U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W. MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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PUBLIC COPY

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Date: DEC 0 8 2011 Office: CALIFORNIA SERVICE CENTER File: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 $630. 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,

Michael T. Kelley

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.

On the Form I-129 visa petition, submitted on April 14, 2008, the petitioner stated that it is a software consulting, training, and development firm with 28 employees. The visa petition and the labor condition application (LCA) submitted to support it both state that the beneficiary would work in Golden Valley, Minnesota.

To employ the beneficiary in what it designates as a programmer analyst position, the petitioner endeavors to classify her 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 petitioner failed to establish that the petitioner has in the past complied, and intends to comply in the future, with the terms and conditions of H-1B employment. The director also found that the petitioner had failed to demonstrate that the beneficiary would work in Golden Valley, Minnesota as stated. As such, she found that the petitioner had not demonstrated that the LCA submitted corresponds with the instant petition and may be used to support it.

On appeal, the petitioner asserted that the director's bases for denial were erroneous, and contended that the petitioner satisfied all evidentiary requirements.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and the petitioner's brief and attached exhibits in support of the appeal.

Based upon its review of the entire record of proceeding as expanded upon by the documents submitted on appeal, the AAO finds that the evidence in the record indicates that the petitioner has not complied with its wage obligations with regard to at least seven H-1B beneficiaries, and has failed to demonstrate that it would comply with the terms of the H-1B visa if the instant petition were approved. The AAO further finds that the petitioner has failed to demonstrate that it submitted an LCA that corresponds with the visa petition and may be used to support it.

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

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

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

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

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

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

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

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

(v) Future bonuses and similar compensation (i.e., unpaid but to-be-paid) may be credited toward satisfaction of the required wage obligation if their payment is assured (i.e., they are not conditional or contingent on some event such as the employer's annual profits). Once the bonuses or similar compensation are paid to the employee, they must meet

> the requirements of paragraphs (c)(2)(i) through (iv) of this section (i.e., recorded and reported as ``earnings'' with appropriate taxes and FICA contributions withheld and paid).
>
> * * *
>
> (4) For salaried employees, wages will be due in prorated installments (e.g., annual salary divided into 26 bi-weekly pay periods, where employer pays bi-weekly) paid no less often than monthly except that, in the event that the employer intends to use some other form of nondiscretionary payment to supplement the employee's regular/pro-rata pay in order to meet the required wage obligation (e.g., a quarterly production bonus), the employer's documentation of wage payments (including such supplemental payments) must show the employer's commitment to make such payment and the method of determining the amount thereof, and must show unequivocally that the required wage obligation was met for prior pay periods and, upon payment and distribution of such other payments that are pending, will be met for each current or future pay period. . . .
>
> (5) For hourly-wage employees, the required wages will be due for all hours worked and/or for any nonproductive time (as specified in paragraph (c)(7) of this section) at the end of the employee's ordinary pay period (e.g., weekly) but in no event less frequently than monthly.

With the petition the petitioner submitted a letter, dated April 2, 2008, from its CEO. Neither that letter nor any other evidence then in the record, however, addressed whether the petitioner had been abiding by the terms and conditions of H-1B employment pertinent to its other H-1B employees.

In an RFE dated April 28, 2008 the service center requested, *inter alia*, (1) a list of the petitioner's nonimmigrant employees; (2) additional evidence that the beneficiary would work in a specialty occupation position; (3) an itinerary showing where the beneficiary would work throughout the period of requested employment; (4) copies of the petitioner's Form 941 Federal Quarterly Wage Reports for the previous four quarters; (5) state quarterly wage reports for those same quarters; and (6) copies of documents from the end-users of the beneficiary's services showing that the beneficiary would work on their projects, describing the duties she would perform and the qualifications required to perform those duties, and stating who would supervise her performance.

In response, the petitioner submitted the requested list of its nonimmigrant H-1B employees. The petitioner submitted the financial documentation requested and a copy of the beneficiary's employment contract. The petitioner provided documents labeled Wage Detail History Results showing amounts it paid to its employees during various quarters.

The petitioner also provided a document labeled, "Itinerary of Services." That document states that the beneficiary would work at the petitioner's offices in Golden Valley, Minnesota 25% of the time and at the Arlington Heights, Illinois location of Next Generation Technology 75% of the time.

The evidence submitted contains the following facts about the petitioner's H-1B employees and the wages it paid them during 2007.

The petitioner agreed to pay [redacted] ([redacted]) annual wages of $46,600, which is equal to $11,650 per quarter. The petitioner's H-1B employee list indicates that [redacted] commenced working for the petitioner on May 21, 2007 and continued through the end of that year. The petitioner paid no wages to that employee during the first and second quarters of 2007, $11,250 during the third quarter, and $3,750 during the fourth quarter.

The petitioner agreed to pay [redacted] ([redacted]) annual wages of $46,600, which is equal to $11,650 per quarter. The petitioner's H-1B employee list indicates that [redacted] commenced working for the petitioner on April 1, 2007 and ceased working for the petitioner on September 30, 2007. The petitioner paid no wages to that employee during the first quarter of 2007, $7,500 during the second quarter, $11,250 during the third quarter, and $3,750 during the fourth quarter.

The petitioner agreed to pay [redacted] ([redacted]) annual wages of $45,000, which is equal to $11,250 per quarter. The petitioner's H-1B employee list indicates that [redacted] commenced working for the petitioner on June 1, 2007 and continued working for the petitioner through the end of that year. The petitioner paid that employee no wages during the first two quarters of 2007, $12,000 during the third quarter, and $6,000 during the fourth quarter.

The petitioner agreed to pay [redacted] ([redacted]) annual wages of $48,000, which is equal to $12,000 per quarter. The petitioner's H-1B employee list indicates that [redacted] commenced working for the petitioner on September 1, 2006 and continued working for the petitioner through the end of 2007. The petitioner paid that employee $11,365.72 during the first quarter of 2007, $13,312.44 during the second quarter, $4,583.34 during the third quarter, and nothing during the fourth quarter.

The petitioner agreed to pay [redacted] ([redacted]) annual wages of $45,000, which is equal to $11,250 per quarter. The petitioner's H-1B employee list indicates that [redacted] commenced working for the petitioner on April 2, 2007 and continued working for the petitioner through the end of that year. The petitioner paid that employee no wages during the first two quarters of 2007, $11,250 during the third quarter, and $12,083.33 during the fourth quarter.

The petitioner agreed to pay [redacted] ([redacted]) annual wages of $50,000, which is equal to $12,500 per quarter. The petitioner's H-1B employee list indicates that [redacted] commenced working for the petitioner on January 2, 2007 and continued working for the petitioner through the end of that year. The petitioner paid that employee $8,333.32 during the first quarter of 2007, $8,096.57 during the second quarter, $13,833.34 during the third quarter, and $14,056.96 during the fourth quarter.

The petitioner agreed to pay [redacted] ([redacted]) annual wages of $45,000, which is equal to $11,250 per quarter. The petitioner's H-1B employee list indicates that [redacted] commenced working for the petitioner on March 11, 2007 and continued working for the petitioner through the end of that year. The petitioner paid that employee $4,000 during the first quarter of 2007, $4,000 during the second quarter, nothing during the third quarter, and $4,000 during the fourth quarter.

The petitioner agreed to pay [redacted] ([redacted]) annual wages of $45,000, which is equal to $11,250 per quarter. The petitioner's H-1B employee list indicates that [redacted] commenced working for the petitioner on June 4, 2007 and left the petitioner's employ on September 28, 2007. The petitioner paid that employee nothing during the first two quarters of that year, $17,678.56 during the third quarter, and $2,483.33 during the fourth quarter.

In an undated letter, dated July 17, 2008 and submitted with the response to the RFE, the petitioner's director stated, "[The beneficiary] is expected to work in Arlington Heights, IL and in our office at Golden Valley, MN. Enclosed please find Exhibit E for the newly executed [LCA] covering the Arlington Heights, IL location."

The petitioner's director also stated that the beneficiary has a bachelor's degree in computer science engineering. The AAO notes that a diploma provided shows that the beneficiary has a bachelor's degree in electronics and electrical engineering from Jawaharlal Nehru Technology University in India. No evidence in the record indicates that she has any other college degree.

The petitioner provided that LCA, approved for both Golden Valley, Minnesota and Arlington Heights, Illinois. That LCA was certified on July 19, 2008, after the visa petition in this matter was submitted.

The director denied the visa petition on August 21, 2008 finding, as was noted above, that the petitioner had failed to demonstrate that it had abided by, and would continue to abide by, the terms and conditions of H-1B employment. That finding was based on the petitioner's apparent failure to pay its H-1B employees their wages as stated on the visa petition. The director also found that the petitioner had failed to support the visa petition with a corresponding LCA.

On appeal, the petitioner's director provided ostensible explanations of discrepancies between the wages the petitioner offered to its H-1B employees and the amounts it actually paid them during 2007.

The petitioner's president stated,

> [redacted] was not able to obtain [a social security number] until May of 2007, right after which he immediately commenced employment with us.

* * *

[redacted] requested extended personal leave to look after his wife during a problematic pregnancy. After delivery, [redacted] wife had paralysis stroke and fell in coma for 3 weeks. Hence he reported for work on April 1, 2007. His employment with us has been characterized with frequent needs to request personal leaves due to family issues, which leaves we have felt complied to grant.

[Verbatim from the original]

* * *

[redacted] transferred to an unknown employer and quit his job with [the petitioner] on July 31, 2007.

* * *

[redacted] reported to us for work on November 7, 2007 after traveling to Mexico and finishing her consular processing to obtain H-1B classification.

* * *

[redacted] was on prolonged maternity leave before she delivered her baby. Furthermore, pursuant to her doctor's advice she was bed rested and took care of her baby until the baby was 3 months old. Thus, even though [redacted] change of status was approved as for October 1, 2006, she reported to work on June 1, 2007.

* * *

[redacted] H-1B validity start date was October 1, 2007. He started with us on November 12, 2007.

* * *

[redacted] requrested [sic] personal leave to visit his family in India thus, he was absent from September 11, 2008 until December 24, 2007. [sic]

* * *

[redacted] was not able to obtain his [social security number] in 2nd week of March and he started his employment with us on April 2, 2007.

* * *

> [redacted] was initially employed with us pursuant to his OPT status starting January 2007. However, starting October 1, 2007, we shifted his payroll on H-1B classification.
>
> * * *
>
> [redacted] requested extensive personal leave to attend family matters in India. She reported back in November of 2007.
>
> * * *
>
> Due to personal reasons, [redacted] started working for [the petitioner] in June of 2007 and soon after that quit her job in September of 2007.

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. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner's director's proposal of plausible explanations for the pay discrepancies is not "independent objective evidence" within the meaning of *Matter of Ho*, and is insufficient to overcome the evidence that the petitioner has not been abiding by the terms and conditions of H-1B employment.

Further, the petitioner's president's explanations do not explain all of the inconsistencies observed in the financial documents and the employee list that the petitioner previously provided.

The petitioner's director states that [redacted] was not able to obtain a social security number until May of 2007, right after which he immediately commenced employment with the petitioner. The petitioner should, then, have paid some wages to [redacted] during the second quarter of 2007, and should have paid him $11,650 during each of the last two quarters, but did not. The record contains no explanation of that discrepancy.

Given that [redacted] reported to work for the petitioner on April 1, 2007, the petitioner should have paid the beneficiary $11,650 during each of the last three quarters of 2007. The evidence demonstrates that it did not. That he took personal some personal leave during those quarters, or even that he took considerable personal leave, is insufficient to explain that discrepancy, and the record contains no other explanation.

The petitioner's director did not reveal when [redacted] worked for the petitioner and when she did not. Whether the petitioner paid her the wages due her pursuant to her employment in H-1B status, therefore, is not amenable to analysis with the facts provided.

The petitioner's president stated that [redacted] visited India from September 11, 2008 until December 24, 2007. Because that statement was intended to address an apparent failure to pay

wages due during 2007, the AAO suspects that the petitioner's president meant to say that [redacted] was absent from September 11, 2007 to December 24, 2007, although that is not clear. If that was his meaning, that statement would only indicate that [redacted] was absent for about 20 days of the third quarter of 2007. That the petitioner paid [redacted] only $4,583.34 of the $12,000 ordinarily due to him during that quarter is not explained by that short absence.

The petitioner's president stated that [redacted] began working for the petitioner on April 2, 2007. He should, then, have been paid almost the full $11,250 due him during the second quarter, but was paid no wages during that quarter.

The petitioner's president's statement that [redacted] requested extensive personal leave to attend family matters in India [and] . . . reported back [to work for the petitioner] in November of 2007" does not indicate when, prior to November of 2007 she did and did not work. In any event, it does not explain why the petitioner paid her $4,000 during the first, second, and fourth quarters of 2007.

The petitioner's president stated, "[redacted] started working for [the petitioner] in June of 2007 and soon after that quit her job in September of 2007." Given that chronology, the petitioner should have paid her something during the second quarter of 2007, which it did not. Further, pursuant to that chronology, it should have paid her nothing during the fourth quarter of that year, when it paid her $2,483.33.

The discrepancies between the amounts due to the petitioner's H-1B employees and the amounts it paid to them during 2007 indicate that the petitioner has not recognized its obligation to pay its salaried H-1B beneficiaries the wage rate specified on the LCA on a regular basis and without reduction, suspension, or delay except in certain limited circumstances that do not appear in this record of proceeding. *See* 20 C.F.R. § 655.731(c) (Satisfaction of required wage obligation). In this regard, the AAO notes that the petitioner failed to provide documentary evidence sufficient to establish that periods of unpaid leave that the petitioner claims the beneficiaries took were not the result of lack of work for those beneficiaries. *See* the "Wage Obligation(s) for H-1B nonimmigrants in nonproductive status," in the regulations at 20 C.F.R. § 655.731. The AAO finds that the director was correct in her determination that the record before her failed to establish that the petitioner would comply with the terms of the approved LCA, and it also finds that the argument submitted on appeal has not remedied that failure. Accordingly, the director's decision to deny the petition shall not be disturbed.

The remaining basis for the decision denying the visa petition was the director's determination that the petitioner had not submitted a corresponding LCA to support the instant visa petition. The AAO will now consider that issue.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

> Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a

> labor condition application in the occupational specialty in which the alien(s) will be employed.

While the U.S. Department of Labor (DOL) is the agency that certifies LCAs before they are submitted to USCIS, the DOL regulations note that it is within the discretion of the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) to determine whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

> For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification. . . .

[Italics added]

The visa petition and the first LCA were both submitted on April 14, 2008, and both indicate that the beneficiary would work in Golden Valley, Minnesota. Subsequently, however, the petitioner submitted an itinerary showing that the beneficiary would work in Arlington Heights, Illinois 75% of the time. In support of this amended claim, the petitioner submitted a second LCA, certified for employment in both Golden Valley, Minnesota and in Arlington Heights, Illinois. That LCA, however, was certified on July 19, 2008.

The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. The LCA submitted in response to the RFE, including Arlington Heights, Illinois as a work location, was certified approximately three months after the petitioner filed the Form I-129. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Pursuant to at 8 C.F.R. § 214.2(h)(4)(i)(B), the LCA certified on July 19, 2008 may not be used to support the instant visa petition. The previous visa petition, certified on April 4, 2008 and submitted with the visa petition, is not approved for employment in Arlington Heights, Illinois, which the petitioner has made plain, in the itinerary submitted, will be the location where the beneficiary will primarily work.

On appeal, the petitioner's director stated:

> Please be advised that the contract between [the petitioner] and Next Generation Technology, Inc. was submitted only as an example of our on-going operation that requires the engagement of Programmer Analysts like the beneficiary.

The statement on the itinerary submitted, however, that the beneficiary would work for Next Generation Technology, Inc. in Arlington Heights, Illinois, does not support the assertion that the evidence pertinent to Next Generation Technology was submitted for any such purpose. It clearly stated that the beneficiary would work for that company in that location for the great majority of the period of requested employment.

Further, that the beneficiary would work at locations other than the petitioner's Golden Valley location is confirmed by the beneficiary's employment contract, provided in response to the RFE. That contract states:

> You will be required to work on a project, at Golden Valley office of [the petitioner]. And sometimes you need to travel to one of the client's place whenever is required, since the clients of [the petitioner] are located throughout the US, the travel expenses will be paid by [the petitioner] upon submission of all such receipts.

Subsequently, the same contract states:

> You are responsible for all costs associated with transportation to and from work locations to which [the petitioner] assigns you. You will also be responsible for costs associated with lodging.

Although the beneficiary's employment contract contradicts itself pertinent to who will pay the beneficiary's travel expenses when she travels to remote client sites, it makes clear that the beneficiary is expected to work at remote client sites.

The petitioner has not provided an LCA that corresponds to the instant visa petition and may be used to support it, and, therefore, as indicated by the director, had failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B). For this additional reason, the appeal will be dismissed and the visa petition will be denied.

Beyond the decision of the director, the AAO finds that the record contains additional issues that were not addressed in the decision of denial. The AAO will first address whether the petitioner has demonstrated that it would employ the beneficiary in a specialty occupation.

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. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would be employing the beneficiary in a specialty occupation position.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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 a particular position 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. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

As was noted above, the petitioner seeks to employ the beneficiary in what it designates a programmer analyst position. In his letter of April 2, 2008, the petitioner's CEO gave the following description of the duties of the proffered position:

(1) Developing customer software for enterprise resource planning needs;

(2) Customizing functional modules on GUI mode like financial accountancy, Sales and Distribution, Materials Management and production planning;

(3) Coding in programming languages that suit the particular front end package;

(4) Writing algorithms required to develop programs using system analysis and design;

(5) Preparing flowcharts and entity-relationship models and diagrams to illustrate sequence of steps that program must follow and to describe logical operations;

(6) Using graphic files and text data from a database and presenting it on web;

(7) Collecting user requirements and analyzing coding to be done;

(8) Evaluating an existing system's software, hardware, business bottlenecks, configuration and networking issues, understanding client's requests for enhancements and new business functions;

(9) Interface programming, debugging and executing of programs;

(10) Monitoring the database using backup, archive and restoring procedures.

The petitioner's CEO further stated, "The nature of [the beneficiary's] duties is highly specialized. This position requires a professional with a minimum of Bachelor's in Computers, Electrical or Electronics related field or equivalent." The petitioner's CEO revealed no other analysis that led to the conclusion that the proffered position requires a bachelor's degree in any subject.

Further, as was noted above, to qualify as a position in a specialty occupation, the proffered position must require a minimum of a bachelor's degree or the equivalent *in a specific specialty*. The petitioner's CEO offered no analysis that led to the conclusion that computers, and electrical or electronics-related fields, all taken together, delineate a specific specialty, as opposed to a wide array of specialties with no common core of knowledge characterizing degrees in them.

The failure of the petitioner even to allege that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty is a sufficient reason, in itself, to find that the petitioner has not demonstrated that the proffered position is a specialty occupation position, and sufficient reason, in itself, to deny the visa petition. However, the AAO will continue its analysis of the specialty occupation issue, to identify other evidentiary deficiencies that preclude recognition of the proffered position as a specialty occupation.

In response to a request in the April 28, 2008 RFE, the petitioner submitted vacancy announcements it had placed for various positions. Those pertinent to programmer analyst positions will be addressed.

A classified advertisement for programmer analyst positions states "Requirements: Master's in computer science, EE, or related technical field."

An announcement for programmer analysts placed on the petitioner's own website states, "Candidates should have a bachelor's degree or equivalent in a related field . . . ."

One classified newspaper advertisement is for software engineers, systems analysts, programmer analysts, computer and information systems managers, and database administrators. It states, "All positions require at least a bachelor's or equivalent . . . ." It does not indicate any specific specialty the degrees should be in.

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.[1] The *Handbook* discusses the duties of programmer analyst positions in the section entitled Computer Systems Analysts. It states the following as to programmer analyst positions:

> 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

[1] The *Handbook*, which is available in printed form, may also be accessed on the Internet, at http://www.stats.bls.gov/oco/. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online.

> 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.

Programmer analyst positions, then, combine the duties of a computer systems analyst with those of a programmer. The *Handbook* states the following about the duties of computer systems analysts:

> To begin an assignment, systems analysts consult with an organization's managers and users to define the goals of the system and then design a system to meet those goals. They specify the inputs that the system will access, decide how the inputs will be processed, and format the output to meet users' needs. Analysts use techniques such as structured analysis, data modeling, information engineering, mathematical model building, sampling, and a variety of accounting principles to ensure their plans are efficient and complete. They also may prepare cost-benefit and return-on-investment analyses to help management decide whether implementing the proposed technology would be financially feasible.
>
> When a system is approved, systems analysts oversee the implementation of the required hardware and software components. They coordinate tests and observe the initial use of the system to ensure that it performs as planned. They prepare specifications, flow charts, and process diagrams for computer programmers to follow; then they work with programmers to "debug," or eliminate errors, from the system. Systems analysts who do more in-depth testing may be called *software quality assurance analysts*. In addition to running tests, these workers diagnose problems, recommend solutions, and determine whether program requirements have been met. After the system has been implemented, tested, and debugged, computer systems analysts may train its users and write instruction manuals.

The *Handbook* discusses computer programmer positions in the section entitled Computer Software Engineers and Computer Programmers. It describes the duties of computer programmers as follows:

> *Computer programmers* write programs. After computer software engineers and systems analysts design software programs, the programmer converts that design into a logical series of instructions that the computer can follow (A section on computer systems analysts appears elsewhere in the *Handbook*.). The programmer codes these instructions in any of a number of programming languages, depending on the need. The most common languages are C++ and Python.
>
> Computer programmers also update, repair, modify, and expand existing programs. Some, especially those working on large projects that involve many programmers, use computer-assisted software engineering (CASE) tools to automate much of the coding process. These tools enable a programmer to concentrate on writing the

> unique parts of a program. Programmers working on smaller projects often use "programmer environments," applications that increase productivity by combining compiling, code walk-through, code generation, test data generation, and debugging functions. Programmers also use libraries of basic code that can be modified or customized for a specific application. This approach yields more reliable and consistent programs and increases programmers' productivity by eliminating some routine steps.

The duties of the proffered position, as described by the petitioner's CEO, are consistent with a blend of the duties of a computer systems analyst position and a computer programmer position. The AAO therefore finds that the proffered position is a programmer analyst position. The *Handbook* describes the educational requirements of computer systems analysts, including programmer analysts, as follows:

> ***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.

A preference for a bachelor's degree is not a minimum requirement. A preference for a degree in "computer science, information science, applied mathematics, engineering, or the physical sciences" is certainly not a requirement of a degree in any one specific specialty. Neither that section of the *Handbook*, nor any evidence in the record, suggests that programmer analyst positions categorically require a minimum of a bachelor's degree or the equivalent in any specific specialty.

The petitioner has not demonstrated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

Next, the AAO will consider the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). This prong alternatively requires a petitioner to establish that a bachelor's

degree, in a specific specialty, 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 specific 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 was noted above, the *Handbook* offers no support for the proposition that the petitioner's industry, or any other, requires a minimum of a bachelor's degree or the equivalent in a specific specialty. The record contains no evidence that a professional association of programmer analysts or computer systems analysts requires a minimum of a bachelor's degree or the equivalent in a specific specialty for entry. The record contains no letters or affidavits from other firms or individuals in the petitioner's industry. The record contains, in short, no evidence pertinent to the common requirements for programmer analysts in the petitioner's industry.

The petitioner has not demonstrated that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar organizations, and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), which is satisfied if the petitioner is able to demonstrate that, although a more typical programmer analyst position may not require a minimum of a bachelor's degree or the equivalent in a specific specialty, the individual position proffered in the instant case is so complex or unique that it can be performed only by an individual with a degree.

Most of the duties of the proffered position are so abstractly phrased that distinguishing them from the duties of other programmer analyst positions is impossible. "Developing customer software," "Coding in programming languages," "Writing algorithms," "Preparing flowcharts," etc. are merely generic duties of typical programmer analyst positions. The only duty that is more concretely described, "Customizing functional modules on GUI mode," is not unique and provides no indication of complexity beyond the ken of a typical programmer analyst.

Further, as was noted above, the petitioner's CEO indicated that a degree in computers or in any electronics or electrical-related field would be a sufficient qualification for the proffered position, which is tantamount to an admission that it does not, in fact, require a minimum of a bachelor's degree or the equivalent in any specific specialty.

The petitioner has not demonstrated that the particular position proffered is so complex or unique that it can be performed only by an individual with a minimum of a bachelor's degree or the

equivalent in a specific specialty; and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which is satisfied if the petitioner demonstrates that it normally requires a minimum of a bachelor's degree or the equivalent in a specific specialty for the position. The vacancy announcements provided and the petitioner's CEO's statement are the only evidence pertinent to the petitioner's recruitment or hiring practices.

One announcement requires a master's degree in computer science, electrical engineering, or a related field. The AAO notes that computer science and electrical engineering do not delineate a specific specialty. That position does not require a minimum of a bachelor's degree or the equivalent in a specific specialty.

One announcement indicates that candidates should have a bachelor's degree or the equivalent in a "related field." Given that the previous announcement considered both computer science and electrical engineering to qualify one for such positions, the AAO cannot find that "a related field" denotes any specific specialty.

The remaining announcement states that all of the positions require "at least a bachelor's degree or equivalent," with no indication that the degree should be in any specific specialty.

Finally, as was observed above, by stating that the a degree in computers or any electronic or electrical-related field is a sufficient qualification for the proffered position, the petitioner's CEO conceded that it does not require a minimum of a bachelor's degree or the equivalent in a specific specialty.

The vacancy announcements provided are the only evidence in the record about the petitioner's previous history of recruiting and hiring, and they uniformly fail to demonstrate that the petitioner normally requires a minimum of a bachelor's degree or the equivalent in a specific specialty for its programmer analyst positions. The CEO's statement pertains to the petitioner's current practice pertinent to the proffered position, and affirmatively states that a degree in any of a wide array of cases is a sufficient qualification for the proffered position. The petitioner has not demonstrated that it normally requires a minimum of a bachelor's degree or the equivalent in a specific specialty for the proffered position and has not, therefore, demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO will consider the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*), which is satisfied if the petitioner demonstrates that the nature of the specific duties of the proffered position is so specialized and complex that knowledge required to perform those duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

Again, as was noted above, the duties of the proffered position as described by the petitioner's CEO are the generic duties of a programmer analyst position. The record contains no indication that those duties are in any way more specialized or complex than the duties of other programmer analyst positions, which, as was also noted above, do not categorically require a minimum of a bachelor's degree or the equivalent in a specific specialty.

The petitioner has not demonstrated that 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. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

The petitioner has not demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to any of the alternative criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). The visa petition will be denied on this additional basis.

The remaining issue to be discussed is whether the petitioner has demonstrated that the beneficiary is qualified to work in the proffered position. An examination of the duties of the proffered position suggests that those duties might be closely related to computer science, information technology or information systems, computer engineering, or, of course, computer systems analysis. The beneficiary, however, has a bachelor's degree in electrical and electronics engineering.

Pursuant to the instant visa category, a beneficiary's credentials to perform a particular job are relevant only when the job is found to qualify as a specialty occupation. As discussed in this decision, the proffered position has not been shown to require a baccalaureate or higher degree, or its equivalent, in a specific specialty and has not, therefore, been shown to qualify as a position in a specialty occupation.

The AAO observes, however, that if the petitioner had demonstrated that the proffered position required a minimum of a bachelor's degree or the equivalent in a specific specialty, the petitioner would then be obliged, in order for the visa petition to be approvable, to demonstrate, not only that the beneficiary has a bachelor's degree or the equivalent, but that the beneficiary has a minimum of a bachelor's degree or the equivalent *in that specific specialty*. *See Matter of Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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. The appeal will be dismissed and the petition denied.

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