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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

PUBLIC COPY



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Date: **MAR 29 2012** Office: CALIFORNIA SERVICE CENTER

FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and dismissed the subsequently filed motion to reopen and motion to reconsider. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed in part, sustained in part, and remanded to the service center director for reconsideration of the director's determination that the proffered position is not a specialty occupation.

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as an IT consulting and solutions firm with 15 employees. It seeks to employ the beneficiary as a network and computer systems administrator and 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).

On October 14, 2009, the director denied the petition, finding that the petitioner failed to: (1) establish that it meets the regulatory definition of an intending United States employer as defined by 8 C.F.R. § 214.2(h)(4)(ii); (2) meet the definition of an "agent" at 8 C.F.R. § 214.2(h)(2)(i)(F); (3) submit an itinerary of the services or specify the work location of the beneficiary; (4) submit a valid Labor Condition Application (LCA) for all locations; and (5) demonstrate that the proffered position is a specialty occupation.

On November 16, 2009, the petitioner filed a Form I-1290B requesting that the director reopen the matter to consider allegedly new evidence corroborating the employer-employee relationship. The petitioner also requested that the director reconsider the denial of the petition because the petitioner is the "sole and ultimate employer of the beneficiary" and the director's finding to the contrary is "mistaken." The director dismissed the motion to reopen on March 29, 2010, finding that the petitioner was given a reasonable opportunity to submit the evidence for the record before the petition was adjudicated by the director. The director also determined that the evidence did not constitute new facts that were previously unavailable and could not have been discovered earlier in the proceedings. The petitioner's motion to reconsider was dismissed because counsel's assertion that the director mistakenly characterized the relationship between the petitioner and beneficiary was not supported by any pertinent precedent decisions or regulations.

On April 30, 2010, the petitioner filed a timely appeal of the director's dismissal of the motions to reopen and reconsider. The issues before the AAO are whether the director's decisions to dismiss the petitioner's motions to reopen and reconsider were proper.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's letter denying the petition; (5) the Form I-290B, brief, and documentation filed in support of the motions to reopen and reconsider; (6) the director's letter dismissing the motions to reopen and reconsider; and (7) the Form I-290B, brief, and documentation filed in support of the appeal.

Upon review of the record, we find that the petitioner has failed to meet the requirements for a motion to reopen. Title 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "A motion to reopen must

state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.¹

The petitioner submitted the following documents with its combined motions to reopen and reconsider: (1) a sample employment agreement; (2) data pertaining to mileage reimbursement to employees; (3) a copy of the petitioner's Educational Assistance Program offered to its employees; (4) invoices; (5) employee meeting minutes; (6) sample employee progress review forms; (7) time logs of partner/employee planning sessions; (8) time logs of employee observation; (9) a computer print-out indicating that clients are billed fixed fees for projects; (10) a computer print-out indicating billable and non-billable employee tasks and travel time; (11) a list of employee assignments; (12) invoices indicating on-site and off-site projects; (13) a copy of an employee's business card indicating the petitioner's main phone number and web address; (14) invoices indicating sales tax charged to the petitioner's clients; (15) a sample non-compete agreement; and (16) letters from the petitioner's clients indicating that the petitioner is solely responsible for the hiring, training, salaries, benefits, and management of the employees providing IT services to those clients. On appeal, counsel argued that the evidence should be considered new because the evidence was not "necessary until the erroneous denial [of the petition] was issued."

A review of the evidence submitted on motion by the petitioner reveals no fact that could be considered *new* under 8 C.F.R. § 103.5(a)(2). All of the various types of evidence submitted by the petitioner appear to have existed, or could have been obtained, prior to the adjudication of the petition and were readily available to the petitioner and previous counsel. Although it appears that most of the documents were produced subsequent to the denial of the instant visa petition, the petitioner could have produced earlier versions of the documents; therefore, none of the facts alleged are in any sense *new*. Furthermore, if the petitioner has relevant, rebuttal evidence, the administrative process provides for an appeal as a forum for that evidence.

The requirements for a motion to reopen are greater than that for an appeal, noting for instance that there is no requirement that evidence submitted in support of an appeal be "new." See generally 8 C.F.R. §§ 103.3 and 103.5. The petitioner chose to file a motion to reopen instead of an appeal of the director's denial of the petition, however, and as such, precluded itself from having a *de novo* review of the director's underlying decision to deny the petition as well as the opportunity to submit additional, but not necessarily new, evidence in support of this matter. As such, it is, unfortunately, too late to request that this evidence be considered when such evidence was previously available or could have been discovered or presented in the previous proceeding.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8

¹ The word "new" is defined as "1. Having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence>" WEBSTER'S NEW COLLEGE DICTIONARY 753 (3d ed. 2008).

U.S.C. § 1361. The petitioner has not sustained that burden with regard to its motion to reopen. Title 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." The AAO finds that the director was correct in her determination that the motion to reopen failed to meet the applicable requirements. Accordingly, the appeal of the director's denial of the petitioner's motion to reopen will be dismissed.

The next issue is whether the director's dismissal of the petitioner's motion to reconsider was proper. As mentioned above, the petitioner's motion to reconsider was dismissed by the director on the basis that counsel's assertion, i.e., that the director mistakenly characterized the employment relationship between the petitioner and beneficiary, was not supported by any pertinent precedent decisions or regulations. On appeal, counsel asserts that the director misunderstood the record evidence in concluding that the petitioner is not an employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii).

Title 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Upon review of the evidence submitted by the petitioner prior to the director's October 14, 2009 denial of the petition, we find that that the director's dismissal of the motion to reconsider was in error. The evidence submitted prior to the director's denial establishes that the petitioner meets the regulatory definition of an intending United States employer and that the petitioner will have "an employer-employee relationship with respect to" the beneficiary in this matter. See 8 C.F.R. § 214.2(h)(4)(ii) (defining the term United States employer). As the director's decision was incorrect based on the evidence of record at the time of her initial decision, the petitioner's appeal of the director's dismissal of the combined motion to reopen and motion to reconsider has been sustained in part. The director's March 29, 2010 dismissal of the motion to reconsider will therefore be withdrawn, and the matter will be remanded for the director to grant the motion and reconsider her initial decision to deny the petition.

In reconsidering the petition, the director should not affirm her initial decision and deny the petition again on grounds related to the petitioner's standing to file the instant petition, i.e., its qualifications as a United States employer in this matter, or on the itinerary or LCA grounds previously identified by the director as additional grounds for denying the benefit sought in this matter. With regard to the specialty occupation basis of denial, however, while the director erred in stating that the petitioner did not provide sufficient evidence of the specific job duties that the beneficiary would perform under contract for the petitioner's client, for the reasons discussed below, the director did not err in concluding that the petitioner failed to meet its burden in establishing that the 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(j)(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 submitted, *inter alia*, the following documents with the Form I-129: (1) the petitioner's support letter, dated March 31, 2009; (2) a copy of the beneficiary's foreign diploma; (3) an evaluation of the beneficiary's foreign degree and experience; (4) a copy of the beneficiary's Utah Valley State College transcript; (5) print-outs of job advertisements from www.careerbuilder.com; and (6) promotional information printed from the petitioner's website.

In the H Classification Supplement to Form I-129, the petitioner stated that the beneficiary's job duties would be to "[i]ninstall, configure, and support local area network (LAN), wide area network (WAN), and Internet system or a segment of a network system." The petitioner also provided the following description of the job duties in its Form I-129 support letter:

- Maintain and administer computer networks and related computing environments including computer hardware, systems software, applications software, and all configurations;
- Perform data backups and disaster recovery operations;
- Diagnose, troubleshoot, and resolve hardware, software, or other network and system problems, and replace defective components when necessary;
- Configure, monitor, and maintain email applications or virus protection software;
- Operate master consoles to monitor the performance of computer systems and networks, and to coordinate computer network access and use;
- Monitor network performance to determine whether adjustments need to be made, and to determine where changes will need to be made in the

- future; and
- Confer with network users about how to solve existing system problems.

In its Form I-129 support letter, the petitioner states that it requires a "bachelor's degree in computer science, information systems, computers and telecommunications, or related field, or equivalent work experience." The petitioner also indicates that similar companies with positions parallel to the proffered position require at least a "bachelor's degree in computer science, information systems, computers and telecommunications, or related field," as evidenced by their Internet advertisements.

On June 19, 2009, the director issued an RFE requesting the petitioner to submit the following, *inter alia*: (1) an evaluation of the beneficiary's foreign education credentials; (2) documentation establishing the type of training and/or experience the beneficiary has obtained and its educational equivalent in the United States; (3) documentation certifying and substantiating the beneficiary's recognition of expertise; (4) documentation demonstrating the beneficiary's degree equivalency; (5) documentation clarifying the employer-employee relationship with the beneficiary; (6) an itinerary of definite employment and information on any other services planned for the period of time requested; (7) a line-and-block organizational chart; (8) the petitioner's Federal Form 941, Quarterly Wage Reports for all employees; (9) payroll summaries; (10) copies of the petitioner's two most recent income tax returns; (11) business licenses; (12) proof of business conducted at location listed on the Form I-129; (13) clarification of the business address where the beneficiary will actually work; (14) the petitioner's lease agreement; (15) a floor plan and internal and external photographs of the work areas for all employees; (16) photographs of the petitioner's premises; and (17) the petitioner's building occupancy permit.

On July 20, 2009, in response to the director's RFE, the petitioner submitted the following: (1) an evaluation of the beneficiary's foreign degree and experience previously submitted with the Form I-129; (2) a letter from the foreign degree evaluator claiming that he has authority to grant "waiver credit for previous professional and/or work experience"; (3) the beneficiary's College Level Examination Program test results; (4) numerous Microsoft certificates and Microsoft test results; (5) a "Letter of Professional Recommendation" attesting to the experience and skills of the beneficiary; (6) the beneficiary's undergraduate Utah Valley State College transcript; (7) a letter from the petitioner attesting to the workplace location of the petitioner and where the beneficiary will work; (8) a copy of the petitioner's Educational Assistance Program offered to its employees; (9) a letter from the City of Orem stating that the location of the petitioner's business is zoned "Commercial" with "Urban Mixed-Use Overlay"; (10) a copy of the building permit; (11) a copy of the Certificate of Occupancy; (12) a copy of the petitioner's lease; (13) a copy of the petitioner's job offer letter to the beneficiary; (14) copies of contracts signed by the petitioner and the petitioner's clients; (15) a line-and-block organizational chart; (16) photos of the petitioner's workspace; (17) copies of federal tax returns; and (18) copies of W-2 Wage and Tax Statements for the petitioner's employees.

As stated above, the director denied the petition on October 14, 2009, finding that the petitioner failed to: (1) establish that it meets the regulatory definition of an intending United States employer as defined by 8 C.F.R. § 214.2(h)(4)(ii); (2) meet the definition of an "agent" at 8 C.F.R. § 214.2(h)(2)(i)(F); (3) submit an itinerary of the services or specify the work location of

the beneficiary; (4) submit a valid labor condition application (LCA) for all locations; and (5) demonstrate that the proffered position is a specialty occupation.

In addressing the specialty occupation basis for denial, the petitioner's counsel asserts on appeal that "[i]t is clear that those duties qualify the occupation as a specialty [occupation] due to their level of complexity and the clear requirement of theoretical and practical application of a body of specialized knowledge, and attainment of a bachelor's or higher degree (or its equivalent) in the specific specialty as a minimum for entry into the occupation in the United States."

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*), on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The petitioner's counsel claims that the proffered position falls under the *Handbook* category for "Computer Network, Systems, and Database Administrators." *See* U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., "Computer Network, Systems, and Database Administrators," <http://www.bls.gov/oco/ocos305.htm> (accessed March 29, 2012).² The AAO agrees with the petitioner's counsel that the proffered position is closest to that of a network and computer systems administrator, as described in the *Handbook*. The *Handbook's* description of network and computer systems administrators is, in part, as follows:

Network and computer systems administrators design, install, and support an organization's computer systems. They are responsible for LANs, WANs, network segments, and Internet and intranet systems. They work in a variety of environments, including large corporations, small businesses, and government organizations. They install and maintain network hardware and software, analyze problems, and monitor networks to ensure their availability to users. These workers gather data to evaluate a system's performance, identify user needs, and determine system and network requirements.

² The AAO's references to the *Handbook* are to the 2010-2011 edition available online. The *Handbook*, which is available in printed form, may also be accessed on the Internet at <http://www.stats.bls.gov/oco/>.

Systems administrators are responsible for maintaining system efficiency. They ensure that the design of an organization's computer system allows all of the components, including computers, the network, and software, to work properly together. Administrators also troubleshoot problems reported by users and by automated network monitoring systems and make recommendations for future system upgrades. Many of these workers are also responsible for maintaining network and system security.

Id. The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. The Computer Network, Systems, and Database Administrators chapter in the *Handbook* indicates that network and computer systems administrators do not constitute an occupational group that categorically requires either a bachelor's or higher degree, or the equivalent, in a specific specialty, or knowledge usually associated with the attainment of such a degree. This section states, in pertinent part:

Network and computer systems administrators **often** are required to have a bachelor's degree, **although an associate degree or professional certification, along with related work experience, may be adequate for some positions.** Most of these workers begin as computer support specialists before advancing into network or systems administration positions. (Computer support specialists are covered elsewhere in the *Handbook*.) Common majors for network and systems administrators are computer science, information science, and management information systems (MIS), **but a degree in any field, supplemented with computer courses and experience, may be adequate.** A bachelor's degree in a computer-related field generally takes 4 years to complete and includes courses in computer science, computer programming, computer engineering, mathematics, and statistics. Most programs also include general education courses such as English and communications. MIS programs usually are part of the business school or college and contain courses such as finance, marketing, accounting, and management, as well as systems design, networking, database management, and systems security.

Id. (emphasis added). The *Handbook* further states that "[w]orkers can enter this field with many different levels of formal education, but relevant computer skills are always needed. *Id.* Because the *Handbook* indicates that entry into the network and computer systems administrators occupation does not normally require a minimum of a bachelor's or higher degree in a specific specialty, the *Handbook* does not support the proffered position as being a specialty occupation.

As the evidence of record does not establish that the particular position proffered here is one for which the normal minimum entry requirement is a baccalaureate or higher degree in a specific specialty, or its equivalent, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

Again, in determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165 (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 is one for which the *Handbook* reports an industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions. The petitioner did not submit documentation regarding the hiring practices of similar businesses for network and computer systems administrators. Finally, the petitioner's reliance upon the job vacancy advertisements printed from www.careerbuilder.com is misplaced.

In support of its assertion that the degree requirement is common in the petitioner's industry in parallel positions among similar organizations, the petitioner submitted copies of six job advertisements.³ The advertisements provided, however, establish at best that a bachelor's degree is

³ 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 six job advertisements with regard to determining the common educational requirements for entry into parallel positions in similar companies. 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 network and computer systems administrator 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

generally required, but not at least a bachelor's degree or the equivalent in a specific specialty. In addition, even if all of the job postings indicated that a bachelor's or higher degree in a specific specialty or its equivalent were required, the petitioner fails to establish that the submitted advertisements are relevant in that the posted announcements are not for parallel positions in similar organizations in the same industry.

For instance, while the first advertisement states that the position is for an information technology system administrator requiring a Bachelor of Science degree in Computer Science, or a related field, the hiring company provides services such as recruiting and training programs, specialized accounting, human resources and IT consulting for the gaming industry. Thus, it cannot be found to be a parallel position in a similar organization. The second advertisement only states that a bachelor's degree is "preferred" and does not state that a bachelor's degree in a specific specialty is required. Similarly, the third advertisement is for a position in a company that supplies high-voltage analog integrated circuits and only states that a Bachelor of Science degree in computer science, information technology or related discipline is "preferred." Thus, it, too, cannot be found to be a parallel position in a similar organization with a specialty degree requirement.

The fourth advertisement is for a senior network analyst position that requires a Bachelor of Science degree in computer science or related field plus a minimum three to five years of experience in an IT capacity in a warehouse environment. Therefore, it, too, cannot be found to be a parallel position in a similar organization. The fifth advertisement states that a bachelor's degree relevant to design/information technology or "equivalent military experience" is required. Thus, it does not indicate that a bachelor's or higher degree in a specific specialty or its equivalent is required.

The sixth advertisement is for a senior network systems administrator position that does not require a bachelor's degree in a specific specialty as evidenced by the following stated requirements: (1) a bachelor's degree in computer science, information systems, or a closely related field and three years of full-time paid experience within the past five years in LAN design, configuration and administration; *or* (2) four years of progressively responsible full-time, paid experience within the past five years in LAN design, configuration and administration. As four years of work experience has not been demonstrated to be equivalent to a bachelor's or higher degree in a specific specialty, it cannot be found that this advertised position requires a bachelor's or higher degree in a specific specialty or its equivalent. Consequently, the petitioner has failed to establish the first prong of the referenced criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." The evidence of record does not refute the *Handbook's* information to the effect that an associate degree or professional certification, along with related work experience, may be adequate for some computer and network administrator positions. Moreover, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than network and computer systems administrator positions that can be performed by persons without a specialty degree or its equivalent, particularly in parallel positions in organizations similar to

entry into the occupation in the United States.

the petitioner. Even if it had, such a claim of relative complexity would not be credible given the petitioner's claim on the submitted LCA that the position is a Level I, entry-level position. In other words, if the proffered position were, in fact, more complex or unique relative to other network and computer systems administrator positions, the petitioner would have classified the position with DOL as at least a Level III or IV position, necessitating the payment of a wage approximately \$20,000 to \$30,000 more per year than an entry-level position in this occupation.

Next, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) by establishing that the employer normally requires a degree or its equivalent in a specific specialty for 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.⁴

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. Here, relative specialization and complexity have not been developed by the petitioner as an aspect of the proffered position. In other words, the proposed duties have not been established as being more specialized and complex than computer and network administrator positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent.⁵

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

⁴ While a petitioner may believe or otherwise assert that a proffered position requires a degree in a specific specialty, 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 at 387. 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").

⁵ As noted above, the petitioner has designated the proffered position as a Level I position on the submitted LCA, indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. *See* Employment and Training Administration (ETA), *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009). Therefore, even if the petitioner were to claim that this position is more specialized and complex relative to other network and computer systems administrators, such a claim would simply not be credible as such a higher-level position would be classified as a Level III or IV position, requiring a significantly higher prevailing wage.

specialty occupation. Based on the current record of proceeding, the petition should be denied for this reason.

The AAO has not examined the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined.

It must be noted, however, that the combined evaluation of the beneficiary's education and work experience submitted by the petitioner is insufficient to establish that the beneficiary possesses the equivalent of a U.S. bachelor's degree in any specific specialty. Specifically, as the claimed equivalency was based in large part on work experience, there is insufficient evidence that (1) the evaluator 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 *and* that (2) the beneficiary also has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty. See 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) and (D)(1). For instance, the evaluator only claims to be authorized to grant "waiver credit," which is not the same as being authorized to grant college-level credit for experience in the specialty. Furthermore, the evaluator's claims regarding his authority to grant college-level credit are unsupported by any letter from an authorized official, such as the dean or registrar, at the University of Miami verifying his assertions.

As such, the evaluation may only be accepted as finding that the beneficiary possesses the educational equivalent of a U.S. associate degree in computer information systems. As insufficient evidence was presented that the beneficiary has at least a U.S. bachelor's degree in any specific specialty, or its equivalent, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

The AAO conducts appellate review on a de novo basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In view of the foregoing, the decision of the director to dismiss the motion to reconsider and the bases for the denial of the petition will be withdrawn. The petition is remanded to the director for consideration of the whether or not the proffered position qualifies as a specialty occupation. The director may request any additional evidence considered pertinent in determining whether or not the proffered position qualifies as a specialty occupation. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.⁶

⁶ Upon reconsideration, if the director should find that the proffered position qualifies as a specialty occupation, the petition may not be approved until sufficient evidence is presented to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), demonstrating the beneficiary's qualifications to perform the duties of that specialty occupation.

ORDER: The director's decision to dismiss the motion to reconsider is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.