



U.S. Citizenship
and Immigration
Services

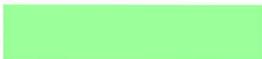
(b)(6)



DATE:

OFFICE: VERMONT SERVICE CENTER

FILE:

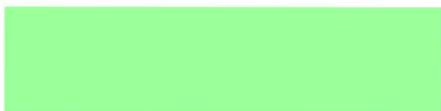


IN RE:

AUG 08 2013

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The director initially approved the nonimmigrant visa petition. Upon subsequent review of the record, the director issued a notice of intent to revoke (NOIR) the approval of the petition, and ultimately did revoke the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The approval of the petition remains revoked.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on August 17, 2010. In the Form I-129 petition and supporting documentation, the petitioner describes itself as an information technology firm established in 2000. Seeking to employ the beneficiary in what it designates as a computer programmer/analyst position, the petitioner filed this H-1B petition in an endeavor to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The petition was initially granted. Thereafter, the director reviewed the record and issued a NOIR. The NOIR contained a detailed statement regarding the new information that U.S. Citizenship and Immigration Services (USCIS) had obtained and notified the petitioner that it was afforded an opportunity to submit evidence in support of the petition and in opposition to the grounds alleged for revocation of the approval of the petition. The petitioner did not submit a response to the notice. Thereafter, the petitioner claimed that it did not receive the NOIR and USCIS reissued the NOIR. Counsel for the petitioner submitted a response. The director reviewed the response and, on January 29, 2013, the director revoked the approval of the petition. Thereafter, counsel for the petitioner submitted an appeal of the decision.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's NOIR dated April 16, 2012; (3) the director's revocation notice dated August 8, 2012; (4) the director's NOIR dated August 16, 2012; (5) the response to the NOIR; (6) the director's revocation notice dated January 29, 2013; (7) the Form I-290B and the allied submissions on appeal. The AAO reviewed the record in its entirety before issuing its decision.

As will be discussed below, the AAO finds that the petitioner has not overcome the specified grounds for revocation. Accordingly, the appeal will be dismissed, and the approval of the petition will remain revoked.

USCIS may revoke the approval of an H-1B petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii), which states the following:

- (A) Grounds for revocation. The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:
- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
 - (2) The statement of facts contained in the petition was not true and correct,

- inaccurate, fraudulent, or misrepresented a material fact; or
- (3) The petitioner violated terms and conditions of the approved petition; or
 - (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
 - (5) The approval of the petition violated paragraph (h) of this section or involved gross error.
- (B) Notice and decision. The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

The AAO finds that the bases specified for the revocation action in the instant matter are proper grounds for such action. Specifically, the director notified the petitioner that USCIS attempted to verify the beneficiary's employment and contacted [REDACTED] the end-user designated by the petitioner in the H-1B submission. The end-user informed USCIS that the beneficiary tendered his resignation on December 23, 2010. Additionally, the director noted that another employer had filed an H-1B petition on behalf of the beneficiary. The director's statement provided sufficient notice to the petitioner of the intent to revoke the approval of the petition in accordance with 8 C.F.R. § 214.2(h)(11)(iii)(A)(1), (2) and (3). As will be evident in the discussion below, the AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner has failed to rebut and overcome the grounds for revocation. Accordingly, the appeal will be dismissed, and approval of the petition will remain revoked.

As a preliminary matter, the AAO notes that even if the petitioner had overcome the grounds for revoking the approval of the H-1B petition, the petition would still be remanded to the director for issuance of a new NOIR and initiation of a new revocation-on-notice process with regard to this petition's approval because of several additional matters that the AAO observes in the record of proceeding.¹

In this matter, the petitioner stated that it seeks the beneficiary's services as a computer programmer/analyst on a full-time basis at the rate of pay of \$51,000 per year. In the Form I-129 and supporting documents, the petitioner indicated that the beneficiary would be "providing services to the end user [REDACTED] at its location, [REDACTED]. The petitioner further stated "that besides working at

¹ Therefore, the AAO notes that the petitioner has not overcome the grounds specified for revoking the approval of the petition. Thus, it serves no purpose to remand the case to the director to address the additional deficiencies the AAO observes in the record of proceeding.

the client site the beneficiary will also be required to visit our headquarters in [REDACTED] for business meetings, project presentations and seminars." The petitioner listed its office location as [REDACTED]

In the August 10, 2010 letter of support, the petitioner described the proposed duties of the beneficiary as follows:

- Analyze the programs and extract the business rules.
- Create low level technical design document.
- Develop User Interfaces.
- Design Web-based ASP.NET Internet applications linked to firm-wide DB2 databases.
- Develop programs in COBOL, DB2, VSAM, CICS.
- Prepare Unit Test Cases, Test plans.
- Perform reviews and quality inspection of the programs and the test results documents.
- Create migration packages for System Testing, User Acceptance Testing and Implementation.
- Work with production team to analyze bugs and resolve issues.
- Provide post implementation and production support.

In addition, the petitioner stated that the proffered position requires "at a minimum, a bachelor's degree in computer science, engineering, Mathematics, Statistics, applied science, business or related field."

The petitioner further stated in the letter of support, "Please be advised that the beneficiary will be providing services to the end user [REDACTED] at its location, [REDACTED]. The petitioner continued by stating that it was enclosing "a letter from the end user confirming the duration of the project to which [the beneficiary] is assigned, the specific duties and the end user's requirements for the position of Computer Programmer/Analyst."

With the Form I-129 petition, the petitioner submitted a copy of the beneficiary's foreign academic credentials as well as a credential evaluation from Education Evaluation and Immigration Services. The evaluation indicates that the beneficiary's foreign education is equivalent to a bachelor's degree in computer information systems from an accredited university in the United States.

The petitioner also provided several documents in support of the petition. More specifically, the documentation included the following:

- A Labor Condition Application (LCA) in support of the instant H-1B petition. The occupational category is designated as "Computer Programmers" at a Level I (entry) wage level. The AAO notes that the LCA lists the places of employment as the following:

- [REDACTED]
- [REDACTED]

No other work sites are provided.

- A Form W-2, Wage and Tax Statement, issued to the beneficiary for 2009.
- The beneficiary's Earning Statements from the period beginning March 1, 2010 to the period ending June 30, 2010.
- A letter from [REDACTED] IT Technical Director, NCMMIS for [REDACTED] State Health Care, dated August 6, 2010. In the letter, Mr. [REDACTED] states that "[t]his letter is to confirm that [the beneficiary], who is an employee of [the petitioner], will be providing information technology services to our company on the NCMMIS project." Mr. [REDACTED] further states that "[t]he assignment location is [REDACTED] and "[the beneficiary] will be working as [a] Programmer Analyst." In addition, Mr. [REDACTED] states that "[t]he estimated completion of his contract is Feb, 2014."
- An offer of employment letter from [REDACTED] president for the petitioner, dated June 7, 2010. In the letter, Mr. [REDACTED] states that the beneficiary's "title will be Computer Programmer Analyst." Mr. [REDACTED] further states that the beneficiary "will provide expertise services to assist our client [REDACTED] on their NCMMIS Project at their location [REDACTED]"
- Form I-9, Employment Eligibility Verification, for the beneficiary.
- An Annual Performance Appraisal for the beneficiary.
- A line-and-block organizational chart.
- Copies of the weekly time and status reports for the beneficiary. The client name is listed as [REDACTED] the project is listed as NC MMIS.
- Promotional material.
- The petitioner's Federal Income Tax Return for 2009.

The director approved the petition on September 24, 2010. Thereafter, an administrative site visit was conducted to verify the information within the petition.² USCIS contacted the end user [REDACTED]

² A site visit is an administrative inquiry relating to the petitioner's burden of proof. Agency verification methods may include but are not limited to review of public records and information; contact via written correspondence, the Internet, facsimile or other electronic transmission, or telephone; unannounced physical

and was informed that the beneficiary tendered his resignation on December 23, 2010. Further, USCIS records indicated that an H-1B was filed on behalf of the beneficiary by a different employer.

The director reviewed the information and then issued the NOIR. The NOIR contained a detailed statement regarding the information that USCIS had obtained and notified the petitioner that it was afforded an opportunity to provide evidence to overcome the stated grounds for revocation. The petitioner did not submit a response to the NOIR. The director revoked the petition. Thereafter, the petitioner claimed that it did not receive the NOIR and USCIS reissued the NOIR.

Notably, the petitioner did not submit a statement or letter of support in response to the NOIR. Rather, counsel provided a letter on his own letterhead dated September 5, 2013. Counsel stated that "the beneficiary's assignment at [REDACTED] was terminated by [the petitioner] due to business reasons." Counsel further stated that the "[b]eneficiary continued to be an employee of [the petitioner]." Notably, the letter is not signed or endorsed by the petitioner and the record of proceeding does not indicate the source of the information.³

In addition, counsel submitted the following:

- A written statement dated September 4, 2012 from the beneficiary.⁴
- Forms W-2s for 2010 and 2011 issued by the petitioner to the beneficiary.
- The beneficiary's Earning Statements from the period beginning December 1, 2011 to the period ending August 14, 2012.
- A letter from [REDACTED] Technical Lead, Production Management for [REDACTED] dated August 22, 2012.⁵ The letter discusses the beneficiary's services

site inspections; and interviews. *See generally* sections 103, 214, and 291 of the Act, 8 U.S.C. §§ 1103, 1184, and 1361 (2006); 8 C.F.R. § 103.2(b)(7). As in all visa petition proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. A site visit may lead to the discovery of adverse information, as in the present case, but it is just as likely to confirm the petitioner's eligibility for the benefit sought. Here, the director properly notified the petitioner of the information, and the petitioner was provided with an opportunity to respond.

³ Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

⁴ The AAO reviewed the statement submitted by the beneficiary. However, it must be noted that a beneficiary is not a recognized party in a proceeding. 8 C.F.R. § 103.2(a)(3).

⁵ The AAO observes that the August 22, 2012 letter from [REDACTED] is almost identical to the August 6, 2010 letter from [REDACTED] State Health Care (submitted with the initial petition).

in the future tense. For example, the letter states that the beneficiary "*will be* providing information technology services" and that he "*will be working* as a Programmer Analyst [emphasis added]." The letter continues by stating that the beneficiary's project "will continue until at least December 2012" with the possibility of an extension.⁶ The assignment location is stated as [REDACTED]

The director reviewed counsel's response but found the information submitted insufficient to refute the findings in the NOIR. The director noted that the petitioner indicated that the beneficiary would be providing services to the end user [REDACTED] at its location, [REDACTED]

However, [REDACTED] informed USCIS that the beneficiary had tendered his resignation on December 23, 2010. The director noted that the Form W-2 for 2011 provided for the beneficiary listed an address in [REDACTED] and that the pay statements indicated that he resided in [REDACTED] and then [REDACTED]. The director noted that the evidence suggested that the beneficiary was performing services for several different end clients. The director further stated that the petitioner had not filed an amended petition to reflect the change in work location, nor had the petitioner provided evidence to establish that it filed an LCA to support the work locations. Moreover, the record did not contain evidence regarding the beneficiary's work location or the end client (if any) from December 24, 2010 until the present. The director revoked the approval of the petition.

Thereafter, counsel submitted an appeal. On appeal, counsel asserts that the director erred in the decision to revoke the approval of the petition. In support of the assertions, counsel resubmitted evidence, as well as provided the following documents (which were not previously provided with regard to this H-1B petition):

- May 10, 2012 letter of support from the petitioner.
- A Subcontract between [REDACTED] and the petitioner, effective December 22, 2010. The AAO observes that the document states that "[t]he period of performance for this AGREEMENT is December 27, 2010 through December 27, 2011." The site location is "[REDACTED] or As Designated by Client."
- Copies of the petitioner's invoices to [REDACTED] dated December 31, 2010 to March 21, 2011 for consulting services provided by the beneficiary.

More specifically, the wording of the letters match – virtually verbatim, including grammatical and punctuation errors. When affidavits are worded the same (and include identical errors), it indicates that the words are not necessarily those of the affiant and may cast some doubt on the affidavits' validity.

⁶ Based upon the letter, there is no indication that the beneficiary currently or in the past served on a project for [REDACTED]

- Copies of checks made payable to the petitioner from [REDACTED] dated March 3, 2011 to April 28, 2011.
- A written statement dated February 27, 2013 from the beneficiary.
- A General Subcontracting Agreement between [REDACTED] and the petitioner, effective March 3, 2010.
- A "Work Statement" dated March 7, 2011 that indicates the beneficiary will serve as an "IT Mainframe Programmer" in [REDACTED] for the client [REDACTED] on or about March 21, 2011.
- A "Work Statement" dated October 17, 2011 that indicates the beneficiary will serve as an "IT Mainframe Programmer" in [REDACTED] for the client [REDACTED] on or about October 17, 2011.
- An LCA, which indicates the occupational category is designated as "Computer Programmers" at a Level I (entry) wage level. The validity dates are April 8, 2011 to October 1, 2013. The AAO notes that the LCA lists the places of employment as the following:
 - [REDACTED]
 - [REDACTED]
- An LCA, which indicates the occupational category is designated as "Computer Programmers" at a Level I (entry) wage level. The validity dates are February 6, 2012 to October 1, 2013. The AAO notes that the LCA lists the places of employment as the following:
 - [REDACTED]
 - [REDACTED]
- An offer of employment letter from [REDACTED] President for the petitioner, dated May 9, 2012. In the letter, [REDACTED] states that the beneficiary's "title will be Computer Systems Analyst."
- Letters from [REDACTED] Technical Lead, Production Management for [REDACTED]. The AAO notes that the letters provide inconsistent information as to the beneficiary's job title. Moreover, three of the letters indicate that the beneficiary will be working in the future, whereas one of the letters reports that the beneficiary has been assigned to the location from March 21, 2011 to the present (February 8, 2013). No explanation was provided.
 - Letter dated May 10, 2012.

- o Letter dated August 22, 2012 (previously provided)
- o Letter dated February 8, 2013
The above letters indicate that the beneficiary "will be providing information technology services" and that he "will be working as a Systems Analyst."
- o Another letter dated February 8, 2013, stating that the beneficiary "has been assigned to [REDACTED] location from March 21, 2011 to the present.

The AAO notes that counsel responded to the NOIR on September 7, 2012. Although most of the above documentation pre-dates counsel's response, the documentation was not previously provided to USCIS.

In the appeal brief, counsel states that the "preponderance of the evidence" standard is applicable in this matter. The AAO notes that with respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I & N Dec. 369, 375-376 (AAO 2010), states in pertinent part the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. See *INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Thus, in adjudicating the petition pursuant to the preponderance of the evidence standard, USCIS examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is

probably true. The "preponderance of the evidence" standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, the petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. As will be discussed, in the instant case, that burden has not been met.

The AAO reviewed the record of proceeding in its entirety. The AAO observes that even if the petitioner had overcome the grounds for revoking the approval of the petition (which it has not), the petition would still be remanded to the director for issuance of a new NOIR and initiation of a new revocation-on-notice process with regard to this petition's approval because of several additional matters that the AAO observes in the record of proceeding.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable 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 387. 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), 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. *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.

The AAO notes that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. See *Defensor v. Meissner*, 201 F.3d at 387-388. The court held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

In the instant case, the AAO notes that the petitioner has provided inconsistent information regarding the minimum requirements for the proffered position. For instance, in the August 10, 2010 letter of support, the petitioner stated that the proffered position requires "at a minimum, a bachelor's degree in *computer science*, engineering, *Mathematics, Statistics*, applied science, business or related field [emphasis added]."

The petitioner provided letters from its end clients [REDACTED] stating that "[t]he position requires a person with a minimum of [a] Bachelors [sic] degree in computers/science/engineering/business related field and experience in information technology related area." (As previously noted, the letters are worded virtually verbatim.) The AAO notes that the requirements of the petitioner differ from the requirements of the end clients. No explanation for the variances was provided.⁷

Furthermore, the AAO notes that the petitioner did not provide documentation from [REDACTED] regarding the requirements for the position (for which counsel claims that the beneficiary worked from December 27, 2010 to March 20, 2011). Thus, it does not appear that there are any particular academic or experience requirements for the project with [REDACTED]. The petitioner failed to produce evidence that the proffered position qualifies as a specialty occupation on the basis of the requirements imposed by at least one of the entities using the beneficiary's services.

As recognized in *Defensor v. Meissner*, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location(s) in order to properly ascertain the minimum educational requirements necessary to perform those duties. See *Defensor v. Meissner*, 201 F.3d at 387-388. In other words, as the nurses in that case would provide services to the end-client hospitals and not to the petitioning staffing company, the petitioner provided job

⁷ The petitioner has provided inconsistent information as to the academic requirements of the proffered position. 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).

duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination. *See id.*

Here, the record of proceeding in this case is similarly devoid of sufficient information from the end-client, [REDACTED] regarding the specific job duties to be performed by the beneficiary for that company. The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary, therefore, precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation.

In addition, the AAO observes that the petitioner's entry requirement of at least a bachelor's degree in computer science, engineering, mathematics, statistics, applied science, or business for the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. *See* section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Again, the petitioner states that its minimum educational requirement for the proffered position is a bachelor's degree in computer science, engineering, mathematics, statistics, applied science, or business. It must first be noted that the petitioner has not established how each field of study is directly related to the duties and responsibilities of the particular position. Furthermore, the AAO

notes that the field of engineering is a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering. Therefore, it is not readily apparent that a general degree in engineering or one of its other sub-specialties, such as chemical engineering or nuclear engineering, is closely related to computers or that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the particular position proffered in this matter.

Further, the petitioner indicated that a general-purpose degree such as a degree in business is acceptable for the proffered position. Although a general-purpose bachelor's degree, such as a degree in business, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, F.3d at 147.⁸

Here and as indicated above, the petitioner, who bears the burden of proof in this proceeding, simply fails to establish either (1) that all of the disciplines (including any and all engineering fields) are closely related fields, or (2) that all of the disciplines (including any and all engineering specialties) are directly related to the duties and responsibilities of the proffered position. Absent this evidence, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, under the petitioner's own standards. Accordingly, as the evidence of record fails to establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty*, or its equivalent, for entry into the particular position, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion.

As the evidence of record fails to establish how these dissimilar fields of study form either a body of highly specialized knowledge or a specific specialty, or its equivalent, the petitioner's assertion that the job duties of this particular position can be performed by an individual with a bachelor's degree in any of these fields suggests that the proffered position is not in fact a specialty occupation. Therefore, absent probative evidence of a direct relationship between the claimed degrees required and the duties and responsibilities of the position, it cannot be found that the proffered position requires anything more than a general bachelor's degree. Going on record without supporting

⁸ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. See, e.g., *Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; cf. *Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.

documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The AAO will now analyze the petitioner's proffered position under 8 C.F.R. § 214.2(h)(4)(iii)(A). 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 normally the 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 AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁹ As previously discussed, the petitioner designated the proffered position in the LCA under the occupational category "Computer Programmers."

The AAO reviewed the chapter of the *Handbook* entitled "Computer Programmers," including the sections regarding the typical duties and requirements for this occupational category.¹⁰ However, the *Handbook* does not indicate that normally the minimum requirement for entry into computer programmer positions is at least a bachelor's degree in a specific specialty, or its equivalent.

The subchapter of the *Handbook* entitled "How to Become a Computer Programmer " states the following about this occupation:

Education

Most computer programmers have a bachelor's degree; however, some employers hire workers who have an associate's degree. Most programmers get a degree in computer science or a related subject. Programmers who work in specific fields, such as healthcare or accounting, may take classes in that field in addition to their degree

⁹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2012 – 2013 edition available online.

¹⁰ For additional information regarding the occupational category "Computer Programmers," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., Computer Programmers, on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-1> (last visited July 24, 2013).

in computer programming. In addition, employers value experience, which many students get through internships.

Most programmers learn only a few computer languages while in school. However, a computer science degree also gives students the skills needed to learn new computer languages easily. During their classes, students receive hands-on experience writing code, debugging programs, and many other tasks that they will do on the job.

To keep up with changing technology, computer programmers may take continuing education and professional development seminars to learn new programming languages or about upgrades to programming languages they already know.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., Computer Programmers, on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4> (last visited July 24, 2013).

When reviewing the *Handbook*, the AAO must note that the petitioner designated the proffered position as a Level I (entry level) position on the LCA. This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.¹¹ That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and

¹¹ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

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

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.

As noted above, a Level I designation is appropriate for employees who work under close supervision and receive specific instructions on required tasks and results expected. However, in the appeal, counsel repeatedly claims that the beneficiary is an "expert" in various technologies and that "he will not need day-to-day instruction from [the petitioner] on what he is to do." Counsel's statements do not appear to correspond with the wage level selected by the petitioner. No explanation was provided.

reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results. DOL guidance states that a position for a research fellow, a worker in training, or an internship is an indicator that a Level I wage should be considered. Thus, based upon the wage level selected by the petitioner for the proffered position, there is no indication that the proffered position is a high-level or senior position. Rather the designation is appropriate for a beginning level employee.

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupation. Rather, the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty. The *Handbook* repeatedly states that some employers hire workers who have an associate's degree. Furthermore, while the *Handbook's* narrative indicates that most computer programmers obtain a degree (either a bachelor's degree or an associate's degree) in computer science or a related field, the *Handbook* does not report that *at least* a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. The *Handbook* continues by stating that employers value computer programmers who possess experience, which can be obtained through internships.

The *Handbook* states that most computer programmers have a bachelor's degree, but the *Handbook* does not report that it is an occupational, entry requirement.¹² The text suggests that a baccalaureate degree may be a preference among employers of computer programmers in some environments, but that some employers hire candidates with less than a bachelor's degree, including candidates that possess an associate's degree. The *Handbook* does not support the petitioner's claim that the

¹² The statement that "most computer programmers have a bachelor's degree" does not support the view that all computer programmer positions qualify as a specialty occupation. The statement does not indicate that most employees in this occupation have a bachelor's degree *in a specific specialty*, or its equivalent, that is directly related to the duties and responsibilities of the position. As previously noted, although a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

Furthermore, the term "most" is not indicative that a particular position within the wide spectrum of computer programming jobs normally requires at least a bachelor's degree in a specific specialty, or its equivalent. For instance, 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 employees in this occupation have a bachelor's degree, it could be said that "most" of the individuals have such a degree. It cannot be found, therefore, that a statement that "most" employees possessing such a degree in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. As previously mentioned, the proffered position has been designated by the petitioner in the LCA as a Level I low, entry-level position relative to others within the occupation. 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.

proffered position falls under an occupational group for which normally the minimum requirement for entry is at a baccalaureate (or higher degree) in a specific specialty, or its equivalent.

In the letter of support submitted with the petition, the petitioner cites to *Matter of Precision Programming, Inc.*, EAC 90 202 51006 (AAU April 22, 1993). However, the petitioner did not submit a copy of *Matter of Precision Programming, Inc.* and, as such, there is no evidence that the facts of the instant petition are analogous to those in the unpublished decision. Furthermore, the decision was issued approximately 20 years ago and does not address the computer-related occupations as they have evolved since that time.¹³ In addition, the AAO notes that *Matter of Precision Programming, Inc.* is not a precedent decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. For all of the reasons articulated above, the unpublished decision is immaterial to this discussion regarding the job duties of the petitioner's proffered position and whether the petitioner has satisfied its burden of establishing that this particular position qualifies as a specialty occupation.

The fact that a person may be employed in a position designated as that of a computer programmer and may be involved in using information technology (IT) skills and knowledge to help an enterprise (or client) achieve its goals in the course of his or her job is not in itself sufficient to establish the position as one that qualifies as a specialty occupation. Thus, it is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." 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 (Reg. Comm. 1972)).

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

Next, the AAO will review the record regarding the first of the two alternative prongs of 8 C.F.R.

¹³ Moreover, the AAO reminds the petitioner that the issue is whether the petitioner's proffered position qualifies as a nonimmigrant H-1B specialty occupation and not whether it is a profession as that term is defined in section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), and 8 C.F.R. § 204.5(k)(2). Thus, while a position may qualify as a profession as that term is defined in section 101(a)(32) of the Act, the occupation would not necessarily qualify as a specialty occupation unless it met the definition of that term at section 214(i)(1) of the Act.

§ 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, 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*, or other authoritative source, reports a standard industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference its previous discussion on the matter. 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.

Thus, based upon a complete review of the record, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, 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. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

In the instant case, the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the computer programmer/analyst position. Specifically, the petitioner failed to credibly demonstrate exactly what the beneficiary will do on a day-to-day basis such that complexity or uniqueness can even be determined. Further, the petitioner failed to demonstrate how the computer programmer/analyst duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While related courses may be beneficial, or even essential, in performing certain duties of a computer programmer/analyst position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here proffered.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the LCA indicates a wage level based upon the occupational classification "Computer Programmers" at a Level I (entry level) wage. The wage level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."¹⁴

Therefore, the evidence of record does not establish that this position is significantly different from other computer programmer positions such that it refutes the *Handbook's* information to the effect that a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty, is acceptable for computer programmer positions. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than computer programmer positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO observes that the petitioner has indicated that the beneficiary's academic background and experience will assist him in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not explain or clarify at any time in the record which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Consequently, as the petitioner fails to demonstrate that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

¹⁴ For additional information regarding the Level IV wage level as defined by DOL, 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.

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner (or in this case, the client) 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 the 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. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

While a petitioner (or client) may believe or otherwise assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing the petitioner's (or client'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 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 388. In other words, if a stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if 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").

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

The petitioner stated in the Form I-129 petition that it has 85 employees and was established in 2000 (approximately 10 years prior to the filing of the H-1B petition). However, upon review of the record, the petitioner did not provide any documentary evidence regarding current or past recruitment efforts for this position. Furthermore, the petitioner did not submit any information

regarding employees who currently or previously held the position. The petitioner did not submit probative evidence to establish that the end clients normally require a baccalaureate (or higher) in a specific specialty, or its equivalent, for the position. The record does not establish a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

Upon review of the record, the petitioner has not provided probative evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

Upon review of the record of the proceeding, the AAO notes that the petitioner has not provided probative evidence to satisfy this criterion of the regulations. In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.

Furthermore, the AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupation. The petitioner designated the position as a Level I position (the lowest of four possible wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation." It is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a substantially higher prevailing wage. As previously discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that 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. As a result, even if it were determined that the petitioner overcame the ground for revocation of the approval of the petition, the petition

would be remanded to the director to review for issuance of an RFE or NOIR.

In addition, the AAO finds that the record of proceeding contains additional issues, not identified by the director in the NOIR that could also be remanded to the director for review and for consideration of issuance of an RFE or new NOIR. More specifically, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states, in pertinent part:

Service or training in more than one location. A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions. The address that the petitioner specifies as its location on the Form I-129 shall be where the petitioner is located for purposes of this paragraph.

The itinerary language at 8 C.F.R. § 214.2(h)(2)(i)(B), with its use of the mandatory "must" and its inclusion in the subsection "Filing of petitions," establishes that the itinerary as there defined is a material and necessary document for an H-1B petition involving employment at multiple locations, and that such a petition may not be approved for any employment period for which there is not submitted at least the employment dates and locations. Here, given the indications in the record that the beneficiary would work at multiple locations at some point during the requested period of employment and as the petitioner failed to provide this initial required evidence when it filed the Form I-129 in this matter, the petition could be remanded to the director for review and to contemplate the issuance of a request for evidence or new NOIR and initiation of a new revocation-on-notice process with regard to this petition's approval.¹⁵

The AAO will now address the director's ground for revocation of the approval of the petition, namely that the petitioner made a material change to the terms and conditions of the beneficiary's employment as specified in the original petition without filing an amended petition. The AAO reviewed the record of proceeding in its entirety, including the documents submitted with the petition, in response to the NOIR and in support of the appeal, as well as the information obtained during the site visit.

In pertinent part, the Act defines an H-1B nonimmigrant worker as:

[A]n alien . . . who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . who meets the requirements for the occupation specified in section 214(i)(2) . . . and with respect to whom *the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of*

¹⁵ In the appeal, counsel and the beneficiary claim that the "position requires travel to various client locations throughout the U.S. to work on short and long term projects." Counsel references the beneficiary's "short term assignment from December 2010 to March 2011." Notably, the petitioner has not established that it complied with the short-term placement(s) or assignment(s) of an H-1B nonimmigrant under 20 C.F.R. § 655.735.

Labor] an application under section 212(n)(1)

Section 101(a)(15)(H)(i)(b) of the Act (emphasis added).

In turn, section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A), requires an employer pay an H-1B worker the higher of the prevailing wage in the "area of employment" or the amount paid to other employees with similar experience and qualifications who are performing the same services. *See Patel v. Boghra*, 369 Fed.Appx. 722, 723 (7th Cir. 2010).

Implemented through the LCA certification process, section 212(n)(1) is intended to protect U.S. workers' wages and to eliminate any economic incentive or advantage in hiring temporary foreign workers. 65 Fed. Reg. 80110, 80110-80111 (Dec. 20, 2000) (the "process of protecting U.S. workers begins with a requirement that employers file a labor condition application (LCA) (Form ETA 9035) with [DOL]."). The LCA currently describes, *inter alia*, the number of workers sought, their job title and occupational classification, the prevailing wage, the actual rate of pay, and the place of employment. The prevailing wage may be determined by DOL based on the arithmetic mean of the wages of workers similarly employed in the area of intended employment. 20 C.F.R. § 655.731(a)(2)(ii).

In accord with the clear and unambiguous language of the Act and regulations, a prospective employer must file an LCA and receive approval from DOL before an H-1B petition can be submitted to USCIS. *See* section 101(a)(15)(H)(i)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(i)(B)(1); *see also* 56 Fed. Reg. 37175, 37177 (Aug. 5, 1991) and 57 Fed. Reg. 1316, 1318 (Jan. 13, 1992) (discussing filing sequence). Upon receiving DOL's certification, the prospective employer then submits the certified LCA to USCIS with an H-1B petition on behalf of a specific worker. 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). If an employer does not submit the LCA to USCIS in support of an H-1B petition, the process is incomplete and the LCA is not certified to the Secretary of Homeland Security as contemplated by statute.

While DOL certifies LCA applications, its role is limited by statute to reviewing LCAs "for completeness and obvious inaccuracies." Section 212(n)(1)(G)(ii) of the Act. In contrast, USCIS must determine whether the attestations and content of an LCA correspond to and support the material elements of the H-1B visa petition, including the specific place of employment. 20 C.F.R. § 655.705(b).

In the event of a material change, the petitioner must file an amended or new petition with USCIS with a new LCA. Specifically, the pertinent regulation requires:

The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. *In the case of an H-1B petition, this requirement includes a new labor condition application.*

8 C.F.R. § 214.2(h)(2)(i)(E) (emphasis added); *see also* 8 C.F.R. § 214.2(h)(11)(i)(A) (requiring petitioners to "immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary" and file an amended petition).

A material change in the terms and conditions of employment has occurred when there is a change in the permanent worksite of a beneficiary to a geographical area not covered by an LCA certified to DHS with respect to that beneficiary. Accordingly, when the terms and conditions of employment have changed such that a corresponding LCA must be certified to DHS with respect to that beneficiary, the petitioner must file a new or amended H-1B petition to reflect that material change.

In this matter, the petitioner claimed in both the Form I-129 petition and the certified LCA that the beneficiary's places of employment were located in [REDACTED] Metropolitan Statistical Area) and [REDACTED] Metropolitan Statistical Area). No other locations were provided. In an attempt to verify the beneficiary's employment, USCIS contacted the petitioner's client, [REDACTED], and was informed that the beneficiary tendered his resignation as a subcontractor with [REDACTED] on December 23, 2010. Moreover, a review of USCIS records indicated that another employer had filed an H-1B petition on behalf of the beneficiary. The director issued an NOIR. In response to the director's NOIR, counsel stated that "the beneficiary's assignment at [REDACTED] was terminated by [the petitioner] due to business reasons." Counsel further claimed that the "[b]eneficiary continued to be an employee of [the petitioner]." In addition, counsel submitted a letter from [REDACTED] Technical Lead, Production Management from [REDACTED]. The letter is dated August 22, 2012. In the letter, Mr. [REDACTED] states that "[t]his is to confirm that [the beneficiary], who is an employee of [the petitioner] will be providing information technology services to our company on the Actuarial Valuation Production project at [REDACTED]." Mr. [REDACTED] further states that "[t]he assignment location is [REDACTED]."

On appeal, *for the first time*, counsel states that after the beneficiary stopped working on the NCMMS project for [REDACTED] on December 23, 2010, he was assigned to another project "pursuant to [the petitioner's] contract with vendor [REDACTED] to perform IT consulting services for [REDACTED] in [REDACTED] from December 27, 2010 until March 2011. Counsel further claims that [REDACTED] is in the [REDACTED] Metropolitan Statistical Area, which was included in the LCA submitted with the initial petition. In addition, counsel states that on March 21, 2011, the petitioner assigned the beneficiary "to work on a project at [REDACTED] in [REDACTED] pursuant to [the petitioner's] contract with [REDACTED]." Counsel further claims that "[the petitioner] obtained a certified LCA for the [REDACTED] worksite." According to counsel, "[w]hen [the petitioner] promoted [the beneficiary] in May 2012, signaling a material change to the terms and conditions of his employment, [the petitioner] filed an amended H-1B petition."¹⁶

¹⁶ It must be noted that the record of proceeding contains inconsistent information regarding the beneficiary's promotion. On appeal, counsel claims that the petitioner promoted the beneficiary to the position of computer systems analyst in May 2012. In support of this assertion, counsel submitted an offer of

A material change in the terms or conditions of employment of a beneficiary is one "which may affect eligibility under section 101(a)(15)(H) of the Act and paragraph (h) of this section." See 8 C.F.R. § 214.2(h)(11)(i)(A); see also *Kungys v. United States*, 485 U.S. 759, 772 (1988) ("[T]he test of whether [specific facts] were material is whether they had a natural tendency to influence the decisions of the Immigration and Naturalization Service."). Since section 212(n) of the Act ties the prevailing wage to the "area of employment," a change in the beneficiary's permanent "place of employment" to a geographical area not covered in the original LCA would be material for both the LCA and the Form I-129 visa petition, as a change may affect eligibility under section 101(a)(15)(H) of the Act. For an LCA to be effective and correspond to an H-1B petition, it must specify the beneficiary's place(s) of employment.

Were USCIS aware that the beneficiary's actual place of employment differed from that covered by the LCA, USCIS may reasonably have concluded that the LCA did not correspond with the employment described in the petition and thus denied the petition. Having materially changed the beneficiary's authorized place of employment to geographical areas not covered by the original LCA, the petitioner was required to immediately notify USCIS and file an amended or new H-1B petition. The petitioner failed to do so. The change in employment location was material and necessitated the filing of an amended or new H-1B petition, along with the new LCA, with both documents indicating the relevant change. 8 C.F.R. §§ 214.2(h)(2)(i)(E) and (h)(11)(i)(A).

By failing to file an amended petition with a new LCA, or by attempting to submit a preexisting LCA that has never been certified to USCIS with respect to a specific worker, a petitioner may impede efforts to verify wages and working conditions. Compliance with the LCA and H-1B petition process is critical to the United States worker protection scheme established in the Act. In conclusion, based upon a complete review of the record of proceeding, the petitioner has failed to overcome the grounds specified in the NOIR for revoking the approval of the petition. In addition, even if the petitioner had overcome the ground for revocation of the approval of the petition, the petition would still be remanded to the director for review for issuance of an RFE or NOIR regarding the additional issues discussed above.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed. The approval of the petition remains revoked.

employment letter dated May 9, 2012 from the petitioner. However, in response to the NOIR and on appeal, counsel provided a letter dated August 22, 2012 (approximately three months after the beneficiary's promotion) from [REDACTED] that states that "[the beneficiary] will be working as a Programmer Analyst." No explanation for the discrepancy was provided.

Further, the AAO observes that the August 22, 2012 letter from [REDACTED] contains a list of the beneficiary's responsibilities. Notably, the letters dated May 10, 2012 and February 8, 2013 from [REDACTED] submitted on appeal, that indicate that "[the beneficiary] will be working as [a] Systems Analyst" contain the same duties listed in the August 22, 2012 letter. Again, no explanation was provided.