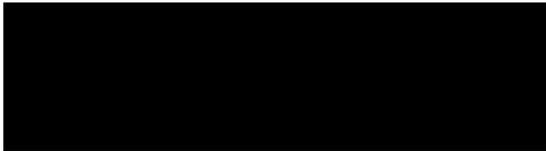




U.S. Citizenship
and Immigration
Services

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Date: **JUN 12 2012** Office: VERMONT 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The petitioner filed a combined motion to reopen and motion to reconsider. The director granted the motion on February 11, 2010, affirmed the previous decision and denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as an "Information Technology" firm with 1 employee. It seeks to employ the beneficiary in a full-time capacity as a "software engineer" and 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 initially denied the petition on August 14, 2009 on the grounds that the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation. The director found that it could not be determined where, when, or for whom the beneficiary would be needed for client, subcontractor, or end client projects given the nature of the petitioner's business as an information technology consultancy or staffing business. Upon consideration of a timely motion to reopen and reconsider, on February 11, 2010, the director issued a new decision affirming his initial decision. On appeal, the petitioner asserts that the director's basis for denial was erroneous and contends that it 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 dated August 14, 2009; (5) the petitioner's motion to reopen/motion to reconsider filed on September 28, 2009; (6) the director's denial letter dated February 11, 2010; 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.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has failed to establish that the proffered position qualifies as a specialty occupation in accordance with the controlling statutory and regulatory provisions. Accordingly, the appeal will be dismissed, and the petition will be denied.

Furthermore, the AAO will also address an additional, independent ground for denial of the petition, not identified by the director's decision, that the AAO finds also precludes approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner failed to submit a Labor Condition Application (LCA) that corresponds to the petition. Thus, for this reason as well, the appeal will be dismissed and the petition will be denied, with each reason considered as an independent and alternative basis for denial.

As a matter critically important in its determination of the merits of this appeal, the AAO finds that there are significant discrepancies in the record of proceeding with regard to the petitioner's occupational classification of the proffered position and the duties and responsibilities of the proffered position.

Specifically, on the Form I-129 H-1B Data Collection Supplement, the petitioner identified the proffered position as falling under the occupational code 199, which, the AAO notes, is assigned by the U.S. Department of Labor (DOL) to the category "Miscellaneous Professional, Technical, and Managerial Occupations."¹ The petitioner's representative signed the Form I-129 under penalty of perjury that the information supplied to U.S. Citizenship and Immigration Services (USCIS) on the petition and the evidence submitted with it is true and correct.

On the LCA, the petitioner also specified that the occupational classification for the proffered position falls under occupational code 199 and stated that the job title is "Software Engineer." The AAO notes that by completing and submitting the LCA, and by signing the LCA, the petitioner attested that the information contained in the LCA was true and accurate.

In a letter submitted with the Form I-129, the petitioner asserted that the petitioner wishes to employ the beneficiary in the position of a software engineer to "assist with the [d]evelopment and integration of **applications and systems** to meet client's [sic] business needs." (emphasis added). In a letter submitted in response to the RFE, the petitioner's counsel asserted that the petitioner wishes to employ the beneficiary in the position of a software engineer to develop Uniform Resource Locator (URL) redirecting software. The petitioner also stated that the beneficiary would be responsible for designing, developing, testing, installing, and deploying software applications.

In the appeal, the petitioner states that the proffered position is for an in-house project developing and maintaining the petitioner's URL redirecting service. The petitioner also submitted descriptions of other in-house projects such as "E-mail Record Management Solution" and "External Document Management System (EDMS)."

Although the job title on the LCA submitted with the petition reads "Software Engineer" and the petitioner stated that the proffered position will require the beneficiary to design, develop, test, install, and deploy software applications, that job as titled and as described by the petitioner is not included in occupation code 199.²

With respect to the LCA, DOL provides clear guidance for selecting the most relevant *O*NET* occupational code classification.³ The "Prevailing Wage Determination Policy Guidance" states the following:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the

¹ See U.S. Department of Labor, Employment and Training Administration, *Form ETA 9035CP, Appendix 1*, which provides a list of the "Three-Digit Occupational Groups." The form is accessible on the Internet at http://www.lca.doleta.gov/h1bcl_oc.pdf (last visited May 16, 2012).

² See U.S. Department of Labor, Dictionary of Occupational Titles, <http://www.onetonline.org/crosswalk/DOT?s=199> (last visited May 16, 2012).

³ 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.

employer's job offer shall be used to identify the appropriate occupational classification If the employer's job opportunity has worker requirements described in a combination of O*NET occupations, the SWA should default directly to the relevant O*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the SWA shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

Also problematic is the prevailing wage that the petitioner provided on the LCA. The prevailing wage claimed by the petitioner to correspond to the proffered "software engineer" position is the code assigned to the occupation "Computer Support Specialists." The petitioner provided a Level II wage for "Computer Support Specialists" which is \$43,326 per year (\$20.83 per hour) and indicated that it would pay the beneficiary \$48,000 per year.⁴

The AAO observes that the prevailing wage for the position "Computer Software Engineers/Applications" at a Level II wage is significantly higher at \$76,107 per year (\$36.59 per hour) than the prevailing wage for Computer Support Specialists. The prevailing wage for "Computer Software Engineers/Systems" at a Level II wage is even higher at \$86,216 (\$41.45 per hour) which is nearly double the prevailing wage that the petitioner provided on the LCA. The instructions that accompany the LCA indicate that, when completing Section D, "Period of Employment and Occupation Information," the employer should enter the occupational code that most clearly describes the occupation "to be performed." Based on the petitioner's characterization of the proffered position, the LCA should, therefore, list the occupational code for Computer Software Engineers/Applications or Computer Software Engineers/Systems, the employment fields that the petitioner and petitioner's counsel claim is reflected in the duties of the proffered position.

If, however, the petitioner believed its position was described as a combination of O*NET occupations, it should have chosen the relevant occupational code for the highest paying occupation, in this case "Computer Software Engineers/Systems." However, the petitioner chose the occupational category "Computer Support Specialists" for the proffered position which involves "technical assistance, support, and advice," not designing, developing, testing, installing, and deploying software applications and systems.⁵ The fact that the LCA so clearly lists the wrong occupational code and the wrong prevailing wage undermines the credibility of the petition. Had the petitioner provided the occupational code and prevailing wage for computer software engineers to the Department of Labor, it would have been required to pay a much higher wage to the beneficiary. However, the petitioner provided the wrong occupational code and prevailing wage on the LCA and was able to obtain an LCA certified for a different occupation at a much lower rate of pay, i.e., \$48,000, then turn to USCIS and claim that the position is for a computer software engineer in an attempt to qualify the proffered position as a specialty occupation.

⁴ The AAO notes that \$48,000 per year is approximately \$23 per hour.

⁵ See U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., "Computer Support Specialists," <http://www.bls.gov/oco/ocos306.htm> (accessed Mar. 20, 2012).

Given that the LCA submitted in support of the petition is certified for an occupational code and prevailing wage that is not that of the position described in the petition, it must be concluded that the LCA does not correspond to the petition. In other words, even if it were determined that the petitioner overcame the director's grounds for denying the petition (which it has not), the petition could still not be approved due to the petitioner's failure to submit an LCA that corresponds to the position and that is certified for the proper wage classification.

While DOL is the agency that certifies LCA applications 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.

(emphasis 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. Here, it appears that the petitioner has failed to submit a certified LCA that corresponds to the claimed duties of the proffered position. It is further noted that the petitioner provided no explanation for the inconsistencies. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* Thus, the appeal will be dismissed and the petition will be denied for this reason.

The next issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

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

United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed 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), 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 indicated that the beneficiary would be employed as a software engineer. 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.

Generally, when determining the occupational classification for a proffered position, the AAO reviews the U.S. Department of Labor’s (DOL’s) *Occupational Outlook Handbook* (hereinafter the *Handbook*).⁶ The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.

As previously noted, the evidence of record contains significant discrepancies regarding the proffered position. As a result, the evidence submitted does not provide a sufficient basis for the AAO to discern the substantive nature of the work and requirements comprising the proffered position. This fact is in itself sufficient to preclude the petitioner from establishing a specialty occupation. A position may be awarded H-1B classification only on the basis of evidence of record establishing that, at the time of the petition’s filing, definite, non-speculative work would exist for the beneficiary for the period of employment specified in the Form I-129. The record of proceeding does not contain such evidence. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future

⁶ 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/>.

eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). However, as described below, even if the petitioner had established that the occupational category for the proffered position was that of "Computer Software Engineers/Applications," "Computer Software Engineers/Systems," or "Computer Support Specialists," it would not qualify as a specialty occupation by virtue of its occupational classification.⁷

The *Handbook* section on "Computer Software Engineers and Computer Programmers" states the following:

Computer software engineers design and develop software. They apply the theories and principles of computer science and mathematical analysis to create, test, and evaluate the software applications and systems that make computers work. The tasks performed by these workers evolve quickly, reflecting changes in technology and new areas of specialization, as well as the changing practices of employers. (A separate section on computer hardware engineers appears in the engineers section of the *Handbook*.)

Software engineers design and develop many types of software, including computer games, business applications, operating systems, network control systems, and middleware. They must be experts in the theory of computing systems, the structure of software, and the nature and limitations of hardware to ensure that the underlying systems will work properly.

Computer software engineers begin by analyzing users' needs, and then design, test, and develop software to meet those needs. During this process they create flowcharts, diagrams, and other documentation, and may also create the detailed sets of instructions, called algorithms, that actually tell the computer what to do. They also may be responsible for converting these instructions into a computer language, a process called programming or coding, but this usually is the responsibility of *computer programmers*.

Computer software engineers can generally be divided into two categories: applications engineers and systems engineers. *Computer applications software engineers* analyze end users' needs and design, construct, deploy, and maintain general computer applications software or specialized utility programs. These workers use different programming languages, depending on the purpose of the program and the environment in which the program runs. The programming

⁷ For these chapters, *see* U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., "Computer Software Engineers and Computer Programmers," <http://www.bls.gov/oco/ocos303.htm> (accessed Mar. 29, 2012) and "Computer Support Specialists" at <http://www.bls.gov/oco/ocos306.htm> (accessed Mar. 29, 2012). It must be noted that the 2012-13 edition of the *Handbook* does not have a section on "Computer Software Engineers" and, therefore, the AAO's references are to the 2010-11 edition of the *Handbook*.

languages most often used are C, C++, Java, and Python. Some software engineers develop packaged computer applications, but most create or adapt customized applications for business and other organizations. Some of these workers also develop databases.

Computer systems software engineers coordinate the construction, maintenance, and expansion of an organization's computer systems. Working with the organization, they coordinate each department's computer needs—ordering, inventory, billing, and payroll recordkeeping, for example—and make suggestions about its technical direction. They also might set up the organization's intranets—networks that link computers within the organization and ease communication among various departments. Often, they are also responsible for the design and implementation of system security and data assurance.

Systems software engineers also work for companies that configure, implement, and install the computer systems of other organizations. These workers may be members of the marketing or sales staff, serving as the primary technical resource for sales workers, or providing logistical and technical support. Since the selling of complex computer systems often requires substantial customization to meet the needs of the purchaser, software engineers help to identify and explain needed changes. In addition, systems software engineers are responsible for ensuring security across the systems they are configuring.

U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 Ed., "Computer Software Engineers and Computer Programmers," <http://www.bls.gov/oco/ocos303.htm> (accessed Mar. 29, 2012).

As evident in the following excerpt, the *Handbook* indicates that a bachelor's degree or higher in a specific specialty is not a normal minimum requirement for entry into a computer software engineer position:

For software engineering positions, most employers prefer applicants who have at least a bachelor's degree and broad knowledge of, and experience with, a variety of computer systems and technologies. The usual college majors for applications software engineers are computer science, software engineering, or mathematics. Systems software engineers often study computer science or computer information systems. Graduate degrees are preferred for some of the more complex jobs.

* * *

Employers who use computers for scientific or engineering applications usually prefer college graduates who have a degree in computer or information science, mathematics, engineering, or the physical sciences. Employers who use computers for business applications prefer to hire people who have had college courses in management information systems and business, and who possess

strong programming skills. A graduate degree in a related field is required for some jobs.

In addition to educational attainment, employers highly value relevant programming skills and experience. Students seeking software engineering or programming jobs can enhance their employment opportunities by participating in internships. Some employers, such as large computer and consulting firms, train new employees in intensive, company-based programs.

As technology advances, employers will need workers with the latest skills. To help keep up with changing technology, workers may take continuing education and professional development seminars offered by employers, software vendors, colleges and universities, private training institutions, and professional computing societies. Computer software engineers also need skills related to the industry in which they work. Engineers working for a bank, for example, should have some expertise in finance so that they understand banks' computing needs.

Id. The *Handbook's* information on the educational requirements for the occupational classification "Computer Software Engineer" indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement. As previously noted, the petitioner and counsel have provided inconsistent information in connection with the occupational classification of the proffered position, including attempting to establish that the proffered position is a specialty occupation on the basis of classifying the position under the occupational category "Computer Software Engineer." The AAO finds that even if the petitioner established that the proffered position were to be classified as a computer software engineer, the *Handbook* does not support the assertion that the occupational group categorically requires at least a bachelor's degree, or the equivalent, in a specific specialty. While the petitioner submitted information printed from three websites⁸ to demonstrate the educational and training requirements of employers for software engineers, none of the print-outs indicate that a bachelor's degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position.

Regarding the educational requirements for entry in to the occupation of "Computer Support Specialists," the *Handbook* states the following:

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

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

⁸ The three websites are www.about.com, www.usajobs.org, and www.careerplanner.com.

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

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

U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 Ed., "Computer Support Specialists," <http://www.bls.gov/oco/ocos306.htm> (accessed Mar. 29, 2012). The *Handbook* does not indicate that at least a bachelor's degree in a specific specialty is required for computer support specialists. According to the *Handbook*, some employers hire individuals with only an associate's degree, relevant experience, or certifications instead of formal education.

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. However, it is not self-evident that, as described in the record of proceeding, that the normal entry requirement for the proffered position would be at least a bachelor's degree, or its equivalent, in a specific specialty.

The petitioner has not established that the position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that there is a categorical requirement for at least a bachelor's degree in a specific specialty. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the position is one for which a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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.

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).

Here, and 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. The petitioner has not provided any documentation to indicate that the industry's professional association has made a degree a minimum entry requirement for the occupation. Moreover, the petitioner did not submit any letters or affidavits to meet this criterion of the regulations.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner provided eight job announcements for software engineers. However, upon review of the documents, the petitioner fails to establish that similar organizations to the petitioner routinely employ individuals with bachelor's degrees (or higher) in a specific specialty, in parallel positions.

The AAO notes that for the petitioner to establish that an advertising organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. 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).

A review of the documentation indicates the following deficiencies in the job postings:

- 1) [REDACTED] is in the data warehousing and business intelligence industry. There is no evidence in the record that the petitioner is also in the data warehousing and business intelligence industry. Furthermore, unlike the proffered position, the posting indicates that it will only consider candidates with U.S. citizenship for the software engineer position. Thus, the advertised position cannot be found to be a parallel position in a similar organization.
- 2) [REDACTED] seeks a software engineer requiring only a bachelor's degree, not at least a bachelor's degree or the equivalent in a *specific specialty*.
- 3) [REDACTED] is an international communications equipment company with over 15,000 employees. Thus, it appears that the size, scope, and number of employees for the organization far exceed the petitioner's. Furthermore, unlike the stated requirements for the proffered position, the job posting indicates that it requires the candidate to already possess an active Full Scope Polygraph clearance and to maintain the clearance. Thus, the advertised position cannot be found to be a parallel position in a similar organization.
- 4) [REDACTED] posting for an RF Software Engineer is for a client that is a "leading international organization that produces RF Planning software for the civilian and military markets and provides . . . digital cartography." The position requires that the candidate possess "RF Planning and Digital Cartography knowledge." There is no evidence that the petitioner requires the beneficiary to possess RF Planning and Digital Cartography knowledge. Thus, the advertised position cannot be found to be a parallel position in a similar organization.

- 5) [REDACTED] is in the defense-aerospace industry and creates custom solutions in support of national security defense. There is no indication in the record that the petitioner is in the same industry. Furthermore, unlike the petitioner, the advertising company employs electrical engineers, mathematicians, and computer scientists. While the advertised position requires a bachelor's degree in computer science/computer engineering with an engineering/math focus or other equivalent field of discipline, the position also requires the candidate to have U.S. citizenship and the ability to obtain and maintain a security clearance. Thus, the advertised position cannot be found to be a parallel position in a similar organization.
- 6) [REDACTED] too, is in the defense-aerospace industry and requires the candidate to possess a current Secret clearance. Thus, the advertised position cannot be found to be a parallel position in a similar organization.
- 7) [REDACTED] as mentioned above, is an international communications equipment company with over 15,000 employees. Thus, it appears that the size, scope, and number of employees for the organization far exceed the petitioner's. Thus, the advertised position cannot be found to be a parallel position in a similar organization.
- 8) Solers is in the defense-aerospace industry. Furthermore, the position requires the candidate to "specify, design, develop, integrate, and test distributed information/knowledge management systems . . . for world-wide distributed information dissemination, communications, intelligence, and command and control systems." Thus, the advertised position cannot be found to be a parallel position in a similar organization.

The job announcements do not establish that similar organizations to the petitioner in the same industry routinely employ individuals with degrees in a specific specialty, in parallel positions.⁹ 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).

⁹ Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from just eight job advertisements with regard to determining the common educational requirements for entry into parallel positions in similar companies. *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 the finding that the position of software engineer in a 1-employee information technology company 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 require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

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 specific specialty.

The petitioner claims that the duties of the proffered position are "highly complex." However, a review of the record indicates that the petitioner has failed to credibly demonstrate that the duties the beneficiary will be responsible for or perform on a day-to-day basis entail such complexity or uniqueness as to constitute a position so complex or unique that it can be performed only by a person with at least a bachelor's degree in a specific specialty. Moreover, as reflected in this decision's earlier comments, the AAO questions the level of complexity, uniqueness and/or specialization of the duties and responsibilities of the position based upon the LCA submitted with the Form I-129.

Moreover, 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. 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. 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)).

Upon review of the record of proceeding, the duties, as described by the petitioner, do not elevate the proffered position above that for which less than a bachelor's degree would be adequate. 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. In fact, the record of proceeding fails to adequately establish that the job duties described relate any dimensions of complexity or uniqueness such that a bachelor's degree in a specific specialty would be required.

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).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) 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. 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.¹⁰

In the instant case, the petitioner claims that the duties of the proffered position can only be performed by an individual with at least a bachelor's degree in computer science or a closely related field. However, the supporting documentation is inconsistent with this assertion and does not establish that the petitioner normally requires at least a bachelor's degree, or its equivalent, in a specific specialty for the position. First, the copies of the "Casual Employee Agreement[s]" for [REDACTED] do not indicate that the employees are employed as software engineers and performing the same duties as described by the petitioner in the instant petition. Similarly, the "Independent Consultant Agreement" between the petitioner and [REDACTED] also does not indicate that the consultant would perform the same duties as those described for the proffered position. Thus, there is no indication in the record that the positions for which the employees were hired are the same position as the proffered position.

Second, the wages paid to each of the employees and the independent consultant are much higher than the salary offered for the proffered position, further indicating that those positions are different from the proffered position. Specifically, according to the copies of the Casual Employee Agreements submitted by the petitioner, the petitioner agreed to pay its employees the following hourly wages: 1) [REDACTED] at "\$50 per billable hour"; 2) [REDACTED] at "\$75 per hour"; and 3) [REDACTED] at \$80 per billable hour." The Independent Consultant Agreement indicates that the petitioner agreed to pay [REDACTED] "\$59 per hour." The AAO notes that all of those wages are at least two times the salary offered to the beneficiary. Thus, the record 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.

The AAO notes that the petitioner claims 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

¹⁰ 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.

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").

In the instant case, the record of proceeding does not establish that the petitioner normally requires at least a bachelor's degree, or the equivalent, in a specific specialty for the proffered position. Thus, 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.

The AAO incorporates by reference and reiterates its earlier discussion that the petitioner has failed to establish that the duties of the proffered position are sufficiently specialized and complex that performance would require knowledge at a level associated with at least a bachelor's degree, or the equivalent, in a specific specialty. Insufficient evidence was provided to demonstrate that the proffered position reflects a higher degree of knowledge and skill than would normally be required of employees who perform some software engineering duties, but not at a level requiring the application of theoretical and practical knowledge that is usually associated with at least a bachelor's degree in specific specialty or its equivalent.

As previously noted, 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). 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. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

The petitioner failed to meet its burden of proof to establish that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).¹¹

¹¹ It is noted that, even if the proffered position were established as being that of a computer support specialist as indicated by the prevailing wage provided by the petitioner on the LCA, a review of the *Handbook* does not indicate that such a position qualifies as a specialty occupation in that the *Handbook* does not state a normal minimum requirement of a U.S. bachelor's or higher degree in a specific specialty or its equivalent for entry into the occupation of computer support specialist. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Computer Support Specialists," <http://www.bls.gov/ooh/computer-and-information-technology/computer-support-specialists.htm> (last visited May 16, 2012). As such, absent evidence that the position of computer

The petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

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).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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

support specialist satisfies one of the alternative criteria available under 8 C.F.R. § 214.2(h)(4)(iii)(A), the instant petition could not be approved for this additional reason.