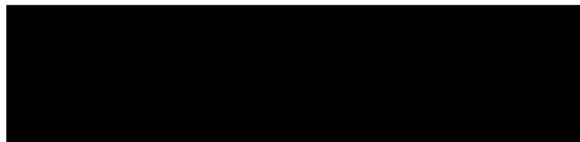


identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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**



D2

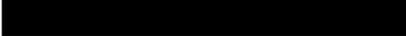
Date: DEC 27 2011

Office: CALIFORNIA SERVICE CENTER

File: 

IN RE:

Petitioner: 

Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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,

for Michael T. Kelly

Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on October 26, 2009. The petitioner indicated that it is a for-profit fabric wholesaler with 9 employees and a gross annual income of approximately \$3.5 million and a net income of approximately \$87,860.

Seeking to employ the beneficiary in what it designates as a computer systems analyst position, the petitioner filed this H-1B petition in an endeavor 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 on December 29, 2009, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel asserts that the director's basis for denial was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and documentation in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO concurs with the director that the petitioner has not established that the proffered position qualifies as a specialty occupation within the meaning of the controlling statutory and regulatory provisions. Accordingly, the appeal will be dismissed, and the petition will be denied.

Later in this decision, the AAO will also address two additional, independent grounds, not identified by the director's decision, that the AAO finds also preclude approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner (1) failed to offer the beneficiary an adequate wage for the proffered position under the applicable regulations, and (2) failed to submit a Labor Condition Application (LCA) that corresponds to the petition. Thus, for these reasons as well, the appeal will be dismissed and the petition will be denied, with each considered as an independent and alternative basis for denial.¹

The petitioner indicated on the Form I-129 and supporting documentation that it seeks the beneficiary's services as a computer systems analyst, on a part-time basis (20 hours per week), at

¹ The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

a salary of \$22.49 per hour (\$449.80 per week). In connection with the Form I-129 petition, the petitioner submitted a letter of support that included a description of the duties that the beneficiary would perform in the proffered position.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on October 30, 2009. Specifically, the director requested additional evidence from the petitioner to demonstrate that the proffered position is a specialty occupation. The director requested the petitioner provide a more detailed description of the proffered position, including specific job duties, the approximate percentage of time to be spent on each duty and level of responsibility. In addition, the petitioner was asked to provide a clear explanation of the duties to be performed that are more discretionary, demanding, complex, highly advanced, specialized, or sophisticated that exceed industry or normal position standards. The petitioner was also requested to provide documentary evidence to establish that the position meets the statutory and regulatory requirements for H-1B classification to be granted.²

In response to the RFE, the petitioner provided the following description of the proffered position along with the percentage of time the beneficiary would spend performing each of the duties:

- Monitor [REDACTED] software to meet key business objectives (25% of time);

² In the appeal, counsel asserts that the director's request for evidence was arbitrary and unreasonable. For example, counsel indicates that the director's request for documentation, such as job postings for parallel positions among similar organizations indicating a degree requirement, was arbitrary and unreasonable and beyond the scope of the regulations. The AAO notes that the request for evidence asked the petitioner to "[p]rovide evidence to establish a degree requirement is common to the industry in parallel positions among similar organizations. *Evidence may include* job listings or advertisements" (Italics added.) The first sentence is almost verbatim from the regulations, and the second sentence provides an example of the type of documentation that may establish that the proffered position meets the requirements.

A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). The director notified the petitioner, through the RFE, that the record of proceeding was insufficient to establish that the proffered position qualified as a specialty occupation according to the statutory and regulatory requirements. The petitioner was then provided an opportunity to submit additional evidence to establish that the petition met least one of the criteria for H-1B petitions involving a specialty occupation. The director's request was not arbitrary or unreasonable, as the RFE was constructed to allow the petitioner an opportunity to provide evidence that would directly relate to the specific criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated.

- Design and develop applications using .Net Framework 1.1, C#, VB.NET, ASP.NET, VB6.O, XML, and Microsoft SQL Server 2000 on Windows platform for apparel business (20%);
- Gather business requirements and develop conceptual design and technical design for programming projects (15%);
- Evaluate alternative solutions and recommend solution that best meets the need of the business (10%);
- Translate user requirements into overall solution architecture for technical solutions (10%);
- Recognize, identify and document potential areas where existing business processes require change, or where new processes need to be developed, and make recommendations in these areas (10%);
- Review computer system capabilities, work flow and scheduling limitations to determine if requested program or program change is possible within existing system (10%).

The description of the duties that the petitioner provided in response to the RFE is almost identical to the description it provided in the letter of support with the Form I-129. In the letter of support, the first duty is listed as "[m]onitor and administer [REDACTED] software to meet key business objectives" and the second duty does not contain the words "for apparel business."³ Additionally, the initial description included the sentence "[w]ork independently and resolve complex problems with no or limited supervision." Thus, despite the director's request, the petitioner did not provide a more detailed description of the job duties of the proffered position.

As indicated above, the beneficiary is expected to spend 25% of her time monitoring [REDACTED] software. In response to the RFE and in the appeal, counsel claims that "the attainment of a degree is a job requirement due to the complexity of the software [REDACTED] and the need for some affirmation of the educational and technical background of the individual." Counsel states that the petitioner purchased [REDACTED] software and contracted for

³ [REDACTED] is an enterprise resource planning (ERP) software product. The Microsoft website states that "[REDACTED] is a business management solution that helps small and mid-sized organizations streamline their highly specialized business processes, rapidly adapting to the unique way they do business." The website also indicates that "[f]or nearly 30 years, [REDACTED] has delivered the capabilities, performance, and ease of use that power more than 84,000 diverse businesses in over 40 countries." See [REDACTED] (visited December 20, 2011). There is no indication that use of the software by businesses requires computer-related specialized knowledge at the bachelor's level or higher.

the maintenance of it for a specific period; however, "such a remote maintenance proved not to be an efficient tool for dealing with computer issues." The petitioner and counsel contend that the proffered position is a specialty occupation, in part, based upon their assertion that specialized knowledge is required for monitoring the complex software used by the petitioner.⁴ However, the AAO finds that the record of proceeding contains no documentary evidence substantiating this claim. The AAO further finds that the record of proceeding also lacks evidence substantiating the petitioner's claims that it is necessary to possess, at a minimum, a bachelor's degree level of a body of highly specialized computer-related knowledge, "due to the complexity of the software and need for affirmation of the educational and technical background of the individual." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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).

Counsel claims on appeal that the job description "provided a vivid and distinctive description of the position of computer systems analyst as it related to a petitioner in the apparel industry." The AAO disagrees with counsel and finds that the minimum level of training, experience, and/or formal education that would be required to attain the knowledge required for the position is not self-evident in the duty descriptions, even considered in the aggregate and in the context of the evidence that the record of proceeding relates about the general business operations in which they would be applied.

The AAO notes that the petitioner's descriptions of the duties of the proffered position are broad and generic in that they do not convey the substantive nature of the specific matters upon which the beneficiary would focus or the practical and theoretical level of knowledge that the beneficiary would have to apply to those matters. That is, the duty descriptions appear relatively abstract, as they depict the general functions of the proffered position, and, as such, do not establish a level of complexity, uniqueness and/or specialization that distinguishes the duties, or the position, from computer systems analysts positions whose performance does not require a bachelor's degree, or the equivalent, in a computer or IT (information technology) related specialty. In this regard, the AAO also notes that the petitioner's references to computer and IT terms, appearing as they do without any documentary evidence correlating them to a minimum

⁴ The company [REDACTED] provides the [REDACTED] software. A review of its website indicates that the company has posted brief biographies of its employees, including their educational credentials. The biographies indicate that the employees who provide technical support to customers for the [REDACTED] software have degrees in a range of fields, including English Literature, Business, Economics, Public Administration, Commerce and Computer Science. Thus, based upon the information provided on the [REDACTED] website, a baccalaureate or higher degree in a computer-related field, or its equivalent, is not required to provide professional technical support of the WinFashion software. See [REDACTED] (visited December 20, 2011).

necessary level of education in a body of highly specialized knowledge, do not indicate that the use of the software to which they refer would require any particular level of formal education in a computer-related specialty, or, for that matter, any such formal education at all.

Moreover, the AAO observes, that while providing a list of generalized functions, the record of proceeding does not convey how such a broad spectrum of duties would actually translate into actual performance requirements with respect to any specific projects to which the beneficiary would be assigned, and how the performance of the duties in the course of such projects would correlate to a need for at least a bachelor's degree in a specific specialty. Further, the petitioner failed to provide a meaningful description that adequately explains what the beneficiary would be doing on a day-to-day basis. In short, the evidence submitted does not provide a sufficient basis to discern either the substantive nature, or the associated minimum-level educational requirement, of the services that the beneficiary would actually perform if this petition were approved.

(It should be noted that, for efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the duties of the proffered position into each basis discussed below for dismissing the appeal.)

The AAO will first address the director's determination that the petitioner failed to establish that the proffered position is a specialty occupation. The AAO agrees with the director and finds that the evidence in the record of proceeding fails to establish that the proffered position as described by the petitioner constitutes a specialty occupation.

In deciding whether a proffered position qualifies as a specialty occupation, the AAO analyzes the evidence of record according to the statutory and regulatory framework below.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one requiring the following:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

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

An occupation which requires [(1)] theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires [(2)] 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 and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. See *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); see also *COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. See *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. 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.

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position.

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

The descriptions of the duties of the proffered position indicate generally that the beneficiary will be primarily involved in computer-related and IT activities. Here incorporating this decision's earlier comments about the evidentiary deficiencies regarding the substantive work that the beneficiary would actually perform, the AAO notes that the descriptions of the duties of the proffered position do not convey either the substantive nature of the specific matters upon which the beneficiary would focus or the practical and theoretical level of knowledge that the beneficiary would have to apply to those matters.

When determining whether the record of proceeding establishes that a particular position meets the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), the AAO will routinely review the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*. The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁵

The section of the *Handbook* most relevant to this proceeding is the chapter "Computer Systems Analysts."⁶ However, despite counsel's assumption to the contrary, computer systems analysts do not comprise an occupational group that categorically requires at least a bachelor's degree, or the equivalent, in a specific specialty. Thus, even if the generic statements that comprise the information about the proposed position and its duties were sufficient to demonstrate that the proffered position is that of a computer systems analyst, the *Handbook* does not indicate that

⁵ All of the AAO's references are to the 2010-2011 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

⁶ For this chapter, see Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2010-11 Edition*, Computer Systems Analyst, on the Internet at <http://bls.gov/oco/ocos287.htm> (visited December 20, 2011).

entry into positions in the occupation normally requires at least a bachelor's degree, or its equivalent, in a specific specialty.

The introduction to the "Training, Other Qualifications, and Advancement" section of the chapter on computer systems analysts in the *Handbook* states the following:

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.

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.

The *Handbook* does not indicate that computer systems analysts comprise an occupational group that categorically requires at least a bachelor's degree, or the equivalent, in a specific specialty. The information on the educational requirements in the "Computer Systems Analysts" chapter of the *Handbook* indicates, at most, that a bachelor's or higher degree may be a general preference, but not an occupational entry requirement. Moreover, the *Handbook* indicates that a non-technical degree, accompanied with technical skills, may be acceptable for entry into the occupation. Furthermore, courses in related subjects along with practical experience may be acceptable to some employers for entry to the occupation. Thus, the proffered position does not qualify as a specialty occupation by virtue of its occupational classification.

As the *Handbook* does not support the proposition that the occupation "Computer Systems Analysts" typically requires a minimum of a bachelor's degree or the equivalent in a specific specialty, the petitioner is obliged to show not only that the beneficiary would perform the services of a computer systems analyst, but also that she would do so at a level that requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a computer-related specialty. In such an occupational context, it is incumbent on the petitioner to provide sufficient evidence to establish that the particular position

that it proffers would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty.

However, as reflected in this decision's earlier discussion of the duties comprising the proffered position, the generically-described position duties provided by the petitioner do not demonstrate that this petition's particular computer systems analyst position is one that would normally require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized computer-related knowledge, as necessary for qualification as a specialty occupation. That is, the petitioner has not established that the beneficiary's actual duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation.

Thus, the petitioner has not established that the position falls under an occupational category for which the *Handbook* indicates that there is a categorical requirement for at least a bachelor's degree in a specific specialty. Furthermore, it is not self-evident that, as described in the record of proceeding, the proposed duties comprise a position for which the normal entry requirement would be at least a bachelor's degree, or its equivalent, in a specific specialty. Accordingly, the AAO finds that the petitioner has not established its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO reviews the evidence in the record of proceeding relevant to the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong 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.

As previously mentioned, the petitioner is a for-profit fabric wholesaler with 9 employees and a gross annual income of approximately \$3.5 million and a net income of approximately \$87,860.

In determining whether there is 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. at 1102).

As already discussed, the petitioner has not established that its proffered position falls under an occupational classification for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Furthermore, the petitioner has not provided any documentation to indicate that the industry's professional association has made a degree a minimum entry requirement.

The petitioner provided an opinion letter dated December 10, 2009 from Associate Professor [REDACTED] (evaluator). The evaluator claims that the opinion letter is based upon his

"experience as associate professor and evaluator of foreign credentials in the Computer Systems Technology Department of the [REDACTED]. The evaluator's resume indicates that he has served as an associate professor at [REDACTED] since 1998. The evaluator provided the following information regarding his work in the position: "Conducted research in the area of databases and software modeling and optimization" and "Taught Computer Science courses." No further information regarding his job duties in this position was provided.

In the opinion letter, the evaluator states that he has "conducted extensive research in the fields of technology management, algorithm design, application development, architectural design, biomathematics and mathematic modeling." Upon reviewing his resume, under the section "Research Grant & Fellowship," the evaluator's most recent entry is for a grant in July 2003 for a research project entitled "[REDACTED]" (His resume indicates he also received a grant in 2000 and another grant in 2001. All other grants were received in 1990 or earlier.) Under "Research Publications," the two most recent entries are dated 2003 and 2005. All other entries for this section are from the late 1980's and early 1990's. The evaluator also stated in the opinion letter that he has served in the "capacity of a professional consultant and software developer for numerous companies." A review of his resume indicates that he served in various positions with several companies from 1981 to 1998. Based upon the information provided, the evaluator has not established that his education, training, skills or experience have provided him with expertise or specialized knowledge of the current requirements in the industry for computer systems analyst (or parallel positions) among organizations that are similar to the petitioner.

The AAO notes that the evaluator states that he has "grown familiar with the role played by computer systems analysts in corporate IT environments, including firms such as the employer . . ." but he does not provide any further specific information to establish his expertise on this issue. The evaluator's resume includes information regarding his professional experience, background and accomplishments. The AAO finds that neither the resume nor any other evidence in the record of proceeding establishes the evaluator as an authority in the area in which he pronounces his opinion, namely, the current entry requirements for computer systems analysts among organizations that are similar to the petitioner. It is not evident how the evaluator's education, training, skills or experience would translate to expertise or specialized knowledge regarding the present hiring requirements for computer systems analysts (or parallel positions) with for-profit fabric wholesalers similarly situated to the petitioner.

The evaluator states that he "reviewed an outline of the job duties" for the proffered position. He then provided a job summary and description of the duties and responsibilities, which, the AAO finds, expand the duties of the proffered position as depicted to USCIS by the petitioner. No explanation for the variance in the description was provided.

A review of the opinion letter indicates that the evaluator did not identify the specific elements of his knowledge and experience that he may have utilized to reach his conclusions. Furthermore, it must be noted that his conclusions are not supported by independent, objective evidence demonstrating the manner in which he reached such conclusions. He does not provide any

evidence in support of his opinion regarding the educational requirements for the position (e.g. cite studies, surveys, empirical evidence). Thus, there is an inadequate factual foundation to support the opinion and the AAO finds that the opinion is not in accord with other information in the record.

Also, the conclusions reached by the evaluator lack the requisite specificity and detail. For example, the opinion letter contains no evidence that it was based on scholarly research conducted by the evaluator in the specific area upon which he is opining. There is no evidence that he has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. Based upon his resume, he has not performed any research or published any work pertinent to the industry's *educational requirements* for computer systems analysts to work in organizations similar to the petitioner, or been recognized by professional organizations as an authority on those requirements. As the evaluator has not established his credentials as a recognized authority on the hiring/entry standards for this occupation, his opinion in this area merits no special weight. Upon review, the opinion letter rendered by the evaluator is not probative. He has not provided sufficient facts that would support the contention that the proffered position requires at least a bachelor's degree in a specific specialty. The evaluator does not provide a substantive, analytical basis for his opinion. He has not provided a sufficient factual basis by which one may reasonably conclude that his opinion is well founded and reliable.

The AAO may, in its discretion, use as advisory opinions or statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). As a reasonable exercise of its discretion the AAO discounts the evaluator's opinion as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner also provided four job announcements in support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations. However, upon review of the documents, the petitioner fails to establish that similar organizations to the petitioner routinely employ individuals with degrees in a specific specialty, in parallel positions.

The AAO notes that for the petitioner to establish that an organization is similar, it must demonstrate that similar characteristics are shared with the advertising organization. Such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered).

The petitioner provided the following four job announcements:

- An advertisement from an unnamed organization for a Business Analyst. The advertisement states that the educational level for the position is a bachelor's degree, but no further information is provided. Based upon the information

provided, the advertisement indicates that a bachelor's degree is generally required, but not at least a bachelor's degree or the equivalent in a *specific specialty*.

- A job posting from Buxton Consulting, Inc. for a Business Analyst. No further information regarding the employer was provided. The job type is listed as Business Development, Marketing. The advertisement indicates that a bachelor's degree (or 7+ years of combined college education and work experience may be substituted for a degree) is required. The job posting does not indicate that at least a bachelor's degree or the equivalent in a *specific specialty* is required for the position.
- A job posting from Medline Industries for a Systems Analyst/Developer. The posting indicates that the company is the largest privately held national manufacturer and distributor of health care supplies and services. The company website states that Medline "products are found in almost every hospital in the U.S., and for over half of those hospitals the company is a top-ten supplier." Thus, the posting is for a dissimilar organization, whose size and scope appears to far exceed the petitioner's. Furthermore, the job posting states that a 4-year degree is required, but not at least a bachelor's degree or the equivalent in a *specific specialty*.
- A job posting from C&F Enterprises ("leading wholesale textile manufacturer") for a Programmer/Analyst. The company's website states that C&F Enterprises is a home accessories company with manufacturing facilities in China, Hong Kong, Taiwan, and the Philippines and over 250,000 square feet of distribution space in Newport News, Virginia and that the company has a sales team of over 100 individuals, as well as expanding marketing and design teams. The posting is for an organization whose size and number of employees far exceeds the petitioner's. It must be noted that in the appeal, counsel specifically states that "the position proffered was NOT that of a computer programmer/analyst." Thus, it is unclear why the petitioner included this job posting since it is apparently for a dissimilar position.

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job announcement is not necessary. That is, not every deficit of every job announcement has been addressed.

The job announcements support the *Handbook's* information on the educational requirements of "Computer Systems Analysts" that a bachelor's or higher degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement for this occupational category. Rather, the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty.

It must be noted that even if all of the job postings specified a bachelor's degree in a specific specialty as a precondition for consideration (which they do not), the petitioner fails to

demonstrate what statistically valid inferences, if any, can be drawn from four advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. See generally [REDACTED], *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported a finding that the position of computer systems analysts (for organizations that are similar to the petitioner) required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

For the reasons discussed above, the record of proceeding does not establish that a degree in a specific specialty is common in the petitioner's industry for entry into positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. Thus, the petitioner has not satisfied 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 shows that the particular position proffered in this petition is "so complex or unique" that it can be performed only by an individual with at least a bachelor's degree in a specialty occupation.

The AAO incorporates by reference and reiterates its earlier discussions regarding the generalized and generic nature of the proposed duties, for, as reflected in those discussions, the evidence of record fails to distinguish the proffered position as more complex or unique than computer system analyst positions that the *Handbook* indicates are performed by persons without at least a bachelor's degree, or the equivalent, in a specific specialty.

Furthermore, as will be further discussed later below, the LCA submitted by the petitioner in connection with this petition indicates that the proffered position is actually a low-level, entry position that involves routine tasks - relative to other computer systems analysts within the occupation.

In the RFE, the director requested the petitioner provide documentation to establish that the duties of the position that are more discretionary, demanding, complex, highly advanced, specialized, or sophisticated such that a baccalaureate level of education in a specific field of study is a prerequisite for entry into the proffered position.

Even though the petitioner and counsel claim that the duties of the proffered position are so complex or unique that a bachelor's degree is required, the record does not sufficiently demonstrate how the duties of the proffered position require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. The petitioner has not submitted evidence distinguishing the proffered position as more complex or unique than the range of "Computer Systems Analysts" for which the *Handbook* indicates that there is no requirement for a bachelor's or higher degree, or its equivalent, in a specific specialty. The petitioner was provided with an opportunity to establish the relative complexity or uniqueness of the proffered position under this criterion. However, the petitioner failed to adequately convey the substantive nature and the specific matters upon which the beneficiary would focus that are so complex and/or unique as to require that she possess a baccalaureate degree, in a specific specialty, to perform the duties of the position. The petitioner did not sufficiently develop relative complexity or uniqueness as an aspect of the proffered position.

The duties, as described by the petitioner, do not elevate the proffered position above that for which no particular educational requirements are demonstrated. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record of proceeding fails to adequately establish that the job duties described relate any dimensions of complexity and uniqueness such that a bachelor's degree in a specific specialty would be required.

The petitioner has failed to credibly demonstrate the duties the beneficiary will be responsible for or perform on a day-to-day basis entail any particular degree of complexity or uniqueness relative to those comprising computer systems analyst positions performed by persons without the credentials required to satisfy this particular criterion. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it claims are so complex or unique. While a few computers-related courses may be beneficial in performing certain duties of the proffered position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree or its equivalent are required to perform the duties of the particular position here. 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 Obaighena*, 19 I&N Dec. 533; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503.

Therefore, the evidence of record does not establish that this position is significantly different from other positions such that it refutes the *Handbook's* information to the effect that there is a spectrum of educational backgrounds that is suitable for entry into such positions.

Consequently, as the evidence in the record of proceeding has not established that the proffered position is so complex or unique that it can be performed only by a by a person with at least a bachelor's degree, or the equivalent, in a specific specialty, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, the AAO will consider the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is satisfied if the petitioner establishes that it normally requires a degree or its equivalent in a specific specialty for the position.

The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who have previously held the same or similar positions with the petitioner. In the instant matter, counsel indicated that the petitioner had not previously hired a computer systems analyst. The petitioner did not provide any information or documentation regarding its methods for recruiting the beneficiary for the position. No evidence regarding any current or past recruitment efforts for this position, or any similar positions, was submitted. Thus, the evidence does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

In the instant case, the petitioner has not submitted evidence to indicate that the specific duties of the position are 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 refute the *Handbook's* information to the effect that a bachelor's degree in a specific specialty is not normally required. The AAO incorporates by reference and reiterates its earlier comments regarding the description of the proffered duties, as they reflect the fact that the record of proceeding fails to adequately establish that the actual work that the beneficiary would perform would entail a greater level of specialization and complexity than computer systems analyst positions whose duties are not so specialized and complex as to require knowledge associated with at least a baccalaureate degree in a specific specialty or its equivalent.

If the proposed duties possess the requisite degree of specialization and complexity, it is not conveyed by the duties as they are described in the record of proceeding, or by any documentary evidence supplementing those duties. In this regard, the AAO here incorporates its comments and conclusion regarding the lack of probative value in the evaluation that Professor Bellehsen prepared for the petitioner.

As the evidence of record does not establish that the duties of the proffered position are sufficiently specialized and complex that their performance would require knowledge at a level usually associated with at least a bachelor's degree, or the equivalent, in specific specialty, the petitioner has failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any one of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Beyond the decision of the director, the AAO will enter two additional grounds for denial of the petition. Specifically, the petitioner (1) failed to offer the beneficiary an adequate wage for the proffered position under the applicable regulations, and (2) failed to submit a Labor Condition Application (LCA) that corresponds to the petition. Thus, for these reasons as well, the appeal will be dismissed and the petition will be denied, with each considered as an independent and alternative basis for denial.

It must be noted that the AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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).

While the Department of Labor (DOL) is the agency that certifies LCAs before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining 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 regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary.

In this case, the petitioner provided an LCA in support of the petition that indicates the occupational classification for the position is "Computer Systems Analysts" at a Level 1 (entry level) wage of \$22.49 per hour. The place of employment is listed as Los Angeles, California. The prevailing wage source is listed on the LCA as the OFLC Online Data Center.⁷ The LCA

⁷ The Foreign Labor Certification Data Center is the location of the Online Wage Library for prevailing wage determinations, and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatcenter.com/>.

was certified on September 11, 2009 and signed by the petitioner on October 5, 2009. A review of the Form I-129 petition and LCA indicate that the petitioner offered the beneficiary a salary of \$22.49 per hour (\$449.80 per week).

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. See INA § 212(n); 8 U.S.C. 1182(n). The prevailing wage rate is defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment.

Upon reviewing the OFLC Data Center, the prevailing wage rate for a Level 1 computer systems analyst in the "All Industries Database" for 07/2009 to 06/2010 is \$24.15 per hour.⁸ Thus, the petitioner's offered wage to the beneficiary of \$22.49 per hour is below the prevailing wage level for the occupational classification in the area of intended employment. As such, the petitioner has failed to establish that it would pay the beneficiary an adequate salary for her work, as required under the Act, if the petition were granted. As a result, even if it were determined that the petitioner overcame the other independent reason for the director's denial, the petition could still not be approved.

Furthermore, the petitioner asserts that the proffered position will require the beneficiary "to perform complex operations" and to "[w]ork independently and resolve complex problems with no or limited supervision."⁹ Counsel claims that the duties of the proffered position involve "complex responsibilities" and that the petitioner requires the services of "someone with a proven technical background."¹⁰ However, the petitioner's claims are questionable when reviewed in connection with the LCA.

Wage levels should be determined only after selecting the most relevant O*NET occupational code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.¹¹ Prevailing wage determinations start with an entry level wage and progress to a wage that is commensurate with that of a Level 2 (qualified), Level 3 (experienced), or

⁸ The "All Industries Database" for the period of 07/2008 to 06/2009 indicates that the prevailing wage rate for the occupation computer systems analyst at a Level 1, in the same area of employment, was \$22.49 per hour.

⁹ Petitioner's letter of support dated September 28, 2009.

¹⁰ Counsel's letter dated December 8, 2009.

¹¹ DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* (Revised Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

Level 4 (fully competent worker) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.¹² The DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received as indicated by the job description.

The DOL describes a Level 1 wage rate as follows:

Level 1 (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

The petitioner and counsel claimed that the proffered position involves complex duties and responsibilities. Further, they indicated that the beneficiary would be required to "[w]ork independently and resolve complex problems with no or limited supervision" and that the petitioner needs "someone with a proven technical background" for the position. However, the AAO must question the level of complexity of the duties and responsibilities of the proffered position, the level of independent judgment required and the amount of supervision received as the LCA is certified for a Level 1 entry-level position.

The LCA indicates the position is actually a low-level, entry position relative to other computer systems analysts within the occupation. Based upon this wage rate, the proffered position is for a beginning level employee who has only a basic understanding of the occupation. The beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment. She will work under close supervision, and she will receive specific instructions on

¹² A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

required tasks and expected results. Her work will be closely monitored and reviewed for accuracy.

The AAO finds substantial reason to doubt the credibility of the petition in the fact that, on the one hand, the petitioner expressly claimed that the beneficiary's role will involve complex duties and responsibilities, that she will work independently (with little to no supervision) and that the position requires someone with a proven technical background. On the other hand, the related LCA filed to support the petition is for a Level 1 (entry level) position. 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. 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).

Here, it appears that the petitioner has failed to submit an LCA that corresponds to this Form I-129 petition, that is, specifically, that corresponds to the level of work and responsibilities that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and responsibilities in accordance with the requirements of the pertinent LCA regulations. As a result, for this reason also, the petition must be denied.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed, and the petition will be denied.

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