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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**

[Redacted]

82

Date: **DEC 28 2011** Office: VERMONT SERVICE CENTER File: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:
[Redacted]

INSTRUCTIONS:

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$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. Kelly
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and affirmed this decision, upon consideration of the petitioner's subsequent motion to reconsider. 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 Vermont Service Center on October 20, 2008. The petitioner indicated that it is an enterprise engaged in the hotel business with 16 employees and a gross annual income of approximately \$2.3 million.

Seeking to employ the beneficiary in what it designates as a programmer/analyst position, the petitioner filed this H-1B petition in an endeavor to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on December 30, 2008, 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). Upon consideration of a motion to reconsider filed by the petitioner, the director affirmed the denial.

On appeal, counsel asserts that the director's basis for denial was erroneous and contends that the petitioner satisfied all evidentiary requirements. In support of this assertion, counsel submits a brief and additional evidence.

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 director's decision will be affirmed, and the petition will be denied.

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; (5) the petitioner's Motion to Reconsider; (6) the director's decision on the motion, affirming the decision to deny the petition; and (7) the Form I-290B and documentation in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

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 petitioner indicates on the Form I-129 and supporting documentation that it seeks the beneficiary’s services as a programmer/analyst at a salary of \$45,000 per year. In connection with the Form I-129 petition, the petitioner provided a list of duties that the beneficiary would perform in the proffered position. The AAO notes that the petitioner's description of the duties of the proffered position is broad, generic and repetitive and does 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.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on November 3, 2008. Specifically, the director requested additional information from the petitioner to demonstrate that the proffered position is a specialty occupation. The director requested the petitioner provide additional information, including a detailed description of the proffered position with the approximate percentage of time for each duty the beneficiary would perform. The director noted that it was not clear from the record of proceeding how the beneficiary would be relieved from performing non-qualifying functions.

The AAO extracted the following duties from the “Description of Proposed Job Duties & Responsibilities” that the petitioner provided as part of its response to the service center’s RFE:

- Coordinate and integrate with all the 23 branches [of hotels] by creating software programs to maintain [an] effective database;
- Use object-oriented programming languages, as well as client and server applications development processes and multimedia and Internet technology, analyses, design, administration, development, testing and implementation of full cycle applications and object oriented design of applications utilizing Core Java and develop and implement multi-user net enabled information system applications utilizing PL/SQL, Java, JSP, JDBC, J3EE, Servelets, for client server environment Windows XP, Linux;

- Design and develop and implement relational database management systems utilizing Oracle 9i, MS SQL Server, MS-Access;
- [Perform] data modeling, logical and physical design of databases and partitioning the database tables;
- [Perform] coding of triggers and stored procedures using PL/SQL;
- Determine computer software or hardware needed to set up or alter system and analyze, review and alter programs from name to name to optimize the performance of applications;
- Formulate plain outline steps required to develop the applications;
- Prepare flowcharts and diagrams to illustrate sequence of steps program must follow and to describe logical operations involved;
- Direct and participate to (sic) various aspects of life cycle of a system including analysis, design, programming, testing maintenance and support;
- Establish system requirements, client operating system software, network operating systems, system security, back up schedules and recovery plans.

The director requested the petitioner provide the percentage of time the beneficiary would spend on each job duty. However, the petitioner failed to submit this information.

The AAO finds that the petitioner's descriptions of the proposed duties as provided above and elsewhere in the record, which include undefined terms of art and acronyms, to indicate that, if actually performed, those duties would involve the application of technical computer and IT (information technology) knowledge. However, the AAO further finds that the minimum level of training, experience, and/or formal education that would be required to attain such knowledge 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. As the relatively abstract descriptions of general functions that they are, this record's duty descriptions appear generic to the computer programmer/analyst occupation in general, and, as such, do not establish a level of complexity, uniqueness, or specialization that distinguishes them, or the position that they comprise, from computer programmer analyst positions whose performance does not require a bachelor's degree, or the equivalent, in a computer or IT related specialty.

Further, the AAO finds, that while providing a litany 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. 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.

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), 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 indicated that the beneficiary would be employed as a programmer/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.

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)(I), 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.¹

The AAO finds that, as described in the record of proceeding, the proffered position generally comports with the programmer/analyst occupation as discussed in the *Handbook* chapters "Computer Systems Analysts" and "Computer Software Engineers and Computer Programmers."² However, as will now be discussed, programmer/analysts do not comprise an occupational group that categorically requires at least a bachelor's degree, or the 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

¹ 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/>.

² For these chapters, *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 2, 2011) and Computer Software Engineers and Computer Programmers at <http://www.bls.gov/oco/ocos303.htm> (also visited December 2, 2011).

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.

Thus, despite counsel's assumption to the contrary, 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.

The introduction to the "Education and Training" subsection of the chapter on computer software engineers and computer programmers in the *Handbook* states the following about computer programmers:

Many programmers require a bachelor's degree, but a 2-year degree or certificate may be adequate for some positions. Some computer programmers hold a college degree in computer science, mathematics, or information systems, whereas others have taken special courses in computer programming to supplement their degree in a field such as accounting, finance, or another area of business.

The *Handbook* does not indicate that at least a bachelor's degree, or the equivalent, in a specific specialty is normally required for the occupational classification in the United States. Rather, the *Handbook* indicates that the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty. The *Handbook* indicates that a two-year degree may be adequate for entry into computer programming

positions. Thus, the passage does not indicate that these positions normally require a bachelor's degree, or its equivalent, in a specific specialty for entry into the occupation.

Counsel provided an *O*NET OnLine* Summary Report for Computer Programmers in support of the "complex nature" of the proffered position.⁴ The AAO notes that the *O*NET OnLine* Summary Report is insufficient to establish that the proffered position qualifies as a specialty occupation normally requiring at least a bachelor's degree or its equivalent in a specific specialty. *O*NET OnLine* does not state a requirement for a bachelor's degree. Rather, it assigns the occupation of computer programmers a Job Zone "Four" rating, which group it among occupations of which "most," but not all, "require a four-year bachelor's degree." Furthermore, the *O*NET OnLine* does not indicate that a four-year bachelor's degree for Job Zone Four occupations must be in a specific specialty closely related to the requirements of that occupation. Therefore, *O*NET OnLine* is not probative of the proffered position being a specialty occupation.

The *Handbook's* information on the educational requirements of the occupation programmer/analyst indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement. Furthermore, the information from *O*Net OnLine* is not probative in this matter. Therefore, the proffered position does not qualify as a specialty occupation by virtue of its occupational classification.

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 programmer 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.

The AAO notes that the duties of the proffered position as described by the petitioner are in substantial accord with the duties of the occupations computer systems analyst and computer programmers as described in the *Handbook*. However, because, as was noted above, the *Handbook* does not support the proposition that these occupations typically require 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 programmer/analyst, but also that he would do so at a level that requires the theoretical and practical application of at least a bachelor's degree level of knowledge in a computer-related specialty. However, the petitioner has not

⁴ *O*NET OnLine* is accessible at <http://www.onetonline.org/>. As stated on the Home Page of this Internet site, *O*NET OnLine* is created for the U.S. Department of Labor's Employment & Training Administration by the National Center for *O*NET* Development. The *O*NET OnLine* Summary Report for the occupational classification Computer Programmers is accessible on the Internet at <http://www.onetonline.org/link/summary/15-1131.00?redir=15-1021.00> (visited December 2, 2011).

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.

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 record regarding 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 enterprise engaged in the hotel business with 16 employees and a gross annual income of approximately \$2.3 million. The petitioner states that it owns 23 motel franchises of different brands in various locations.

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. Moreover, the petitioner did not submit any letters or affidavits to meet this criterion of the regulations. While the petitioner did submit several job postings, for the reasons discussed below, the petitioner's reliance upon the job vacancy advertisements is misplaced.

The petitioner 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 the petitioner may not establish that an organization is similar unless it demonstrates that similar characteristics are shared with the advertising organizations, such as

the nature or type of organization, the particular scope of operations, its staffing, and, when pertinent, level of revenue (to list a few factors that may be considered).

The petitioner provided the following four job announcements:

- A job description from the Alaska Native Tribal Health Consortium (ANTHC) for a Computer Programmer - Analyst. The job description was approved on May 1, 2005. The AAO finds it questionable that the petitioner is relying upon a job description that was prepared almost four years earlier to establish current industry standards. Moreover, ANTHC is a non-profit organization, which provides health services to about 130,000 Alaska Natives. Thus, the advertisement is for a dissimilar organization (non-profit health organization), whose size and number of employees far exceeds the petitioner's.
- An advertisement from a recruiter for a Programmer Analyst. The advertisement does not provide any information regarding the employer. Furthermore, the advertisement does not contain any educational requirements. Thus, the advertisement is not evidence that a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations.
- A job posting from Computer People (recruiter) for an Analyst Programmer for an unspecified global telecommunications organization. No further information regarding the employer was provided. The posting is for a dissimilar organization (global telecommunications organization). Moreover, the advertisement indicates that "successful candidates will have strong experience of PHP, a degree or equivalent (or relevant industry experience) in a technical course or related subject." The posting does not specify that a candidate must possess a *bachelor's* degree or higher. That is, it appears that an associate's degree may be acceptable.
- A job posting from Robert Half Technology for a Systems Analyst/Programmer. The posting is for a dissimilar organization (employment agency). Furthermore, the job posting indicates that a college degree is preferred. The advertisement does not indicate that a bachelor's degree in a specific field of study is required for the 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 postings is not necessary. That is, not every deficit of every job posting has been addressed.

The job postings support the *Handbook's* information on the educational requirements of "Computer Systems Analysts" and "Computer Software Engineers and Computer Programmers" that a bachelor's or higher degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement for these occupational categories. Rather, the occupations accommodate a wide spectrum of educational credentials, including less than a bachelor's degree.

It must be noted that even if all of the job postings indicated that a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (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* Earl Babbie, *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 the finding that the position of programmer/analyst (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.

The record of proceeding does not establish that a degree in a specific specialty is the norm for entry into positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. For the reasons discussed above, 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.

In the RFE, the director requested the petitioner provide documentation to establish that the particular position is so complex or unique that it can be performed only by an individual with a degree. However, the petitioner failed to adequately convey the substantive nature and the specific matters upon which the beneficiary would focus that are so complex or unique as to require that he 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.

On motion, counsel stated that the beneficiary will be responsible for the "integration of all the softwares (sic) for [the] petitioner's database" as well as for the centralized reporting system "which is reasonably complex in nature." In support, the petitioner provided a chart regarding its centralized reporting system that indicates the various software used by the petitioner's hotels.

In the appeal, counsel asserts that the duties of the proffered position are highly complex and require advanced software skills for the "process of integration" of the petitioner's hotels and for "day-to-day maintenance."

Upon review of the record of proceeding, the duties for the proffered position are vague and generic and appear routine. Even though counsel claims 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" and "Computer Software Engineers and Computer Programmers" 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 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 degree of complexity or uniqueness. 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 Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. Consequently, as the petitioner fails to demonstrate how the proffered position is so complex or unique relative to other positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, 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 third criterion entails an employer demonstrating that it normally requires a degree or its equivalent for the position. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position. In the instant matter, counsel claims that the petitioner "employs individuals with [a] minimum of [a] baccalaureate or higher degree for the similar positions as the nature, size and scope demands for it."

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position.⁵

In the RFE, the director requested the petitioner submit documentation regarding other individuals who are currently, or were, employed in this position or similar positions, along with copies of their degrees or academic credentials. In response, the petitioner provided a list of four employees along with their job titles, which are sales and marketing manager, computer programmer, general manager and business analyst.

The petitioner failed to specify the educational backgrounds of the employees or provide any documentation to establish the educational credentials of the employees. The petitioner did not provide the job duties and day-to-day responsibilities of any of the positions that it claims are the same or similar to the proffered position. The petitioner did not indicate the knowledge and skills required for the positions, or provide any information regarding the substantive content and

⁵ To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

complexity of the job duties, independent judgment required or the amount of supervision received. As a result, it is impossible to determine if the positions are similar or related to the proffered position. Simply going on record without providing adequate 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)).

The petitioner also provided a job posting from its website, dated March 3, 2009, that indicates the employer requires an "[a]ssociates degree or higher in Computer Science or a related major" for the position of programmer analyst. With the appeal, the petitioner indicated that the job posting contained an error and should have stated that the minimum requirement was a bachelor's degree rather than an associate's degree. The petitioner provided revised postings from its website dated December 3, 2009 and December 4, 2009. The revised postings indicate that a "bachelor's degree or higher in Computer Science or a related field" is the educational requirement for the position. No further evidence was provided.

The AAO finds the petitioner's job postings questionable and they do not establish that the petitioner normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position. The petitioner's revised posting is dated over a year after the Form I-129 petition was submitted to USCIS and almost two months after the director's decision on the motion to reconsider. (The director's decision regarding the motion mentioned that the educational requirement of an associate's degree for the programmer/analyst position was listed on the petitioner's website.) No further information regarding the petitioner's recruitment efforts for the proffered position (or similar positions) was provided. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The AAO notes that the petitioner and counsel claim repeatedly that the duties of the proffered position can only be employed by a degreed individual. While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d 384. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation"). Here, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

As the evidence does not establish a prior history of the petitioner recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty, 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 generic descriptions 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 level of specialization and complexity relative to other positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States.

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 finds that the petitioner failed to establish that the beneficiary is qualified to serve in a specialty occupation position.

The AAO conducts appellate review on a *de novo* basis. See *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 at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

The statutory and regulatory framework that the AAO must apply in its consideration of the evidence of the beneficiary's qualifications to serve in a specialty occupation follows below.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and

(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The degree referenced by section 214(i)(1)(B) of the Act, 8 U.S.C. § 1184(i)(1)(B), means one in a specific specialty that is characterized by a body of highly specialized knowledge that must be theoretically and practically applied in performing the duties of the proffered position.

In implementing section 214(i)(2) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Therefore, to qualify an alien for classification as an H-1B nonimmigrant worker under the Act, the petitioner must establish that the beneficiary possesses the requisite license or, if none is required, that he or she has completed a degree in the specialty that the occupation requires. Alternatively, if a license is not required and if the beneficiary does not possess the required U.S. degree or its foreign degree equivalent, the petitioner must show that the beneficiary possesses both (1) education, specialized training, and/or progressively responsible experience in the

specialty equivalent to the completion of such degree, and (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In order to equate a beneficiary's credentials to a U.S. baccalaureate or higher degree, the provisions at 8 C.F.R. § 214.2(h)(4)(iii)(D) require one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;⁶
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. . . .

In the present matter, the petitioner relies upon an evaluation from ██████████ of Morningside Evaluations. Dr. ██████████ indicated that because of the positions he holds at the University of Phoenix, Baruch College of the City University of New York and the Stern School of Business of the New York University, he has "the authority to grant college-level credit for training, and/or courses taken at other U.S. or international universities."⁷

⁶ The petitioner should note that, in accordance with this provision, the AAO will accept a credentials service's evaluation of *education only*, not experience.

⁷ Although Dr. ██████████ resume was not attached to the evaluation, there was a brief summary of his qualifications at the end of the evaluation. Dr. ██████████ qualifications include that he is a Lead Faculty of Management Information Systems and Business Administration at the University of Phoenix, Adjunct Assistant Professor at the Zicklin School of Business of Baruch College of CUNY and Adjunct Assistant Professor at The Stern School of Business of New York University.

Dr. [REDACTED] asserts that the beneficiary attained the equivalent of a Bachelor of Science in Management Information Systems from an accredited institution of higher education in the United States based upon the beneficiary's education and over five years of "work experience and professional training in Management Information Systems." However upon closer review of the evaluation, Dr. [REDACTED] indicates that the evaluation is based upon the beneficiary's three years of academic coursework toward a bachelor of business administration degree and his "employment history, as represented in letters from employers and a curriculum vitae." Dr. [REDACTED] briefly describes the beneficiary's work history but does not provide any information regarding professional training that the beneficiary may have received.

It must be noted that neither the petitioner nor Dr. [REDACTED] provided any independent evidence from appropriate officials, such as deans or provosts at the universities to establish that, at the time that he authored the evaluation, Dr. [REDACTED] was, in the language of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(I), "an official [with] authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience." In fact, Dr. [REDACTED] did not even assert such authority. Further, the AAO observes that no evidence was submitted that the universities have programs for granting credit based on an individual's training and/or courses taken at other U.S. or international universities.

Dr. [REDACTED] does not claim nor does he provide any documentation to indicate that he has authority to grant college-level credit for *work experience* in the specialty (nor does he indicate that the universities that he is affiliated with have programs for granting such credit based on an individual's work experience). Thus, Dr. [REDACTED] has not established that he is competent under 8 C.F.R. § 214.2(h)(4)(iii)(D)(I) to evaluate the beneficiary's experience. Accordingly, the AAO accords no weight to Dr. [REDACTED] assessment of the beneficiary's work experience, and no weight to Dr. [REDACTED] ultimate conclusion that the beneficiary held the equivalent of a U.S. bachelor's degree in the claimed specialty.

Moreover, the AAO finds that Dr. [REDACTED] evaluation of the beneficiary's experience is not supported by evidence sufficient to corroborate his conclusion. Dr. [REDACTED] indicated that the beneficiary provided a curriculum vitae and letters from employers, which Dr. [REDACTED] relied upon to make his determination.⁸ The petitioner submitted a copy of the beneficiary's curriculum vitae to USCIS but failed to include letters from the beneficiary's current and former employers confirming his work history and duties, number of hours worked per week, level of progressively

⁸ The petitioner should note that the evidentiary weight of the beneficiary's curriculum vitae or resume is insignificant. It represents a claim by the beneficiary, rather than evidence to support that claim. As such, its evidentiary weight does not exceed the cumulative corroborative information other documents of record provide about the beneficiary's work experience. This record of proceeding lacks documentary evidence that establishes or corroborates the substantive nature of the beneficiary's work experience. 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)).

responsible experience, etc. Further, Dr. [REDACTED] extremely brief description of the beneficiary's work history does not present an adequate factual foundation for the opinion that Dr. [REDACTED] offers about that history. Thus, the AAO finds the evaluation fails to establish that the beneficiary possesses the equivalent of a bachelor of science in management information systems based upon the information provided regarding his work-related duties and responsibilities, in combination with his three-year degree in business administration. Further, in light of the lack of a sufficient factual foundation discussed above, the evaluation as written would so fail even if it had been rendered by an official qualified under 8 C.F.R. § 214.2(h)(4)(iii)(D)(I).

USCIS may, in its discretion, use as advisory opinions 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).

For the reasons discussed above, the petitioner has not established that the beneficiary is qualified to serve in a specialty occupation in accordance with the regulations at 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D).

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 director's decision will be affirmed, and the petition will be denied.

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