



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **APR 02 2013**

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

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 in accordance with the instructions on 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and dismissed a subsequently filed combined motion to reopen and motion to reconsider. The petitioner appealed the director's dismissal of the combined motions to the Administrative Appeals Office (AAO) which dismissed in part, sustained in part, and remanded the matter to the director for entry of a new decision. Upon her third review of the petition, the director recommended that the petition be denied and certified her decision to the AAO for review. The AAO will affirm the decision of the director. The petition will be denied.

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). As the facts and procedural history have been adequately documented in its previous decision, the AAO will only repeat this information where necessary.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's first request for additional evidence (RFE); (3) the petitioner's response to the director's first RFE and supporting documentation; (4) the director's October 14, 2009 decision 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 March 29, 2010 letter dismissing the combined motions to reopen and reconsider; (7) the Form I-290B, brief, and documentation filed in support of the appeal of the director's dismissal of the combined motions to reopen and reconsider; (8) the AAO's March 29, 2012 decision withdrawing the director's dismissal of the motion to reconsider and remanding the matter for entry of a new decision; (9) the director's second RFE; (10) the petitioner's response to the director's second RFE and supporting documentation; and (11) the director's December 26, 2012 Notice of Certification.

As noted above, the AAO remanded the appeal to the director for entry of a new decision. Specifically, in its March 29, 2012 decision, the AAO determined that the director erred in dismissing the petitioner's motion to reconsider; thus, the AAO withdrew the director's decision dismissing the motion to reconsider and remanded the matter for reconsideration of whether or not the proffered position qualifies for classification as a specialty occupation. In its decision, however, the AAO noted that based on the evidence of record as then constituted, it could not be found that the proffered position qualifies for classification as a specialty occupation. The AAO also found that the evidence in the record was insufficient to establish that the beneficiary is qualified to perform the duties of a specialty occupation.

On May 31, 2012, the director issued her second RFE to the petitioner. The petitioner was asked to submit documentation to establish that a specialty occupation position exists for the beneficiary as well as evidence that the beneficiary is qualified for the proffered position. The director outlined the specific evidence to be submitted.

On August 23, 2012, in response to the director's second RFE, counsel for the petitioner submitted the following documents: (1) a letter from counsel dated August 21, 2012; (2) a letter

from the "Chief Operation Officer" of the petitioner dated August 9, 2012; (3) a "complete job description" from the "Chief Operation Officer" of the petitioner also dated August 9, 2010; (4) copies of four diplomas; (5) an Internet print-out of the U.S. Department of Labor's *Occupational Outlook Handbook's (Handbook)* chapter on "Network and Computer Systems Administrators"; (6) copies of eleven job advertisements posted on the Internet; (7) an evaluation of the beneficiary's foreign degree and experience by [REDACTED] previously submitted with the petition in April 2009; and (8) a copy of the evaluator's resume, previously submitted in response to the director's first RFE.

On December 26, 2012, the director recommended that the petition be denied and certified the case for review to the AAO. Specifically, the director found that (1) the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation, and (2) the evidence fails to establish that the beneficiary is qualified to perform the duties of a specialty occupation. The director also informed the petitioner in the Notice of Certification that the petitioner "may submit a brief or other written statement for consideration" directly to the AAO within 30 days. No brief or other written statement was submitted to the AAO.

The issues before the AAO are (1) whether the proffered position qualifies for classification as a specialty occupation, and (2) whether the petitioner has established that the beneficiary is qualified to perform the duties of a specialty occupation.

U.S. Citizenship and Immigration Services (USCIS) is required to follow long-standing legal standards and determine first, whether the proffered position is a specialty occupation, and second, whether an alien beneficiary is qualified for the position at the time the nonimmigrant visa petition is filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation]."). Therefore, the AAO will first determine whether the proffered position is a specialty occupation.

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 providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and 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. *See Royal Siam Corp. v. Chertoff*, 484

F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular 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 directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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.

With regard to the proffered position, the petitioner's prior counsel provided the following description of the job duties in his 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.

The petitioner provided the following "complete job description (which mirrors the description of the [*Handbook*])" of the proffered position in its response to the director's second RFE:

- Determine what the organization needs in a network and computer system before it is set up (20%)
- Install all network hardware and software and make needed upgrades and

- repairs (15%)
- Maintain network and computer system security and ensure that all systems are operating correctly (15%)
 - Collect data to evaluate the network or system performance and help make the system work better and faster (15%)
 - Train users on the proper use of hardware and software when necessary (20%)
 - Solve problems quickly when a user or an automated monitoring system lets them know about a problem (15%)

In his Form I-129 support letter, the petitioner's prior counsel states that the petitioner requires a "bachelor's degree in computer science, information systems, computers and telecommunications, or related field, or equivalent work experience." The petitioner's prior counsel 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.

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) *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 in his August 21, 2012 letter that the proffered position falls under the *Handbook* category for Network and Computer Systems Administrators. See U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Network and Computer Systems Administrators," <http://www.bls.gov/ooh/computer-and-information-technology/network-and-computer-systems-administrators.htm#tab-1> (last visited Mar. 28, 2013).¹ 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

¹ The AAO's references to the *Handbook* are to the 2012-13 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/>.

Handbook.² The *Handbook* states the following with respect to Network and Computer Systems Administrators:

What Network and Computer Systems Administrators Do

Computer networks are critical parts of almost every organization. Network and computer systems administrators are responsible for the day-to-day operation of these networks. They organize, install, and support an organization's computer systems, including local area networks (LANs), wide area networks (WANs), network segments, intranets, and other data communication systems.

Duties

Network and computer systems administrators typically do the following:

- Determine what the organization needs in a network and computer system before it is set up
- Install all network hardware and software and make needed upgrades and repairs
- Maintain network and computer system security and ensure that all systems are operating correctly
- Collect data to evaluate the network's or system's performance and help make the system work better and faster
- Train users on the proper use of hardware and software when necessary
- Solve problems quickly when a user or an automated monitoring system lets them know about a problem

Administrators manage an organization's servers. They ensure that email and data storage networks work properly. They also make sure that employees' workstations are working efficiently and stay connected to the central computer network. Some administrators manage telecommunication networks at their organization.

In some cases, administrators help network architects who design and analyze network models. They also participate in decisions about buying future hardware or software to upgrade the organization's network. Some administrators provide technical support to computer users, and they may supervise computer support specialists who help users with computer problems.

² It is noted that the petitioner's prior counsel and the AAO previously agreed that the proffered position's duties substantially reflects the duties of network and computer systems administrator positions as described in the *Handbook's* chapter on "Computer Network, Systems, and Database Administrators" in the 2010-11 edition. However, as a result of changes made in the 2012-13 edition of the *Handbook* with respect to computer-related occupations, the occupation of network and computer systems administrators is now described in a chapter titled "Network and Computer Systems Administrators."

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Network and Computer Systems Administrators," <http://www.bls.gov/ooh/computer-and-information-technology/network-and-computer-systems-administrators.htm#tab-2> (last visited Mar. 28, 2013).

However, the *Handbook* does not indicate that network and computer systems administrators constitute an occupational category for which normally the minimum requirement for entry is a specialty occupation level of education, that is, at least a U.S. bachelor's degree in a specific specialty, or its equivalent. This is evident from the discussion in the "How to Become a Network and Computer Systems Administrator" section of its chapter "Network and Computer Systems Administrators." Specifically, this section of the *Handbook* states the following with regard to the entry requirements for this occupation:

How to Become a Network and Computer Systems Administrator

Network and computer systems administrators must often have a bachelor's degree, although some positions require an associate's degree or professional certification along with related work experience.

Education

A bachelor's degree in fields related to computer or information science is most common. However, because administrators work with computer hardware and equipment, a degree in computer engineering or electrical engineering usually is acceptable as well. These programs usually include classes in computer programming, networking, or systems design.

Some positions require an associate's degree or a postsecondary certificate in a computer field with related work experience.

Because network technology is continually changing, administrators need to keep up with the latest developments. Many continue to take courses throughout their careers. Some businesses require that an administrator get a master's degree.

Certification

Certification is a way to show a level of competence and may provide a jobseeker with a competitive advantage. Certification programs are generally offered by product vendors or software firms. Companies may require their network and computer systems administrators to be certified in the product they use. Some of the most common certifications are offered from Microsoft, Red Hat, and Cisco.

Important Qualities

Analytical skills. Administrators need analytical skills to evaluate network and system performance and determine how changes in the environment will affect it.

Communication skills. Administrators work with many other types of workers and have to be able to describe problems and their solutions to them.

Computer skills. Administrators oversee the connections of many different types of computer equipment and must ensure that they all work together properly.

Multi-tasking skills. Administrators may have to work on many problems and tasks at the same time.

Problem-solving skills. Administrators must be able to quickly resolve problems with computer networks when they occur.

Handbook, 2012-13 ed., Network and Computer Systems Administrators, <http://www.bls.gov/ooh/Computer-and-Information-Technology/Network-and-computer-systems-administrators.htm#tab-4> (last visited Mar. 28, 2013).

Again, the *Handbook* does not indicate that a bachelor's or higher degree in a specific specialty, or its equivalent, is a normal minimum entry requirement for network and computer systems administrator positions. It only indicates that "a bachelor's degree in fields related to computer or information science is *most* common." *Id.* (emphasis added). However, "most common" is not indicative that a network and computer systems administrator position normally requires at least a bachelor's degree, or its equivalent, in a specific specialty.³ In any event, this chapter notes that some positions require only an "associate's degree or a postsecondary certificate in a computer field . . .," indicating that the *minimum* requirement for entry into the occupation is in fact a postsecondary certificate in a computer field and not a U.S. bachelor's degree in computer science or its equivalent. *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.

³ The first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of network and computer systems administrator positions require at least a bachelor's degree in computer science or a closely related field, it could be said that "most" network and computer systems administrator positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "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." § 214(i)(1) of the Act.

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 requirement of a bachelor's or higher degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

As stated earlier, 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 a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation. 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. Furthermore and for the reasons discussed below, the petitioner's reliance upon the job vacancy advertisements it submitted is misplaced.

For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and an 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). It is not sufficient for the petitioner and counsel to simply claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion and sufficient corroborating evidence to support it. As previously mentioned, 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. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner submitted copies of seventeen advertisements as evidence that its degree requirement is standard amongst its peer organizations

for parallel positions. Specifically, the petitioner submitted six advertisements through its previous counsel with the Form I-129 petition for the following positions posted on the Internet:

1. Information Technology System Administrator for [REDACTED] requiring, *inter alia*, a "BS degree in Computer Science or related field";
2. [REDACTED] preferring a "Bachelors [sic] Degree";
3. Systems Administrator for [REDACTED] preferring a "BS in Computer Science, Information Technology or related discipline";
4. Senior Network Analyst [REDACTED] requiring, *inter alia*, a "B.S. in Computer Science or related field" and a "minimum of 3-5 years' experience in an IT capacity in a warehouse environment required";
5. Systems Administrator II for [REDACTED] requiring, *inter alia*, a "[b]achelors degree relevant to the occupational field or equivalent military experience"; and
6. Senior Network Systems Administrator for [REDACTED] requiring, *inter alia*, (a) a "bachelor's degree in Computer Science, Information Systems, or a closely related field and three (3) years of full-time paid experience within the past 5 years in LAN design, configuration and administration" or (b) "[f]our years of progressively responsible full-time, paid experience within the past 5 years in LAN design, configuration and administration."

As noted above, the petitioner also submitted the following eleven advertisements through its current counsel in response to the director's second RFE:

7. Temporary/contract/project Senior Network Administrator for an unidentified company, a staffing company, requiring, *inter alia*, a "[b]achelor's degree (B.A.) from four-year college or university and five to seven years related experience and/or training; or equivalent combination of education and experience";
8. MSSQL Database Administrator for [REDACTED] requiring, *inter alia*, "MCDBA or equivalent education";
9. Network Administrator for an unidentified client of Robert Half Technology requiring, *inter alia*, a "bachelor of Computer Science or related background";
10. Network Administrator for an unidentified company requiring, *inter alia*, a "[c]ollege diploma or university degree in the field of computer science and/or some college coursework";
11. Network Administrator for [REDACTED] stating that the "Required Education" is "Not Specified";
12. Network Administrator for an unidentified company requiring, *inter alia*, a "Bachelor's Degree in Computer Science";
13. Network/System Administrator for [REDACTED] preferring a "[b]achelor's in: Computer Science, Information Technology or related field";
14. Network Administrator for [REDACTED] requiring, *inter alia*, a "Bachelor's Degree in Computer Science, Information Technology or closely related field";

⁴ Due to an error in copying, the print-out of this advertisement is incomplete.

15. System Administrator for [REDACTED] preferring an "Associates or Bachelors [sic] degree in MIS or Computer Science";
16. System Administrator for [REDACTED] preferring a "Bachelors [sic] degree"; and
17. System Administrator for an unidentified company requiring, *inter alia*, a "BS in technical field such as Computer Science, Information Services or related field" or a "CNE Certification and three (3) or more years of related experience in large LAN/WAN environments and analyzing systems."

The AAO notes that the petitioner fails to establish that the posted job announcements are for parallel positions in organizations that are similar to the petitioner. Furthermore, as the advertisements are only solicitations for hire, they are not evidence of the employer's actual hiring practices. In addition, even if the submitted advertisements were all for parallel positions in the same industry and in similar organizations to the petitioner, they establish at best that a bachelor's degree may be required for some positions but, even then, the degree or its equivalent often does not have to be *in a specific specialty*. Upon review of the documents, the AAO finds that the advertisements do not establish that a requirement for a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in similar organizations for parallel positions to the proffered position.

Specifically, some of the advertisements indicate that bachelor's degrees, without any specific specialties specified, are preferred while others indicate that bachelor's degrees in fields such as computer science are preferred. Obviously, a preference for a candidate with a bachelor's degree is not a requirement that the individual have such a degree to qualify for the position. Also, the fifth advertisement states that it requires either a "[b]achelor[']s degree relevant to the occupational field or equivalent military experience," without detailing what it deems to be "equivalent military experience." Thus, it, too, does not indicate that a bachelor's or higher degree in a specific specialty or its equivalent is required.

Some advertisements are for positions that do not appear to be parallel positions. For example, the fourth advertisement is for a senior network analyst position that requires a "B.S. in Computer Science or related field" and a "minimum of 3-5 years' experience in an IT capacity in a warehouse environment." According to the certified Labor Condition Application (LCA) submitted in support of the petition, the proffered position is a Level I, entry-level position, not a senior-level position, and there is no indication that the petitioner also requires such experience; therefore, it cannot be found to be a parallel position in a similar organization.

Other advertisements are for positions in unidentified companies or organizations that do not appear to be similar to the petitioner. For example, the first advertising company provides services such as recruiting and training programs, specialized accounting, human resources and IT consulting for the gaming industry. The eighth advertiser is a "multi-concept restaurant operating company with 180+ units . . . ," while the fourteenth advertiser is the [REDACTED]. Also, as noted above, several of the hiring companies are not identified in the advertisements; thus, it cannot be determined that the hiring companies are similar organizations based on the evidence presented by the petitioner.

The AAO reviewed all of the advertisements submitted by the petitioner. As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed. Notably, the advertisements do not establish that a degree requirement in a specific specialty, or the equivalent, is common to the industry in parallel positions among similar organizations to the petitioner.⁵

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's degree or professional certification, along with related work experience, may be adequate for some network and computer systems 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 the petitioner.

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 in a specific specialty or its equivalent for the position. To satisfy this criterion, the petitioner may submit such evidence as documentation 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

⁵ 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 17 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 for a relatively small IT consulting and solutions firm 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 findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States.

position.⁶ While the petitioner submitted four diplomas to support its claim that it only hires individuals with a bachelor's degree in a specific specialty for the same position offered to the beneficiary, record evidence indicates that at least three of the four employees were employed by the petitioner *before* they obtained the degrees that the petitioner claims it requires for the proffered position. Therefore, the record only indicates that the petitioner previously hired only one individual holding a bachelor's degree, i.e., a "Bachelor of Business Administration Computer Information Systems and Accounting Information Systems" from [REDACTED]

In any event, previously hiring only one employee with a bachelor's degree in "Bachelor of Business Administration Computer Information Systems and Accounting Information Systems" does not establish a pattern that the petitioner normally requires, as opposed to simply prefers to hire, someone with at least a bachelor's degree or the equivalent in a specific specialty for the proffered position.

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 or its equivalent. Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than network and computer systems administrator positions that are not usually associated with at least a baccalaureate degree in a specific specialty.⁷

⁶ 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").

⁷ Moreover, as noted above, the petitioner has designated the proffered position as a Level I position on the LCA indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf. Therefore, it is simply not credible that the position is one with specialized and complex duties, as such a higher-level position would likely be classified at a higher level, such as a Level IV position, requiring a significantly higher prevailing wage. 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).

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

Lastly, even if the petitioner had established that the proffered position qualifies as a specialty occupation, the director correctly determined that the beneficiary is not qualified to perform the duties of such a specialty occupation. Specifically, 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.

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

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

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

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

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

- (4) Have education, specialized training, and/or progressively responsible experience that are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Therefore, to qualify an alien for classification as an H-1B nonimmigrant worker under the Act, the petitioner must establish that the beneficiary possesses the requisite license or, if none is required, that he or she has completed a degree in the specialty that the occupation requires. Alternatively, if a license is not required and if the beneficiary does not possess the required U.S. degree or its foreign degree equivalent, the petitioner must show that the beneficiary possesses both (1) education, specialized training, and/or progressively responsible experience in the specialty equivalent to the completion of such degree, and (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The record indicates that the beneficiary holds the foreign equivalent of a U.S. Associate of Arts degree in Computer Information Systems, 21 semester credit hours of courses in computers and telecommunications from [REDACTED] University, 3 credit hours in information systems and computer applications recommended by the College-Level Examination Program (CLEP), numerous Microsoft certifications, and twelve years of professional experience in the computer and telecommunications field. The evaluation of the beneficiary's educational credentials and work experience by [REDACTED] equates the beneficiary's combined academic achievements and work experience to a "U.S. bachelor's degree with a major in computers and telecommunications." An evaluation of only the beneficiary's educational credentials by [REDACTED] dated February 22, 2008, states that the beneficiary has the equivalent of an Associate of Arts in Computer Information Systems.

Again, the beneficiary holds a foreign degree that has only been determined to be equivalent to a U.S. Associate of Arts degree in Computer Information Systems, and there is no indication in the record that the beneficiary held a U.S. bachelor's degree from [REDACTED] University as of the date the instant petition was filed. Therefore, as the evidence of record has failed to satisfy either 8 C.F.R. § 214.2(h)(4)(iii)(c)(1) or (2), i.e., the beneficiary does not hold a U.S. baccalaureate or higher degree in a specific specialty or a foreign degree determined to be equivalent to a U.S. baccalaureate or higher degree required by the specialty occupation, and as the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(c)(3) is not applicable in this matter, the petitioner must demonstrate that the beneficiary meets the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

Under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the petitioner must establish both (1) that the beneficiary's combined education, specialized training, and/or progressively responsible experience are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and (2) that the beneficiary has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

For purposes of 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the provisions at 8 C.F.R. § 214.2(h)(4)(iii)(D) require one or more of the following to determine whether a beneficiary has achieved a level of knowledge, competence, and practice in the specialty occupation that is equal to that of an individual who has a baccalaureate or higher degree in the specialty:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;⁸
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. . . .

In this matter, [REDACTED] 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, his 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 [REDACTED] 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's degree in computer information systems. In addition, the CLEP results only indicate the equivalent of 3 credit hours and not the equivalent of a U.S. bachelor's or higher degree.

As the petitioner has therefore failed to satisfy any of the criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(D)(1)-(4), the AAO will next perform a Service evaluation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

With regard to an equivalency determined by USCIS, 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) states, in part, the following:

⁸ The petitioner should note that, in accordance with this provision, the AAO will accept a credentials evaluation service's evaluation of *education only*, not training and/or work experience.

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;⁹
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

It is always worth noting that, by its very terms, 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) is a matter strictly for USCIS application and determination, and that, also by the clear terms of the rule, experience will merit a positive determination only to the extent that the record of proceeding establishes all of the qualifying elements at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) – including, but not limited to, a type of recognition of expertise in the specialty occupation.

As indicated above, the record contains, *inter alia*, (1) the beneficiary's CLEP test results, (2) numerous Microsoft certificates and Microsoft test results, (3) a "Letter of Recommendation" and a "Letter of Professional Recommendation" attesting to the experience and skills of the beneficiary, and (4) the beneficiary's undergraduate [REDACTED] State College transcript. However, there is no evidence in the record from recognized authorities in the same alleged

⁹ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. 8 C.F.R. § 214.2(h)(4)(ii). A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. *Id.*

specialty occupation that the beneficiary has recognition of expertise in the claimed specialty; nor is there evidence that the beneficiary has membership in a recognized association in the claimed specialty occupation. Further, the petitioner has not submitted any published material by or about the beneficiary. In addition, while the respective recommendation letters from the beneficiary's partner and prior employer in [REDACTED] do provide some insight into the beneficiary's job responsibilities with each company, they each fail to meet any of the five types of documents listed above deemed acceptable to satisfy this regulatory provision. Thus, absent sufficient corroborating evidence as outlined in 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), the AAO cannot conclude that the beneficiary's past work experience included the theoretical and practical application of a body of highly specialized knowledge in a field related to the proffered position *and* that the beneficiary has recognition of expertise in the industry.

The petitioner, therefore, has failed to establish that the beneficiary is qualified to perform the duties of any specialty occupation based on the current record of evidence. For this additional reason, the petition will be denied.

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 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

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

ORDER: The director's decision is affirmed. The petition is denied.