analyst position, the petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the basis of her determination that the petitioner had not established that it was qualified to file an H-1B petition, in that the evidence of record did not establish the petitioner as either (a) a United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii), or (b) an agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F).

On appeal, counsel contends that the director's denial of the petition is erroneous and should be reversed. Counsel argues that, contrary to the director's decision, the record of proceeding before the director established that the petitioner would be the beneficiary's sole employer, would be responsible for the beneficiary's pay and benefits, and would exercise exclusive control over the beneficiary's work, and, therefore, qualifies as a United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii).

Upon review of the entire record of proceeding, as supplemented by the appeal and the documents submitted in its support, the AAO fully affirms the director's decision to deny the petition on each of the grounds that she cited in the decision. However, as will be discussed below, the AAO further finds that the petition must also be denied on an additional, independent basis not identified by the director, namely, the petitioner's failure to establish the proffered position as a specialty occupation. The AAO will address in detail only the specialty occupation issue as it is ultimately paramount to establishing eligibility for H-1B nonimmigrant classification, regardless of which entity should have filed the petition.

As just noted, beyond the decision of the director, the AAO finds that the petition must also be denied because the evidence of record does not establish that the proffered position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). For this reason also, the petition must be denied.

The record reflects that the petitioner is a client-oriented firm whose business depends upon contracts for its Information Technology (IT) Services. This fact is reflected in the petitioner's narrative about itself in the letter of support filed with the petition, and in the contract samples that the petitioner submitted with the Form I-129. In pertinent part, the letter of support states:

[The petitioner] was established in [the] year 2008 as an [IT] firm committed to providing expert solution[s] through multi[-]disciplinary consulting, to our client's business problems. We service a wide range of industries that includes Manufacturing, Accounting, Telecommunications, Multimedia & Broadcasting, E-commerce solutions, Consulting and Financial Brokerage[,] etc. At [this firm], we specialize in creative technology solutions for the [sic] commerce by proving a complete range of creative, cost-effective and corporate solutions for business.

A position may be awarded H-1B classification only on the basis of evidence of record establishing that, at the time of the petition's filing, definite, non-speculative work would exist for the beneficiary for the period of employment specified in the Form I-129. As will be discussed below, the AAO finds that the record of proceeding lacks sufficient credible evidence that, at the petition's filing, the in-house project claimed by the petitioner as the basis of the petition existed and provided for the beneficiary the work specified in the petition. 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 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In this matter, the petitioner bases its specialty occupation claim upon what it identifies as its in-house "EZ Scheduler" project. As noted below, it is in response to the RFE that the petitioner first mentions this specific project, and that the beneficiary would be working in-house on a particular project.

The petitioner asserts that the beneficiary would serve as a Systems Analyst, from October 1, 2008 to September 18, 2011. The letter of support, undated,¹ filed with the Form I-129 includes the following comments regarding the proffered position:

The Position Offered

[The beneficiary] is offered a temporary, full-time employment position as SYSTEMS ANALYST. The primary responsibilities of this position will include the following duties:

1. Research, [d]esign, and develop computer software system applying knowledge of computer theory and dynamic programming methods[,] (40% of work time)[;]

¹ The AAO notes that, on appeal, the petitioner submits another version of this letter, which differs from the letter filed with the Form I-129 in that it adds, after the first sentence of the Position Offered section, "He will be working on our project **EZ Scheduler**."

2. Analyze software requirement to define need and feasibility of design within time and cost constrain[t]s. (40% of daily work time);
3. Expand, modify, and update existing programs to enhance their capability and functionality. (Approximately 10% daily work time);
4. Evaluate interface between hardware and software systems to enhance their capability and functionality and simulation of future programs[.] (Approximately 10% of daily work time)[.]

The duties describe[d] are highly specialized and require the knowledge and training of a professional who holds a degree in [E]ngineering or Computer Science or a related field and has extensive experience in the industry.

Documents submitted with the Form I-129 also include copies of: (1) a Subcontract Agreement with Custom Business Solutions, Inc., for the petitioner's services as a subcontractor; (2) a Subcontractor Service Agreement with Internext Corporation, also for the petitioner's services as a subcontractor; and (3) a Professional Service Teaming Agreement between System Dynamix Corporation and the petitioner, whereby the petitioner is to assign a consultant to assist System Dynamix Corporation in its consulting and program management services. These documents were submitted as samples of the petitioner's contracts with its clients. None of them relate to the beneficiary of this petition.

The petitioner's RFE response includes a 16-page document described by its cover page as "Statement of Work (SOW) for EZ Scheduler." The AAO notes that the document's contents indicate that this SOW relates to a proposed "web application that "can serve the department with centralized functions like Group Scheduler, Facilities booking, Files management system and Bulletin Board." Elsewhere, the document indicates that "the department" refers to one within a firm identified as WellPoint Holding Corp. (hereinafter referred to as WPHC). It is noteworthy that the SOW includes a Proposed Prototype section that states, by way of introduction, that "[t]he requirements will be firmed up only after further in-depth discussion with "WellPoint Holding Corp."²

The petitioner's response to the RFE also includes an "Itinerary of Servi[c]es Letter," dated July 27, 2008, which divides the beneficiary's services on the EZ Scheduler Project into the following four chronological segments:

Start Date: 10/15/2008
End Date: 05/31/2009
Location: Sterling Heights, MI

² The record of proceeding does not include the contract to which the SOW relates, and the petitioner provides no information about WPHC.

Nature of work: Will work to define the project scope with the technologies and the application development approach, develop a detail proposal/vision document giving the project scope and estimate.

Start Date: 06/02/2009

End Date: 05/31/2010

Location: Sterling Heights, MI

Nature of work: Develop use case, sequence and activity diagrams. Create and maintain SDLC and project related documentation. Replace, delete and modify codes to correct errors, analyze review, and alter programs to increase operating efficiency.

Start Date: 06/01/2010

End Date: 03/25/2011

Location: Sterling Heights, MI

Nature of Work: Integrate multiple applications in a variety of hardware-software platforms[.] Strong design and implementation skills in an Oracle/Unix environment. Develop high performance numerical algorithms, data structures, storage and user interface design.

Start Date: 04/01/2011

End Date: 09/20/2011

Location: Sterling Heights, MI

System study, design, development, testing and implementing of IT solutions in application software and [p]erform coding, testing and performance tuning of applications. This would be [the] itinerary of the [s]ervices to be performed by the beneficiary, [name].³ Please feel free to contact us for any further clarifications.

The documents submitted on appeal include seven pages of approximately 100 line-by-line tasks that are introduced by a cover page identifying them as a “Project Description of EZ Scheduler Role of [the Beneficiary].”

Based upon its review of the entire record of proceedings, the AAO concludes that the totality of the relevant evidence does not indicate that the petitioner filed the petition on the basis of an EZ Scheduler project assignment that was, at the petitioner filing, likely to be available for the beneficiary for the employment period specified in the petition. The AAO bases this determination upon an aggregate of factors that it will now address.

³ The person named as the beneficiary is not the person who is the beneficiary of the present petition.

Among the documents filed with the Form I-129 on April 14, 2008 are (1) the petitioner's offer-of-employment letter to the beneficiary, dated February 8, 2008; (2) the petitioner's Employment Agreement with the beneficiary, signed by the petitioner and the beneficiary, respectively, on February 8, 2008 and February 15, 2008; and (3) Schedule A of the Employment Agreement, bearing the same signature dates as the agreement. None of these documents mention the EZ Scheduler project, state that the beneficiary will be assigned to an in-house project, or provide any details regarding any particular project to which the beneficiary would be assigned.

The petitioner's letter of support (undated), filed with the Form I-129, also fails to mention the EZ Scheduler project or any other project. Moreover, the letter's language suggests that a particular assignment for the beneficiary was yet to be determined. In this regard, the AAO notes several aspects of the letter. The language of the "Sufficient [W]ork at H-1B Level" section of the letter, and its reference to attached contracts that have nothing to do with the beneficiary,⁴ are an assertion that H-1B level work for the beneficiary is assured by the vitality of the petitioner's business, rather than a specific project to which the beneficiary would be assigned. That section of the letter of support reads as follows:

Sufficient [W]ork at H-1B Level

[The petitioner's] [c]lients [r]ange from regional to national [o]rganizations [and] include US Script, Cognizant, Systems Dynamix Corp, Internext Corp, Custom Business Solutions and EZSOL Inc. [The petitioner] [i]nteracts with hundreds of information technology partners throughout the nation. [The petitioner] has provided system development services for clients in industries as diverse as financial, manufacturing, health care, and governmental institutions.

Enclosed as Exhibit A are sample[s] of contracts that [the petitioner] holds with its [c]lients. Please note that each of these contracts is strictly between [the petitioner] and its client where [the petitioner's] employees are providing H-1B level [s]ervices. [T]he petitioner is clearly delineated as the actual employer of the consultant, and is responsible for hiring, firing, payment of salary, and any related benefits owed to the employee.

The "Specialty Occupation–System Analyst" section of the support letter argues for specialty occupation classification for the proffered position without mentioning any project to which the

⁴ The contract documents submitted with the Form I-129 are copies of: (1) a Subcontractor Service Agreement with Internext Corporation, also for the petitioner's services as a subcontractor; (2) a Subcontract Agreement with Custom Business Solutions, Inc., for the petitioner's services as a subcontractor; and (3) a Professional Service Teaming Agreement between System Dynamix Corporation and the petitioner, whereby the petitioner is to assign a consultant to assist System Dynamix Corporation in its consulting and program management services. These documents were submitted as samples of the petitioner's contracts with its clients. None of them relate to the beneficiary of this petition, and none of them involve an EZ Scheduler project.

beneficiary would be assigned. Also, the next section of the support letter – the Position Offered section quoted earlier in this decision - describes the proffered position not in terms of specific work to be performed for a particular project, but by generalized functions which, the petitioner argues, qualify it as a specialty occupation.

It is against this background of initial silence about any particular assignment for the beneficiary, and only in response to the RFE's request for contracts substantiating the work to which the beneficiary be assigned, that the petitioner first mentions the EZ Scheduler project and asserts that the beneficiary will be assigned to it. The AAO finds that the assertion in the RFE response is questionable in light of the absence of any previous mention of EZ Scheduler or any other project assignment for the beneficiary.

The AAO next observes several aspects of the EZ Scheduler SOW that appear inconsistent with an underlying project that, at the time of the petition's filing, provided a likely assignment for the beneficiary for the period specified in the petition. The SOW indicates that it relates to a contract with WPHC. However, the petitioner has provided no contract or contract-related correspondence, memoranda, e-mail traffic, or document of any type relating to WPHC. Further, the petitioner's letter of support does not include WPHC in its list of clients; and the contract samples submitted by the petitioner with the form I-129 do not mention WPHC.

The AAO also finds that the record does not establish when, if ever, the EZ Scheduler project would generate the more than two-years of systems analyst services for which the petition was filed. Paragraph 1.1 of the SOW states, in part, "The SOW will serve as the Agreement for this engagement." However, SOW paragraphs 2.2 and 3.1 indicate that the SOW has not yet been signed or accepted by WPHC. The pertinent statements at paragraph 2.2 (Proposed Prototype) are (1) that the prototype is can/may be changed "later once [an] agreement is signed and requirements are discussed; and (2) that [t]he requirements will be firmed up only after further in-depth discussion with [WPHC]." Paragraph 3.1 (Proposed Schedule – Key Milestones) – the last paragraph of the record's SOW document – ends with the phrase "Upon acceptance of this SOW." Further, paragraph 3.1 indicates that the project has not even reached the planning stage, as it states that the proposed milestones "will be reviewed during the planning stage of the project."

In addition, the AAO finds that the SOW is not evidence that the beneficiary would in fact be involved in the EZ Scheduler project, in any capacity. The document not only does not mention the beneficiary by name, but it also fails to specify the types of workers that would be assigned to the project. It merely states that the project shall require "[a] minimum of (5) technical personnel with estimated project duration of 390 days."

Further, the AAO notes that neither the offer/acceptance letter signed by the petitioner and the beneficiary nor the Employment Agreement identifies a particular project assignment or work location.

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 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner must establish the proffered position as a specialty occupation on the basis of employment factors in existence or determined by the time the petition is filed. This the petitioner failed to do.

As indicated in this decision's earlier comments about the evidence regarding the EZ Scheduler project, the language of the SOW indicates that the SOW is preliminary to the signed Agreement that would govern the project, and that the actual requirements of the EZ Scheduler project were yet to be determined and were contingent upon future WPHC discussions. As also earlier noted, other than the SOW, the petitioner submitted no contract or contracted-related documents related to the execution of the EZ Scheduler project. Therefore, there is no basis in the record for ascertaining what work relationships and work control dynamics might arise among the petitioner, its clients, and the beneficiary, if and when requirements were determined and an agreement were actually signed. Furthermore, the SOW language and the absence of any documentary evidence of EZ Scheduler project terms, conditions, requirements decided by the parties by the time of the petition's filing indicate that no such basis existed at the time that the petition was filed.

For the reasons discussed above, the AAO finds that the appeal must be dismissed, and that the petition must be denied. Therefore, the director's decision will not be disturbed

Further, assuming, only for the sake of argument, that the petitioner had established that the EZ Scheduler project assignment was definite when the petition was filed, the evidence of record fails to distinguish the proffered position from system analyst positions not requiring at least a baccalaureate level of highly specialized knowledge in a specific specialty closely related to the performance requirements of the position, as required by section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and its implementing regulations at 8 C.F.R. §§ 214.2(h)(4)(ii)(defining the term specialty occupation) and 214.2(h)(4)(iii)(A)(detailing the criteria that must be met to qualify as a specialty occupation).⁵

⁵ The AAO notes 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). 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 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.

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

The 2008-2009 edition of the Department of Labor's *Occupational Outlook Handbook (Handbook)*⁶ devotes a chapter exclusively to Computer Systems Analysts. The information on educational requirements in the *Handbook's* "Computer Systems Analysts" chapter indicates a bachelor's or higher degree in computer science, information systems, or management information systems is a general preference, but not an occupational requirement, among employers of computer systems analysts. That this occupational category accommodates a wide spectrum of educational credentials is reflected in the following paragraph that opens the "Training, Other Qualifications, and Advancement" section of the *Handbook's* "Computer Systems Analysts" chapter:

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.

The AAO notes that the paragraph's statement that "many employers prefer applicants who have a bachelor's degree" is not indicative of a pervasive requirement for a specific major or academic concentration. The *Handbook's* observation of a preference of "many employers" is not evidence that systems analysts positions normally require a bachelor's degree level of knowledge in a specific specialty. The "Education and Training" subsection of the *Handbook's* "Computer Systems Analyst" chapter confirms this fact, as it states:

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.

The level and type of education that employers require reflects changes in technology. Employers often scramble to find workers capable of implementing the newest technologies. Workers with formal education or experience in information security, for example, are currently in demand because of the growing use of computer networks, which must be protected from threats.

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

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).

⁶ The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. All references are to the 2008-2009 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

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 majors 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 should have some expertise in finance, and systems analysts who wish to work for a hospital should have some knowledge of health management.

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.

The *Handbook's* "Computer Systems Analysts" chapter's comments with regard to educational requirements - that employers prefer applicants with a bachelor's degree and often seek applicants who have at least a bachelor's degree in a technical field - is authoritative evidence that a bachelor's degree or higher in a specific specialty is not the normal minimum requirement for performing the duties of systems analysts. In light of this occupational context, it is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers here would necessitate systems analyst services at a level requiring 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. In this regard, the AAO acknowledges that the petitioner's submissions contain a multitude of technical terms and acronyms. However, they indicate no more than that the position so described would involve the application of specialized IT and computer-related knowledge. However, the type and level of education required to attain such knowledge is not self-evident, and it is not conveyed by the submissions' technical language or any other aspect of the record.

While the descriptions of the proposed duties and responsibilities and the documents submitted regarding the EZ Scheduler project asserted as the beneficiary's work assignment are replete with IT technical terms and terms-of-art indicating that systems analyst work on the project would generally require the application of some degree of specialized knowledge of the IT and computer industry. However, neither those portions of the record nor any other evidence of record establishes a nexus between the proffered position and the necessity for any particular level of education in any particular specialty, or its equivalent, at an accredited United States college or university. While the

petitioner asserts that the proffered position requires “a professional who holds a degree in engineering or Computer Science or a related field” (the petitioner’s letter of support, at 2), it provides no documentary evidence to support that claim. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The evidence of record does not distinguish the proffered position from systems analyst positions that do not require at least a bachelor’s degree, or the equivalent, in a specific specialty. Therefore, as the petitioner has not established that the particular position proffered here is one 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 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). This prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor’s degree, in a specific specialty, that is common to the petitioner’s industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry’s professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms “routinely employ and recruit only degreed individuals.” *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

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. Also, there are no submissions from professional associations, individuals, or firms in the petitioner’s industry.

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.” First, the evidence of record does not refute the indication in the *Handbook’s* “Computer Systems Analysts” chapter that there is a wide spectrum of educational credentials acceptable for systems analyst positions, including degrees not in a specific specialty closely related to computer systems analysis. Second, the record of proceeding does not contain evidence distinguishing the proffered position as unique from or more

complex than systems analysts positions that can be performed by persons without a specialty degree or its equivalent.

As the record has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).⁷

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 evidence of record does not convey that the duties of the proffered position are more specialized and complex than those of systems analyst positions not usually associated with the attainment of a baccalaureate or higher degree.

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), *affd.* 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).

Finally, the AAO will quickly address the issue of whether or not the petitioner qualifies as an H-1B employer or agent. As detailed above, the record of proceeding lacks sufficient documentation evidencing what exactly the beneficiary would do for the period of time requested or where exactly and for whom the beneficiary would be providing services. Given this specific lack of evidence, the petitioner has failed to establish who has or will have actual control over the beneficiary's work or duties, or the condition and scope of the beneficiary's services. In other words, the petitioner has failed to establish whether it has made a bona fide offer of employment to the beneficiary based on the evidence of record or that the petitioner, or any other company which it may represent, will have

⁷ 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 as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

and maintain an employer-employee relationship with the beneficiary for the duration of the requested employment period. *See* 8 C.F.R. § 214.2(h)(4)(ii) (defining the term “United States employer” and requiring the petitioner to engage the beneficiary to work such that it will have and maintain an employer-employee relationship with respect to the sponsored H-1B nonimmigrant worker). As previously discussed, there is insufficient evidence detailing where the beneficiary will work, the specific projects to be performed by the beneficiary, or for which company the beneficiary will ultimately perform these services. Therefore, the director’s decision is affirmed, and the petition must be denied for this additional reason.

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, and the petition is denied.