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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

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[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUL 08 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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 computer services company that seeks to employ the beneficiary as an information technology specialist. The petitioner, therefore, 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, finding that the proffered position was not a specialty occupation. On appeal, counsel for the petitioner submits a joint motion to reopen and reconsider as well as an appeal, asserting that the petitioner had demonstrated eligibility under at least three of the four criteria for a specialty occupation. The director declined to treat the appeal as a motion, and forwarded the matter to the AAO for review.

The AAO concurs with the director's finding that the petitioner failed to establish that the proffered position is a specialty occupation. 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which 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 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). 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.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.



The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE) dated August 11, 2008; (3) the petitioner's response to the director's RFE dated October 31, 2008; (4) the director's decision dated November 26, 2008; and (5) the petitioner's Form I-290B and supporting documents. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as an information technology specialist. According to the petitioner's letter of support, filed with the petition, the proffered position requires an individual who possesses at least a bachelor's degree or its equivalent in computer science, applied mathematics, or a related field. The petitioner failed to provide a detailed description of the duties of the proffered position. Consequently, the director issued an RFE on August 11, 2008, requesting a more detailed job description as well as additional information pertaining to the petitioner's business and past employment practices. In response, the petitioner submitted a letter dated October 30, 2008, in which it provided the following overview of the proffered position.

Our Information Technology Specialist will be responsible for testing, maintenance, optimization and support of our customers' IT parks and databases. In his first year of employment, the Information Technology Specialist will divide his time in the following manner:

Percentage of Time Allotted to Each Duty	Specific Job Duty
60%	Analyzing information and evaluating results to choose the best solution for client IT systems problems. Planning computer security measures; identifying appropriate implementation system, software and personnel for client needs.
25%	Liaising with clients to update relevant information for systems; evaluating computer system user requests or requirements; organizing, planning, and prioritizing client projects.
10%	Communicating with supervisors and peers; conferring with personnel to discuss security violations or programming; compiling, coding, categorizing, calculating, tabulating auditing, or verifying information or data; identifying the underlying technological problems.
5%	Documenting/Recording Information in written or electronic/magnetic form; evaluating information to determine compliance with standards; using relevant information and individual judgment to determine whether events or processes comply with laws, regulations, and industry standards.

The Information Technology Specialist's day-to-day duties will include:

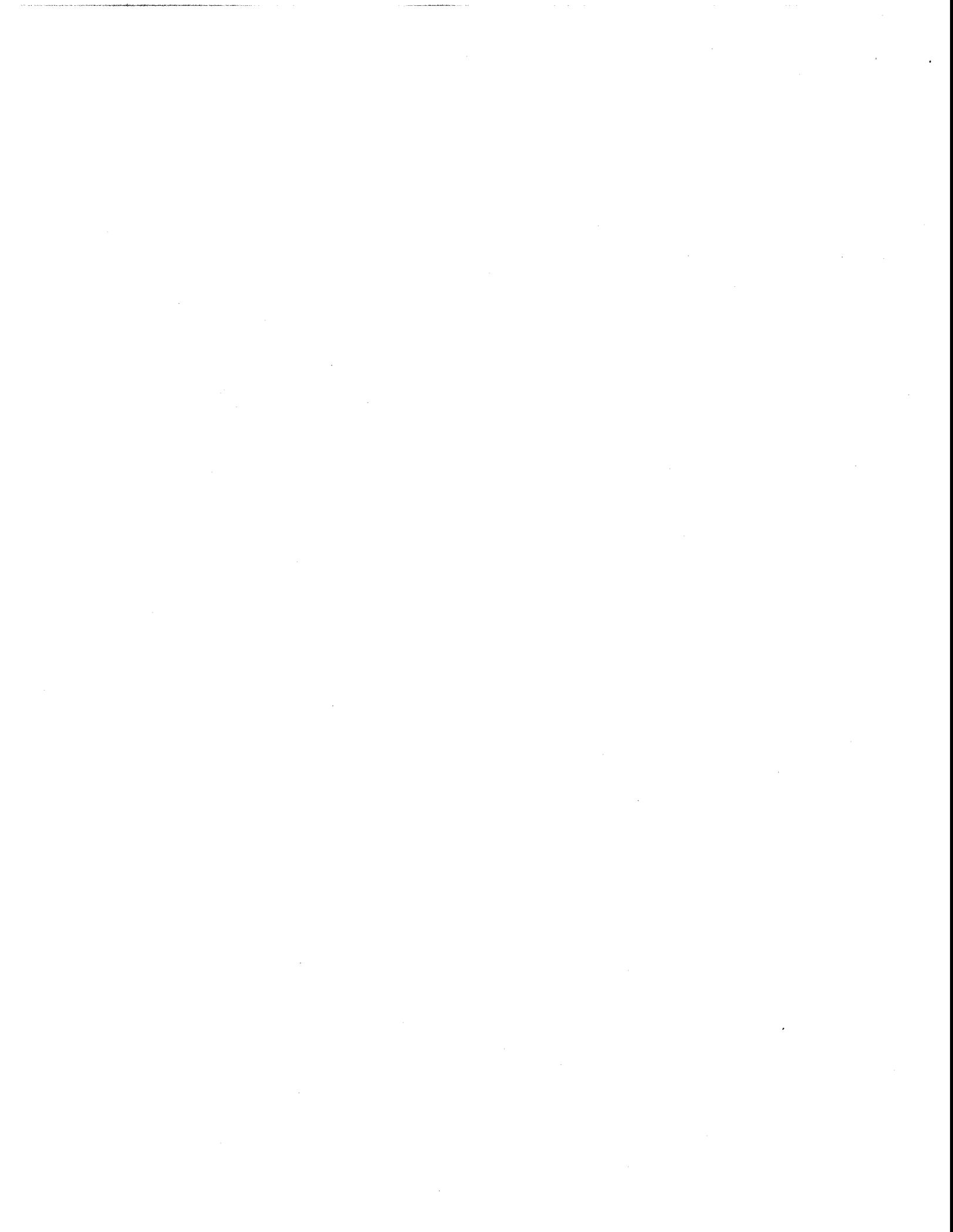


- Development and plans to safeguard computer files against accidental or unauthorized modification, destruction, or disclosure and to meet our clients' emergency data processing needs, including:
 - Monitoring of current reports of computer viruses to determine when to update virus protection systems; monitoring of use of data files and regulation of access to safeguard information in computer files; performance of risk assessments and execution of tests of data processing system to ensure functioning of data processing activities and security measures; and encryption of data transmissions and erection of firewalls to conceal confidential information as it is being transmitted and to prevent tainted digital transfers.
 - Documentation of computer security and emergency measures policies, procedures, and tests.
 - Communication with users to discuss issues such as computer data access needs, security violations, and programming changes.
 - Modification of computer security files to incorporate new software, correct errors, or change individual access status.
 - Coordination of computer system plan implementation with establishment personnel and outside vendors.

On November 26, 2008, the director denied the petition. The director found, and the AAO concurs, that the proffered position, entitled by the petitioner as an information technology specialist, is not a specialty occupation. Upon review of the job description, the director found that the stated duties were more akin to the position of computer support specialist, and stated that the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* had no requirement of a baccalaureate or higher degree in a specialized area for employment as a computer support specialist. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel for the petitioner contends that the director's decision was erroneous, and claims that the director's reclassification of the proffered position as a computer support specialist was incorrect. Nevertheless, counsel contends that, even if the position were a computer support specialist, a bachelor's degree is the normal requirement for such a position. Counsel concludes by stating that the petitioner has established eligibility under at least three of the four criteria governing specialty occupation positions.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.



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

Factors often considered by USCIS when determining these criteria 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.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. In reaching its own conclusions regarding the nature of the proffered position, the AAO has reviewed the *Handbook's* discussion on computer support specialists. The *Handbook* states, in relevant part:

Computer support specialists provide technical assistance, support, and advice to individuals and organizations that depend on information technology. They work within organizations that use computer systems, for computer hardware or software vendors, or for third-party organizations that provide support services on a contract basis, such as help-desk service firms. Support specialists are usually differentiated between *technical support specialists* and *help-desk technicians*.

Technical support specialists respond to inquiries from their organizations' computer users and may run automatic diagnostics programs to resolve problems. In addition, they may write training manuals and train computer users in the use of new computer hardware and software. These workers also oversee the daily performance of their company's computer systems, resolving technical problems with Local Area Networks (LAN), Wide Area Networks (WAN), and other systems.

Despite counsel's claim that this classification is erroneous, the AAO finds that based on the petitioner's overview of the duties of the proffered position, the position is most akin to those set forth in the above section,

With regard to the educational requirements for the position of computer support specialist, the *Handbook* states:

A college degree is required for some computer support specialist positions, but an associate degree or certification may be sufficient for others. Strong problem-solving and communication skills are essential.

Education and training. Due to the wide range of skills required, there are many paths of entry to a job as a computer support specialist. Training requirements for computer support specialist positions vary, but many employers prefer to hire applicants with some formal college education. A bachelor's degree in computer science, computer engineering, or



information systems is a prerequisite for some jobs; other jobs, however, may require only a computer-related associate degree. Some employers will hire applicants with a college degree in any field, as long as the applicant has the necessary technical skills. For some jobs, relevant computer experience and certifications may substitute for formal education.

Most support specialists receive on-the-job training after being hired. This training can last anywhere from 1 week to 1 year, but a common length is about 3 months. Many computer support specialists, in order to keep up with changes in technology, continue to receive training throughout their careers by attending professional training programs offered by employers, hardware and software vendors, colleges and universities, and private training institutions.

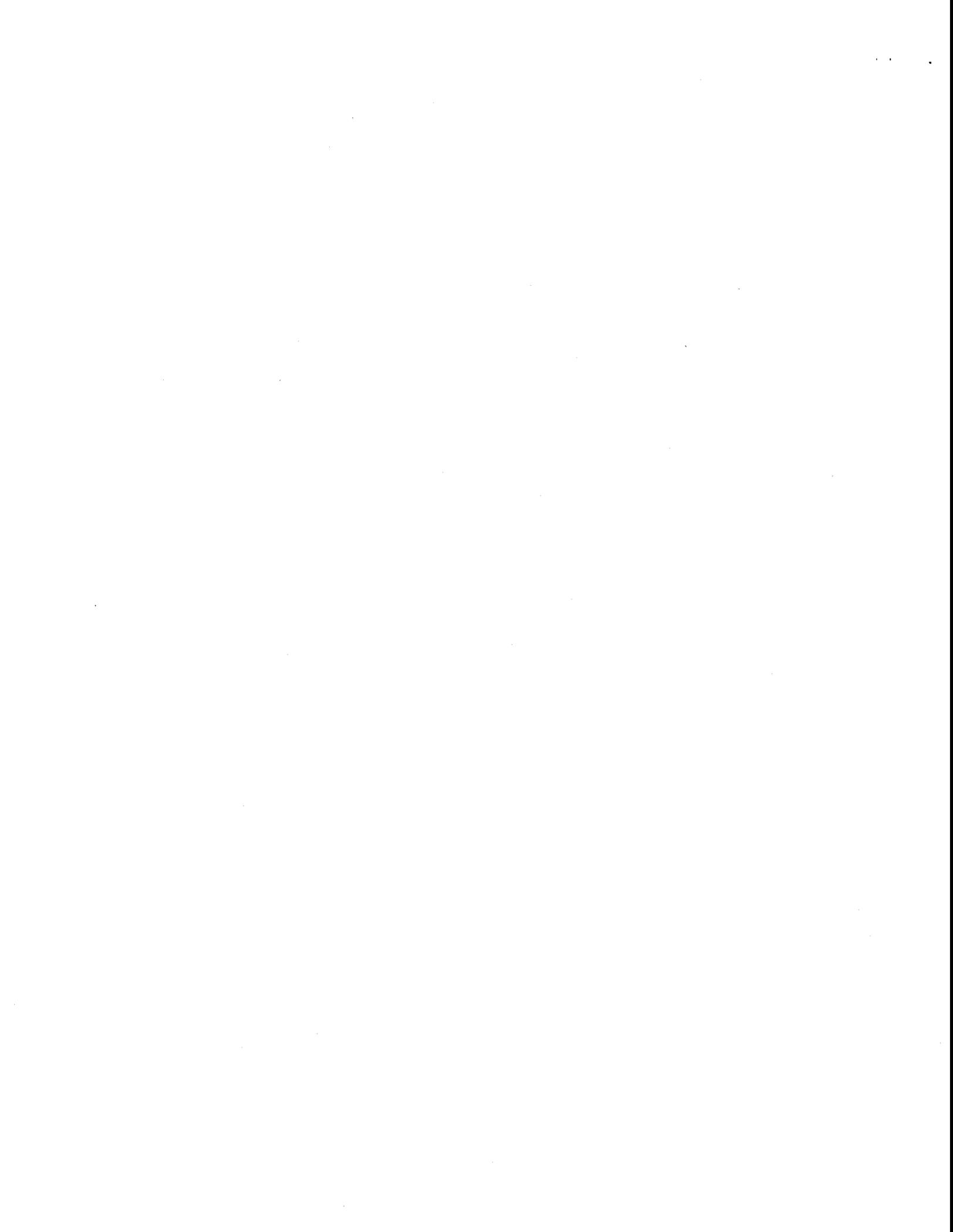
A review of the training required for the position indicates that the formal education of such employees varies widely. While the *Handbook* indicates that a college degree is required for some computer support specialist positions, it also indicates that an associate degree or certification may be sufficient for others.

It is noted that, in response to the RFE, counsel avers in her letter dated October 31, 2008 that the proffered position is more akin to that of a computer security specialist and/or network and computer systems administrators. Counsel also relies on several unpublished decisions in support of her conclusion that the proffered position is a specialty occupation. These assertions, repeated on appeal, are not persuasive. First, even if the proffered position was that of a computer security specialist and/or network and computer systems administrator, the *Handbook* does not state that a degree in a specific specialty is required for entry into any of these occupations. Second, with regard to the unpublished decisions cited by counsel, no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions has been provided. Regardless, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Additionally, counsel contends that the petitioner performs complex and highly specialized work, thereby requiring its employees to have degrees. Both counsel and the petitioner have provided insufficient evidence to demonstrate that the duties of the proffered position go beyond those of a computer support specialist as described above. Even if the petitioner had demonstrated that its organizational structure and required duties of the proffered position were so complex as to warrant a bachelor's degree, the *Handbook* does not state a normal, industry requirement for a bachelor's degree in a specific specialty for entry into the position of a computer support specialist. Instead, the *Handbook* states that some employers will hire an individual with a degree in any field as long as the candidate has the necessary technical skills.

Based on the above, the AAO finds that the *Handbook* does not require a bachelor's degree in a specific specialty for the proffered position. Accordingly, the petitioner has not established that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position.

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - the petitioner provided six job vacancy postings advertised on the



Internet at www.craigslist.org. The advertisements, however, are for six different positions; namely: (1) Technical Support Specialist; (2) Network Operations Specialist; (3) Software Engineer; (4) Programmer Analyst; (5) Operations Specialist; and (6) Operations Support Technician.

The wide variety of position titles and duties associated therein does little to persuade the AAO that these are parallel positions in the petitioner's industry. Moreover, the postings require either a bachelor's degree in a related field *or* substantial experience and, as such, none of them require a bachelor's degree in a specific specialty or its equivalent. Finally, the record does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner, therefore, fails to establish that a degree requirement is common to the industry in parallel positions among similar organizations.

Based on the discussion above, the petitioner has not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

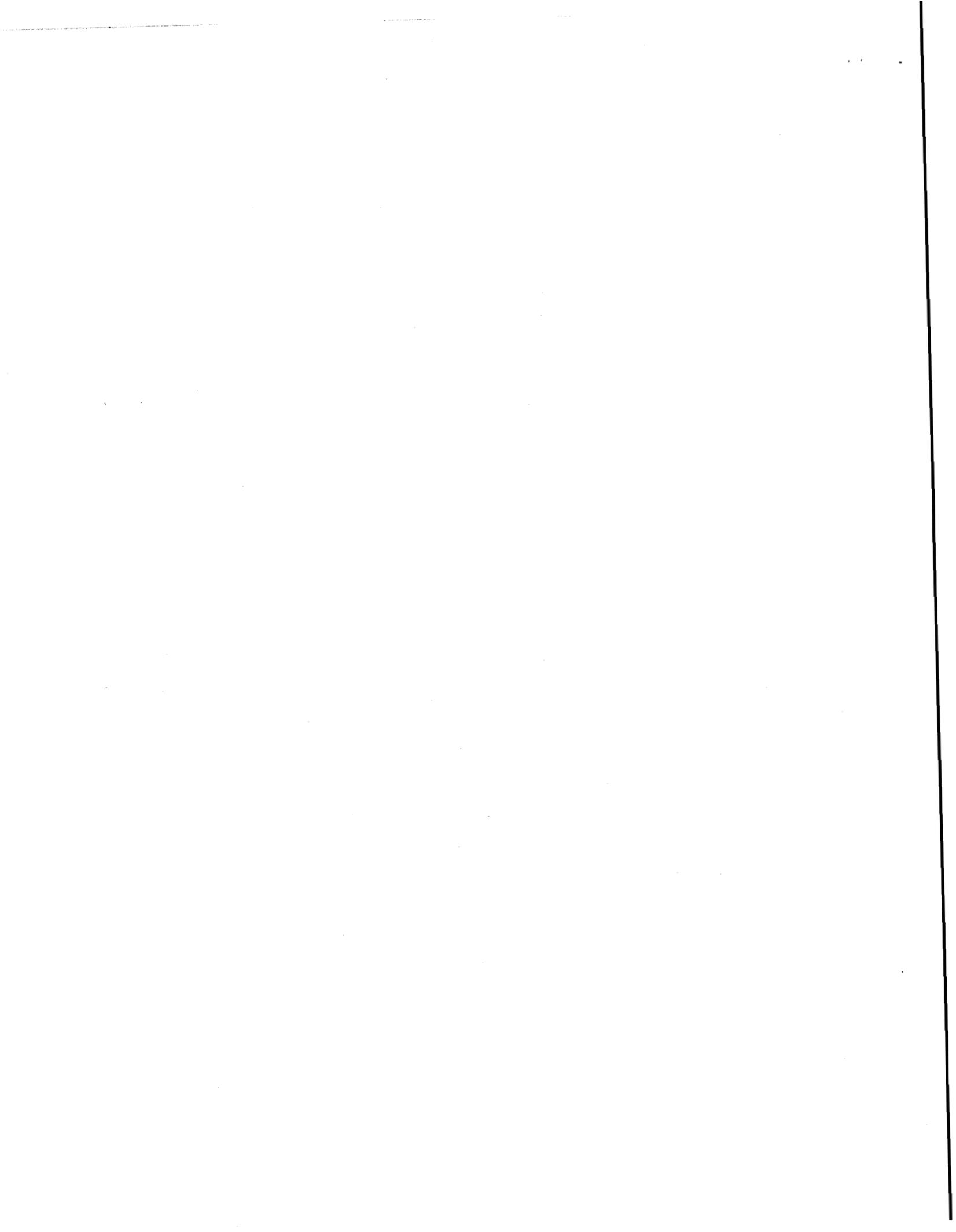
The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. In the petitioner's October 30, 2008 letter, it states that it is a small company that has experienced rapid growth and has obtained several new contracts in the past year. It claims that, as a result of these new contracts, it requires the services of the beneficiary as an information technology specialist. This statement suggests that the petitioner has not previously employed anyone in the proffered position, and the record is devoid of evidence to show otherwise. The petitioner, therefore, has failed to establish that it normally requires a degree or its equivalent for the position.

Finally, the AAO turns to the criterion 8 C.F.R. § 214.2(h)(iii)(A)(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.

Neither counsel nor the petitioner have submitted independent documentation, such as letters or expert testimony, in support of the contention that complex knowledge is required to perform the duties of the proffered position. Instead, the petitioner and counsel simply provide their own opinions with regard to the qualifications necessary for an information technology specialist or, as USCIS has determined, a computer support specialist, to successfully function in the proffered position. Moreover, the description of the duties of the proffered position does not specifically identify any tasks that are so specialized or complex that only a specifically degreed individual could perform them. To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.





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

