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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
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U.S. Citizenship  
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FILE: WAC 08 141 51162 Office: CALIFORNIA SERVICE CENTER Date: **MAR 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 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 describes itself as an Information Technology (IT) company that provides software consulting and developing services in a global context. To employ the beneficiary in what it designates as a Programmer Analyst-Oracle Applications position, 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 on three independent grounds, namely, the petitioner's failures to establish (1) that it is qualified to file an H-1B petition, that is, as either (a) a U.S. employer as defined at 8 C.F.R. § 214.2(h)(4)(ii), or (b) a U.S. agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F); (2) that the Labor Condition Application (LCA) corresponds to the locations where the beneficiary would actually work; and (3) that the proffered position qualifies as a specialty occupation in accordance with section 101(a)(15)(H)(i)(b) of the Act and its implementing regulations.

The AAO withdraws the director's finding that the petitioner lacked standing to file the instant petition. In this regard, the AAO finds that the evidence of record is sufficient to establish that the petitioner will have an employer-employee relationship with regard to this specific beneficiary. While fully affirming the director's determination on the petitioner's failure to submit an LCA corresponding to the beneficiary's work locations, the AAO will further address in detail only the specialty occupation basis of the director's decision, as specialty occupation status is ultimately paramount to establishing eligibility for H-1B nonimmigrant classification, regardless of where the beneficiary will work.

The director's denial of the petition for the petitioner's failure to establish the proffered position as a specialty occupation is based upon the director's determination that the petitioner failed to provide contract and contract-related evidence necessary to establish that the beneficiary would actually perform programmer analyst duties, and would do so for the employment period specified in the Form I-129. The director perceived that contracts between the petitioner and its clients would ultimately determine the beneficiary's work assignments and the particular duties that the beneficiary would actually perform.

The AAO analyzes the specialty occupation 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 (5<sup>th</sup> 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.

Based upon its review of the entire record including the documentation 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, by establishing the proffered position 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) parallel to positions 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) 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 record of proceeding includes several documents indicating the scope of the petitioner’s business.<sup>1</sup>

The document “Outsourced Product Development (OPD) & Support Services” (Appellate Exhibit 5) is a promotional piece on the benefits customer firms will realize if they outsource the following categories of work to the petitioner:

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<sup>1</sup> Most of these documents were first submitted in reply to the service center’s request for additional evidence (RFE).

- Full life cycle engineering
- Customization Services
- Migration to newer technologies
- Maintenance/Version Enhancements/Bug fixes
- Full Product Testing Cycle
- Professional Services
- Documentation Services
- Help Desk Services

A chart (Appellate Exhibit 6) depicts what the petitioner describes as its “proprietary O3 Methodology [D]eployed on Outsourced Product Development.” A six-page copy of a slide presentation (Appellate Exhibit 7) reviews major aspects of the “[The Petitioner’s] Services Portfolio,” including, but not limited to, providing remote development and support services through its “O3 Methodology” of using Onsite/Offsite and Offshore resources. As Exhibit 10 of its RFE response, the petitioner provides copies of its Internet site’s “Welcome” page and pages entitled “Products,” “Services,” “Radiant Advantage,” “About Us,” “Clients,” “Resources,” “Case Studies,” “Partners,” “Careers,” and “Database Management.”

The AAO finds that the above referenced documents indicate that the petitioner provides a wide spectrum of IT support services, including software development and such other services as the petitioner describes as “Professional Services,” “Documentation Services,” “Help Desk Services,” client “Staff Augmentation” and “24/7” database management. The documents also indicate that the petitioner channels some of its work to an offshore location outside the United States.<sup>2</sup> However, the documents do not address the programmer analyst position that is the subject of this petition.

According to the brief on appeal and the petitioner’s RFE reply, the beneficiary will work in three distinct areas, referred to as software development projects. These are identified as (1) Enterprise NSA (Network, Systems, and Application) Manager; (2) RDMBS Project-Reliable Support Services; and (3) Consultrak. These software development endeavors are discussed in appellate exhibits 8, 9, and 10, respectively.

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<sup>2</sup> The copy of the “Welcome” page from the petitioner’s Internet site identifies a particular firm in Hyderabad, India, as its “exclusive Global Development and Outsourcing Partner at [sic] India” that “provides offshore Software Development and Business Process Outsourcing services” and that “has a dedicated team in India providing these critical services and complementing the in-house team to support [the petitioner’s] 24/7 model.

The “Enterprise NSA Manager” document (Appellate Exhibit 8) is a promotional piece that appears to be directed at potential “user” clients for this product, which the opening page of the document describes as “a complete, efficient network and operations management software that offers comprehensive fault and performance management across LAN, WAN, Servers, Applications and all other IT infrastructure.” A salient aspect of the document is its indication that Enterprise NSA Manager has already been developed into a ready-for-market software product. This renders questionable any claim by the petitioner that the beneficiary would be involved in developing Enterprise NSA Manager. Further, this document indicates that assignment of the beneficiary to an Enterprise NSA Manager project would depend upon a customer’s purchase of the product according to a purchase agreement or some other contractual document that would require the beneficiary’s services as a programmer analyst for customizing the product to the customer’s particular needs. However, the record contains no copy of any such document. Consequently, the Enterprise NSA Manager document is not probative evidence of actual project work assigned to the beneficiary during the employment period specified in the petition.

Appellate Exhibit 9, which the brief identifies as “RDMS Project-Reliable Support Services,” consists of two documents. The first is a seven-page document entitled “Mobile Web Platform[:] A Mobile Web Application”; the second is a four-page document entitled “RDBMS Project[:] A Reliable Support Services.” As will be discussed below, these documents are also not probative of actual project work assigned to the beneficiary.

The Mobile Web Platform document discusses a single project, apparently commissioned by an entity variously referred to as “Dimensions Media,” and “DMG.” According to the document, the project’s “[o]bjective is to develop a mobile application framework with the help of [the [petitioner’s] off-site/[o]ffshore development team” that would, among other things, “develop an industry standard and complaint [sic] mobile platform that allows DMG to perform” functions outlined in the document. It is noteworthy that this Mobile Web Platform document indicates that “initial study and analysis is yet to be done,” and that this initial work is to be done “offshore,” and, therefore, not by the beneficiary or other workers at the beneficiary’s location. It is also noteworthy that the document expressly assigns substantial portions of the project to the petitioner’s offshore location, but only expressly identifies the petitioner’s on-shore facility, where the beneficiary would work, for “Alpha Testing” and related work that the Mobile Web Platform document indicates would be performed only after initial development of the Mobile Web Platform product.

Even when read in conjunction with the Mobile Web Platform document, the other, highly technical document at Appellate Exhibit 9, entitled “RDBMS Project[:] A Reliable Support Services,” does not shed any light on what the beneficiary would be doing during the period specified in the petition.

Neither of the two Appellate Exhibit 9 documents mention the beneficiary, assert a need for a Programmer Analyst-Oracle Applications, or delineate work that clearly entails the Programmer Analyst-Oracle Applications duties that the petitioner asserts for the beneficiary. Further, whatever connection there may be between the duties described for the beneficiary and whatever work is

described in the Mobile Web Platform and RDBMS Project documents is not self-evident, and the petitioner has not established such connection, either by cogent explanation or independent documentary evidence.

The other project in which the petitioner attests that the beneficiary would participate is Consultrak, which is discussed at Appellate Exhibit 10, a seven-page document entitled “Consultrack [-] A Consultant tracking system[:] The last mile in “Professional [S]ervices Automation For Consulting [S]ervices.” This document discusses the benefits of Professional Services Automation (PSA) solutions and states that the petitioner is “in the process of building a great [PSA] product to cover different areas within the scope of a Professional [S]ervices firm concentrating on IT consulting. The document closes with this statement of the project’s status:

We have been able to successfully cross the early milestone using the resources currently available[.] We need to enhance the product further and also provide system integration services at our client locations.

Here also the AAO notes that the beneficiary is not mentioned and that the document does not identify points at which the Job Duties generally identified for the beneficiary would be performed.

As Appellate Exhibit 11, the petitioner submits a document entitled “Resource Requirements” which addresses the petitioner’s projects by a short “Work Plan” statement and a “Resources” section that lists required workers by occupational title and number. As discussed below, this document impacts negatively upon the credibility of the petition.

First, the relevant Work Plan section of the Resource Requirements document refers to Enterprise NSA Manager as a product still in development. This conflicts materially with the Enterprise NSA Manager document’s promotion of Enterprise NSA Manager as a product available for purchase. Second, contrary to the petitioner’s attestation that the beneficiary would work as a programmer analyst on RDBMS, the Work Plan of the “RDBMS Team” segment of the Resource Requirements document states that the required resources are “for [the] Database, Management services phased approach,” and that the required resources are 9 senior Database Administrators (“Sr. DBA - 9”) and 12 Database Administrators (“DBA - 12”) – there is no mention of a role for the proffered position (that is, Programmer Analyst or Programmer Analyst–Oracle Applications). Third, the Consultrack segment of the document does not include a programmer analyst among the required resources. Fourth, all of the project segments of the Resource Requirements document refer to the required workers “as a resource pool,” indicating availability for, but not definite employment in, the referenced projects. The contingent nature of the project work is further reflected in the statements at the Consultrack and Mobile Web Application Development that “the resource pool is reserved for” those projects. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner’s

proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*, at 591.

In its letter replying to the RFE, the petitioner presents the following list as the beneficiary's Job Duties:

- a[.] Involved in design, development, implementation customization, support and Application Testing in Oracle Applications.
- b[.] Involved in customization of Reports, Forms, maintenance and Production Support of Oracle Applications 11i.
- c[.] Application development using PL/SQL, SQL\*Plus, SQL\*Loader, Forms 6i, Reports and Oracle 8i/9i and TOAD[.]
- d[.] Development of Triggers, Packages, Functions and Procedures[.]
- e[.] Performance tuning of SQL statements, forms and reports for optimization.
- f[.] Implement Data Loading Operations (Import/Export/SQL\*Loader).
- g[.] Development of Reports Interfaces Conversions and Extensions (RICE).
- h[.] Design and development of custom forms using Forms 6i and custom library[.]
- i[.] Gather business requirements from the clients and developing business models for software applications.
- j[.] Provide Functional and Technical support for Oracle Application Modules [.]
- k[.] Troubleshoot and determine solutions for problems found in Application and Database.
- l[.] Submit and monitor TARS with Oracle.
- m[.] Develop test plans for Oracle patches and custom code fixes.
- n[.] Develop financial roll-in projects, which involve using multi-org functionality of Oracle applications.
- o[.] Use of Application Implementation Methodology (AIM)[.]

- p[.] Participate in various discussions on Techno-functional aspects relevant to the project Life Cycle[.]
- q[.] Customization of reports using Developer Reports in Oracle Applications[.]
- r[.] System administration and user support in Oracle Applications[.]
- s[.] Production support for Oracle financial applications AR and GL modules[.]
- t[.] Data migration in Oracle Application using Data Loader as well as SQL loader.
- u[.] Create new functions, procedures, and packages using PL/SQL to implement business rules.

The petitioner's RFE reply also includes the following "breakdown of the anticipated time in the position offered":

Software and Database analysis, modification, design, development & testing	65%
Maintain Program, functionality and performance	10%
Provide system management, backup and recovery	10%
Study of existing system	10%
Meetings and discussions	5%

The AAO notes that the record of proceeding contains no documentation that performance of the particular position proffered here requires at least a U.S. bachelor's degree, or its equivalent, in a specific specialty directly related to the position, as required by section 214(i)(1) of the Act, 8 U.S.C. § 1184 (i)(1), and the implementing regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner's comments and submissions contain many technical terms, acronyms, and IT terms of art that indicate that performance of the proffered position would require application of some level of specialized IT knowledge. However, the record of proceeding contains no documentation that the attainment of such knowledge requires a particular level of education, or its equivalent, in a specific specialty at an accredited U.S. college or university.

The AAO recognizes the Department of Labor's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the general duties and educational requirements of the wide variety of occupations that it addresses. The AAO finds that the duty descriptions and allied information provided in the record about the proffered position comport with the Programmer Analyst occupation as

discussed in the pertinent chapter of the 2010-2011 edition of the *Handbook*.<sup>3</sup> However, as will now be discussed, the *Handbook* indicates that programmer analyst positions do not categorically require at least a bachelor's degree in a specific specialty.

The *Handbook's* chapter "Computer Systems Analysts" identifies programmer analysts as a subcategory of that occupation, which the *Handbook* generally describes as follows:

*Computer systems analysts* use IT tools to help enterprises of all sizes achieve their goals. They may design and develop new computer systems by choosing and configuring hardware and software, or they may devise ways to apply existing systems' resources to additional tasks.

The chapter briefly describes the Programmer Analysts subcategory as follows:

In some organizations, *programmer-analysts* design and update the software that runs a computer. They also create custom applications tailored to their organization's tasks. Because they are responsible for both programming and systems analysis, these workers must be proficient in both areas. (A separate section on computer software engineers and computer programmers appears elsewhere in the *Handbook*.) As this dual proficiency becomes more common, analysts are increasingly working with databases, object-oriented programming languages, client server applications, and multimedia and Internet technology.

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 applicant's 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

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<sup>3</sup> All references in this decision to the *Handbook* are to the 2010-2011 edition.

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. 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.

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 hiring 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 system 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.

The AAO has considered these and all of the record's comments about the duties of the proffered position, and it has done so in the context of the totality of the evidence about the petitioner and its business operations. The AAO finds the record replete with unexplained technical terms, acronyms, and IT terms of art that indicate that performance of the proffered position would require application of some level of specialized IT knowledge. However, the record of proceeding does not establish that attainment of such knowledge requires a particular level of education, or its equivalent, in a specific specialty at an accredited U.S. college or university.

The AAO looks to the record of proceeding for other evidence that performance of the proffered position requires at least a bachelor's degree level of knowledge in a specific specialty, but finds none.

While the petitioner and counsel assert that the proffered position requires at least a bachelor's degree in Computer Science, Engineering, or a related field, they provide no documentary evidence to support that claim. Counsel's argument that the range of asserted duties is in itself sufficient to establish that they comprise a position requiring at least a bachelor's degree in a specific specialty merits no weight, as it is not supported by any documentary evidence to that effect. In this regard, the AAO notes that the petitioner submits copies of the following chapters of the 2008-2009 edition of the *Handbook*: (1) "Computer Systems Analysts"; (2) "Computer Software Engineers"; and (3) "Computer Programmers." Counsel argues that the *Handbook* indicates the necessity for at least a bachelor's degree, or the equivalent, in "Science, Engineering, or a related analytic or scientific discipline" in that its "Computer Systems Analysts" chapter "states that employers prefer applicants with at least a bachelor's degree in computer science, information science or MIS"; in that its "Computer Software Engineers" chapter "states that most employers prefer applicant's with at least a bachelor's degree and experience with a variety of computer systems and technologies; and because its "Computer Programmers" chapter "states 'a bachelor's degree is commonly required for computer programming jobs'" and that "[j]ob prospects are best for applicants with bachelor's degrees and experience with a variety of programming languages and tools."

Contrary to counsel's view, neither the sections that he quotes nor the chapters from which the quotes are drawn are evidence that the occupations to which they pertain require or are usually associated with at least a bachelor's degree in a specific specialty. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. Because they are not supported by the *Handbook* or any other evidence of record, the assertions of the petitioner and counsel about the necessity of a bachelor's degree in a specific specialty carry no weight. *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 programmer 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 programmer-analyst positions, including degrees not in a specific specialty closely related to such positions. Second, the record of proceeding does not contain evidence distinguishing the proffered position as unique from or more complex than programmer analyst 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).<sup>4</sup> In this regard, the AAO notes that the job placement advertisements submitted by the petitioner do not support the petitioner's assertion that it has satisfied this criterion, in that (1) they do not establish the credentials of persons actually hired for the type of position proffered here, and (2) they indicate that the petitioner's acceptance of less than a bachelor's degree in specific specialty, in that they state that a person not holding a degree specified in the advertisements may qualify by virtue of "any reasonable combination of education, training, and experience."

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 programmer analyst positions not usually associated with the attainment of a baccalaureate or higher degree.

As 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), the director's decision shall not be disturbed.

Finally, the AAO hereby affirms the director's denial of the petition based on the petitioner's failure to submit a valid LCA or LCAs corresponding to the locations where the beneficiary will actually work. Although a valid LCA for Rolling Meadows, Illinois was submitted in support of the petition, it appears from other evidence submitted, e.g., the agreement between the petitioner and the beneficiary, that the beneficiary may work at certain but not-as-yet-identified work locations. In order to establish eligibility at the time of filing in accordance with 8 C.F.R. § 103.2(b)(1), the petitioner is required to submit the requisite LCA(s) covering all employment areas where the beneficiary will work while in H-1B nonimmigrant status if such work exceeds certain DOL time and frequency thresholds. *See generally* 20 C.F.R. § 655.735. Here, given the petitioner's failure to detail with the required

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<sup>4</sup> 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 (5<sup>th</sup> Cir. 2000). 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.

specificity the locations and dates where the beneficiary will work, it cannot be found that the LCA submitted will cover all work locations for the beneficiary. For this additional reason, the petition cannot be approved.

The appeal will be dismissed, and the petition will be denied. 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.