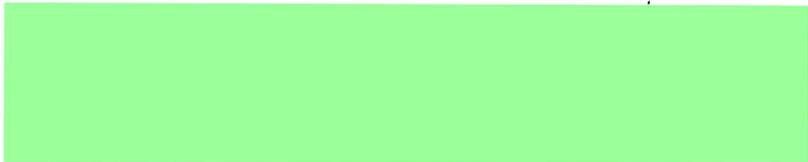
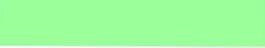




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **FEB 04 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:

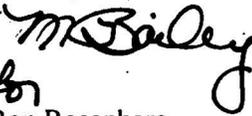


INSTRUCTIONS:

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

If you believe the 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,


for
Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a business, established in 1984, that provides lithography systems for the semiconductor industry and manufactures machines for production of integrated circuits or chips. In order to employ the beneficiary in what it designates as a customer support engineer position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements. In support of this assertion, counsel submitted a brief and additional evidence.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed. The petition will be denied.

The primary issue for consideration is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the 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 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *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.

In the petition signed on March 23, 2011, the petitioner indicates that it wishes to employ the beneficiary as a customer support engineer on a full-time basis at the rate of pay of \$61,850 per year. In addition, the petitioner indicates that the beneficiary will work at [REDACTED]. In the letter of support, dated March 29, 2011, the petitioner describes the duties of the proffered position as follows:

[The beneficiary] will be a member of [the petitioner's] Customer Support Organization, which is responsible for the installation, qualification, repair and maintenance of the [petitioner's] systems at customers' sites and is responsible for the necessary transfer of know-how to the customer. [The beneficiary] will install, repair and maintain [the petitioner's] equipment at customer locations, and will train customers in the use and maintenance of equipment.

The petitioner also states that "the duties of a Customer Support Engineer require at least a Bachelor's degree (or equivalent) in an engineering field and knowledge of a wide range of scientific and technical disciplines, including pneumatics, hydraulics, electronics, semiconductor processes, and relevant software."

In addition, the petitioner submitted a document entitled "Customer Support Engineer," which describes the proffered position's duties as follows:

Working independently and autonomously over 50% of the time in customer clean rooms working with electrical and mechanical equipment to:

- Working independently at customer locations, install [the petitioner's] photolithography systems. Configure customer-specific options required to manufacture advanced micro-processing.
- Calibrate sub-systems to adhere to original equipment manufacturer (OEM) design specifications at nanometer accuracy. Diagnose system tracing to ensure customers' maximum throughput/maximum yield. Perform critical inspections and create procedures to execute engineering on mechanical, pneumatic, optical and computer-based systems.
- Evaluate and diagnose problems and make appropriate corrections, including memory dump files, high speed serial communications, laser interferometers

amplitude and frequency parameters, pneumatic flows and pressures, robot positioning, optical aberrations, overlay alignment, defocus characteristics and motion control protocol.

- Recommend design modifications to address both structural and procedural issues experienced in the field.
- Train customers in equipment operation and routine maintenance. Answer customer questions related to product and procedural issues in a professional manner. Advise users of appropriate actions to correct malfunctions including recommending changes in user procedures.
- Perform administrative and coordination duties, including pass-downs, work orders, field service reports, system problem reports, and monthly reports. Prepare written technical reports on an independent basis.
- As appropriate and necessary, provide support and assistance to less experienced [petitioning company] or local personnel.

Bachelor's degree in an engineering field (or equivalent), mechanical aptitude, and knowledge of pneumatics, hydraulics, electronics, semiconductor processes, and relevant software required [sic]. Will spend over 50% of time working with electrical and mechanical equipment inside customers' clean rooms.

With the Form I-129 petition, the petitioner also submitted a copy of the beneficiary's certificate from [redacted] which indicates that he was awarded a degree on February 23, 1994. In addition, the petitioner submitted a credential evaluation from the [redacted] Inc. The evaluation indicates that the beneficiary's foreign education is equivalent to a bachelor's degree in physics from a regionally accredited college or university in the United States.

In addition, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification "Electronics Engineering Technicians" - SOC (ONET/OES Code) 17-3023.01. The petitioner designated the proffered position as a Level II (qualified) position.

The petitioner also provided evidence in support of the petition, including, the following: (1) a copy of its job vacancy announcement for the proffered position; (2) a letter from [redacted] (3) printouts from the petitioner's website; and (4) 2010 annual report for the petitioner's holding company (which is located in the Netherlands).

The director found the initial evidence insufficient to establish eligibility for the benefit sought and issued an RFE on July 25, 2011. The petitioner was asked to submit probative evidence to establish that a specialty occupation position exists for the beneficiary. The director outlined the specific evidence to be submitted. The AAO notes that the director specifically requested the petitioner to provide a more detailed description of the work to be performed by the beneficiary for the entire

period requested, including the specific job duties, the percentage of time to be spent on each duty, level of responsibility, etc.

The AAO observes that the director stated in the RFE that "an analysis of the proposed duties reveals that the position described by the petitioner reflect the duties of an Engineering Technician." The director repeatedly referenced the chapter of the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (hereinafter the *Handbook*) regarding the occupational category "Engineering Technicians."

On August 24, 2011, counsel for the petitioner responded to the RFE by submitting a brief, along with copies of previously submitted documents and new evidence. Notably, counsel did not address or provide any discussion of the occupational category for the proffered position. Furthermore, there is no indication that the petitioner and counsel disagreed with the director's statement that the proffered position appeared to be an engineering technician. Moreover, counsel did not question the director's references to the chapter of the *Handbook* regarding "Engineering Technicians."

The AAO observes that despite the director's finding that the petitioner's description of the proposed duties was nonspecific, the petitioner elected not to provide a more detailed description of the duties the beneficiary would perform. Consequently, in the instant case, the petitioner did not provide any specific information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks. Thus, the petitioner failed to specify which tasks were major functions of the proffered position, moreover, it did not establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at irregular intervals). As a result, the petitioner did not establish the primary and essential functions of the proffered position. No explanation for failing to submit this information was provided.

The director reviewed the information provided by counsel. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties 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 director denied the petition on March 1, 2012. Counsel submitted an appeal of the denial of the H-1B petition.

Counsel states that the "preponderance of the evidence" standard is applicable in this matter, and claims that the petitioner submitted sufficient evidence to establish that "more likely than not" the proffered position qualifies as a specialty occupation.

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 in its entirety and will make some findings that are material to this decision's application of the H-1B statutory and regulatory framework to the proffered position as described in the record of proceeding.

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. To make this determination, the AAO turns to the record of proceeding. To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. 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."

As a preliminary matter, the AAO notes that the petitioner and counsel have provided inconsistent information as to the academic requirements of the proffered position. The AAO observes that in the March 29, 2011 support letter, the petitioner indicates that the proffered position "require[s] at least a Bachelor's degree (or equivalent) in an engineering field." However, the job vacancy announcement for the proffered position, submitted with the initial petition, indicates that the proffered position requires a "Bachelor of Science: Electronic Engineering / Mechanical Engineering or closely related field." Further, [REDACTED] who submitted an advisory letter, states that "only an individual with a Bachelor's degree in an Engineering field would be able to perform the job duties" of the proffered position. In addition, the AAO notes that in the August 23, 2011 letter, submitted in response to the RFE, counsel states that "[the petitioner] has always required its Customer Support Engineers to have a Bachelor's degree in an Engineering discipline (or equivalent education and/or experience)." However, further in the letter, counsel claims "that the Customer Support Engineering position requires a Bachelor of Science degree in Electronic Engineering, Mechanical Engineering or a closely related field." In the March 27, 2012 letter, submitted on appeal, the petitioner states that "[the petitioner] has always required bachelor's degree in an engineering field or equivalent for its Customer Support Engineer positions." No explanation for the variances was provided. 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).

Furthermore, the petitioner's claim that a bachelor's degree in "an engineering field" is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. The issue here is 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 directly related to the duties and responsibilities of the particular position proffered in this matter.¹

¹ Moreover, on appeal, counsel claims that the beneficiary has a degree in physics and ten years of industry experience, and requests the AAO refer to the beneficiary's resume. The AAO notes that the beneficiary's resume is not probative evidence. That is, the resume represents a claim by the beneficiary, rather than evidence to support that claim. Counsel further states that "[i]n the petitioner's judgment, [the beneficiary's] Physics degree and his many years of industrial experience are the equivalent of a bachelor's degree in an engineering field."

Additionally, in the appeal, the petitioner asserts, *for the first time*, that a degree in physics is sufficient for the proffered position, claiming that it "has often hired Customer Support Engineers with degree in Physics because the mathematics and science foundations of an academic program in Physics makes it closely related to an engineering degree or the equivalent of an engineering degree."

As previously mentioned, with the Form I-129 petition, the petitioner submitted a copy of the beneficiary's certificate from [REDACTED] which indicates that he was awarded a degree on February 23, 1994. The beneficiary's transcript was not provided. In addition, the petitioner submitted a credential evaluation from the [REDACTED]. The evaluation indicates that the beneficiary's foreign

Here, the petitioner, who bears the burden of proof in this proceeding, simply fails to establish that engineering or 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 normally the minimum requirement for entry into the particular position proffered in this matter is 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.

Therefore, absent evidence of a direct relationship between the claimed degree 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. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, 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.

Moreover, upon review of the record of proceeding, the AAO observes that the petitioner and its counsel have provided inconsistent information as to the occupational category for the proffered position. The petitioner and counsel did not address the discrepancies.

More specifically, as previously noted the petitioner submitted an LCA in support of the instant H-1B petition designating the proffered position under the occupational category "Electronics Engineering Technicians" - SOC (ONET/OES Code) 17-3023.01.

On appeal, the AAO notes that counsel claims that the service center erred in concluding that the proffered position is an engineering technician position. Specifically, counsel states, "The CSC erred in disregarding [the petitioner's] detailed job description and in relying on the OOH's engineering technician description to classify the Customer Support Engineer position as an engineering technician position." Counsel claims that the proffered position falls under the occupational category "Engineers." Notably, counsel fails to acknowledge or provide any explanation to reconcile her assertion with information contained in the record of proceeding, specifically, the petitioner's contention in the LCA that the proffered position falls under the

education is equivalent to a bachelor's degree in physics from a regionally accredited college or university in the United States.

The petitioner did not submit probative evidence to establish that the beneficiary's education and/or professional experience is the equivalent of a U.S. bachelor's degree in engineering. The assertion by the petitioner and counsel that the beneficiary's credentials are "equivalent of a bachelor's degree in an engineering field" is not sufficient. There is no evidence to suggest that the petitioner and counsel possesses any particular knowledge, expertise or experience evaluating foreign educational credentials and/or work experience, and they have provided insufficient facts to support this claim.

occupational category of "Electronics Engineering Technicians." Moreover, the AAO observes that the director discussed categorizing the proffered position under this occupational category in the RFE and counsel did not state any objection in her RFE response. Further, counsel fails to acknowledge that the petitioner was notified of the director's conclusion and provided an opportunity to submit an explanation and a more detailed description of the proffered position (including the percentage of time to be spent on each duty) to clarify the primary and essential duties of the proffered position, but the petitioner elected not to provide such information to the director.

When reviewing the LCA, the AAO observes that in designating the proffered position under the occupational category "Electronics Engineering Technicians," the petitioner also indicated that the proffered position is a Level II (qualified) position. DOL guidance states that wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) occupational code classification.² Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent worker) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.³ DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level II wage rate is described by DOL as follows:

² For additional information on wage levels, see DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

³ A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

Level II (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

As noted above, DOL guidance indicates that a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones would be an indication that a wage determination at Level II would be proper classification for a position. The occupational category "Electronics Engineering Technicians," has been assigned an O*NET Job Zone 3, which groups it among occupations for which medium preparation is needed. More specifically, most occupations in this zone "require training in vocational schools, related on-the-job experience, or an associate's degree." See O*NET OnLine Help Center, at <http://www.onetonline.org/help/online/zones>, for a discussion of Job Zone 3.

In the instant case, the petitioner designated the proffered position as a Level II position. This suggests that the petitioner's academic and/or professional experience requirements for the proffered position would correspond to the "training in vocational schools, related on-the-job experience, or an associate's degree" as stated for occupations designated as O*NET Job Zone 3. However, in the instant case, the petitioner claims in its March 29, 2011 letter of support that a "Bachelor's degree in an engineering field (or equivalent), mechanical aptitude, and knowledge of pneumatics, hydraulics, electronics, semiconductor processes, and relevant software [is] required [sic]."

The petitioner failed to provide any explanation for the inconsistencies in the record of proceeding with regard to the petitioner's designation of the proffered position under the occupational category "Electronics Engineering Technicians" as a Level II position, in contrast with the assertions made by counsel regarding the occupational category in the appeal, as well as the petitioner's claimed requirements for the proffered position. The AAO finds that fully considered in the context of the entire record of proceeding, the petitioner failed to establish the nature of the proffered position and in what capacity the petitioner actually intended to employ the beneficiary. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 591-92. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. As previously mentioned, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.*

The AAO will now address the director's basis for denial of the petition, namely that the petitioner

failed to establish that it would employ the beneficiary in a specialty occupation position. For efficiency's sake, the AAO hereby incorporates the above discussion and analysis into the record of proceeding regarding the beneficiary's proposed employment.

In the instant case, the petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary 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. Nevertheless, for the purpose of performing a comprehensive analysis of whether the proffered position qualifies as a specialty occupation the AAO now turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 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 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 *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 will now look at the *Handbook*, an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁴ As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Electronics Engineering Technicians."

The AAO reviewed the chapter of the *Handbook* entitled "Electrical and Electronic Engineering Technicians," including the sections regarding the typical duties and requirements for this

⁴ 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.

occupational category.⁵ However, the *Handbook* does not indicate that normally the minimum requirement for entry into electronic engineering technician positions is at least a bachelor's degree in a specific specialty, or its equivalent.

The subchapter of the *Handbook* entitled "How to Become an Electrical and Electronics Engineering Technician" states the following about this occupation:

Electrical and electronic engineering technicians typically need an associate's degree.

Education

Programs for electrical and electronic engineering technicians usually lead to an associate's degree in electrical or electronic engineering technology. Vocational-technical schools include postsecondary institutions that serve local students and emphasize training needed by local employers. Community colleges offer programs similar to those in technical institutes but include more theory-based and liberal arts coursework.

Prospective electrical and electronic engineering technicians usually take courses in C++ programming, physics, microprocessors, and circuitry. The Technology Accreditation Commission of ABET (formerly the Accreditation Board for Engineering and Technology) accredits programs that include at least college algebra, trigonometry, and basic science courses.

There are also bachelor's degree programs in electrical engineering technology. Graduates of these programs work as electrical engineering technologists, rather than technicians. In some cases, they are considered applied electrical or electronic engineers because they put electrical engineering concepts to use in their work. Earning an associate's degree in electronic engineering technology eases entry into a bachelor's degree program.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Electrical and Electronic Engineering Technicians, on the Internet <http://www.bls.gov/ooh/architecture-and-engineering/electrical-and-electronic-engineering-technicians.htm#tab-4> (last visited January 16, 2013).

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 electrical and electronic engineering technician positions. The *Handbook* reports that typically an associate's degree is sufficient for entry into this occupation. According to the *Handbook*, programs for these positions

⁵ For additional information regarding the occupational category "Electronics Engineering Technicians," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Electrical and Electronic Engineering Technicians, on the Internet at <http://www.bls.gov/ooh/architecture-and-engineering/electrical-and-electronic-engineering-technicians.htm#tab-1> (last visited January 16, 2013).

usually lead to an associate's degree in electrical or electronic engineering technology. Thus, the *Handbook* does not support the assertion that jobs falling within the occupational category "Electronic Engineering Technicians" normally require at least a bachelor's degree in a specific specialty. The narrative of the *Handbook* also states that there are bachelor's degree programs in electrical engineering technology. However, the *Handbook* further reports that graduates of these programs work as electrical engineering technologists, rather than technicians. Moreover, the *Handbook* simply states that such programs exist. That is, the narrative of the *Handbook* does not indicate that such a degree is normally required for entry into electrical engineering technologist positions. Furthermore, the AAO observes that neither the petitioner nor counsel assert that the proffered position falls under the occupational category "Electrical Engineering Technologists." Again, the petitioner indicated in the LCA that the proffered position falls under the occupational category "Electronics Engineering Technicians." Upon review of this chapter of the *Handbook*, the AAO observes that it does not support the claim that the proffered position falls under an occupational group for which normally the minimum requirement for entry is a baccalaureate degree (or higher) in a specific specialty, or its equivalent.

The AAO will now discuss the letter from [REDACTED] submitted with the initial petition. The letter is dated January 18, 2011. Upon review of the letter, the AAO notes that [REDACTED] has failed to provide sufficient information regarding the basis of his claimed expertise on this particular issue. In his opinion letter and curriculum vitae, [REDACTED] describes his educational background and professional credentials. He states that he is an associate professor of computer science and head of the computer engineering program at [REDACTED]. In addition, he states that he has 4 years of experience as a partner in a consulting business (which appears to have been from 1985 to 1988 based upon his curriculum vitae), and 5 years of experience in research engineer positions (apparently from 1988 to 1992, also based upon his curriculum vitae). Thus, his experience as a partner in a consulting business and his experience in research engineering positions occurred approximately 20 years prior to the submission of the H-1B petition. His curriculum vitae also indicates that his current experience includes working as a consultant, specializing in educational evaluations and international education (which does not appear to be relevant to the issue here of whether the proffered position qualifies as a specialty occupation). In addition, [REDACTED] most recently published an article in 2000 (more than a decade prior to the H-1B filing). [REDACTED] claims that he is considered to be a "recognized authority according CIS regulations." It appears that [REDACTED] is referring to the term "recognized authority" as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).⁶ As will be discussed, [REDACTED] has not established that he is a recognized authority or that he has any particular expertise or specialized knowledge of the instant matter.

[REDACTED] stated that he "reviewed [the petitioner's] documents and [has] studied the company website." In his letter, [REDACTED] listed eight general points describing the duties the proffered position. There is no indication that [REDACTED] was provided with further information to establish

⁶ *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. 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. 8 C.F.R. § 214.2(h)(4)(ii).

which duties are primary or essential duties. There is no evidence that [REDACTED] possesses any particular knowledge pertinent to the hiring practices of organizations seeking to fill positions similar to the proffered position in the instant case. Without further clarification, it is unclear how his education, training, skills or experience would translate to expertise or specialized knowledge regarding the *current recruiting and hiring practices* of businesses that provide lithography systems and manufactures machines for production of integrated circuits and chips (as designated by the petitioner in the Form I-129) in the semiconductor machinery manufacturing industry (as designated by the petitioner with the NAICS code) similar to the petitioner for *customer support engineer* positions (or parallel positions). Furthermore, it does not appear that the petitioner and its counsel informed [REDACTED] that the petitioner designated the proffered position under the occupational category "Electronics Engineering Technicians" as a Level II position on the LCA, indicating that it is a position for an employee who has a good understanding of the occupation but who will only perform moderately complex tasks that require limited judgment. Additionally, it does not appear that [REDACTED] was informed that the designation of the proffered position as Level II position suggests that the petitioner's academic and/or professional experience requirements for the proffered position would correspond to the "training in vocational schools, related on-the-job experience, or an associate's degree" as stated for occupations designated as O*NET Job Zone 3.

The opinion letter does not cite specific instances in which his past opinions have been accepted or recognized as authoritative on *this particular issue*. There is no indication that he has published any work or conducted any research or studies pertinent to the educational requirements for *customer support engineers* (or parallel positions) in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that he is an authority on those specific requirements. The opinion letter contains no evidence that it was based on scholarly research conducted by [REDACTED] in the specific area upon which he is opining. In reaching this determination, [REDACTED] provides no documentary support for his ultimate conclusion regarding the education required for the position (i.e., statistical surveys, authoritative industry publications, or professional studies). [REDACTED] asserts a general industry educational standard, without referencing any supporting authority or any empirical basis for the pronouncement.

In the letter, [REDACTED] states, "The position of Customer Support Engineer at [the petitioning company] is so specialized and complex that only an individual with a Bachelor's degree in an Engineering field would be able to perform the job duties." It must be noted that, without further information, [REDACTED] conclusion that a degree in "an Engineering field" is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. As discussed *supra*, a general-purpose bachelor's degree, such as a degree in engineering, may be a legitimate prerequisite for a particular position, but 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, [REDACTED] claims that he reviewed an expanded job description of the proffered position. However, upon review of the opinion letter, there is no indication that [REDACTED] possesses any knowledge of the petitioner's proffered position beyond the job description. The fact that he attributes a degree requirement to such a generalized treatment of the proffered position undermines the credibility of his opinion. [REDACTED] does not demonstrate or assert in-depth knowledge of the

petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. His opinion does not relate his conclusion to specific, concrete aspects of this petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. There is no evidence that [REDACTED] has visited the petitioner's business, observed the petitioner's employees and/or members, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. [REDACTED] provides general conclusory statements regarding the customer support engineer position, but he does not provide a substantive, analytical basis for his opinion and ultimate conclusions.

In summary, and for each and all of the reasons discussed above, the AAO concludes that the opinion letter rendered by [REDACTED] is not probative evidence to establish the proffered position as a specialty occupation. The conclusions reached by [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which he reached such conclusions. There is an inadequate factual foundation established to support the opinion and the AAO finds that the opinion is not in accord with other information in the record.

The AAO may, in its discretion, use as advisory opinions or statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). As a reasonable exercise of its discretion the AAO discounts the advisory opinion letter as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

For efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding the opinion letter into its analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

It is incumbent upon the petitioner to provide persuasive evidence that the proffered position qualifies as a specialty occupation under this criterion, notwithstanding the absence of *Handbook* support on the issue. 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. 158, 165 (Comm. 1998) (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 normally a minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that 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 first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong 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).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter. The petitioner did not submit any documentation from the industry's professional association stating that it has made a degree a minimum entry requirement.

The AAO acknowledges that the record of proceeding contains an opinion letter from [REDACTED]. However, as previously discussed in detail, the AAO finds that the opinion letter does not merit probative weight towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) or establishing the proffered position as a specialty occupation.

In the Form I-129 and supporting documents, the petitioner stated that it is a business, established in 1984, that provides lithography systems for the semiconductor industry and manufactures machines for production of integrated circuits or chips. The petitioner further stated that it has approximately 1,600 employees. Although requested in the Form I-129 petition, the petitioner did not provide its gross annual income and its net annual income. Instead it simply wrote "EURO 4,504,938 sales," which appears to refer to the sales of the holding company located in the Netherlands. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 333295.⁷ The AAO notes that this NAICS code is designated for "Semiconductor Machinery Manufacturing." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This U.S. industry comprises establishments primarily engaged in manufacturing wafer processing equipment, semiconductor assembly and packaging equipment, and other semiconductor making machinery.

U.S. Dep't of Commerce, U.S Census Bureau, 2007 NAICS Definition, 333295 – Semiconductor

⁷ According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited January 16, 2013).

Machinery Manufacturing, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited January 16, 2013).

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner and counsel submitted copies of job advertisements. The AAO reviewed the postings but notes that the petitioner's reliance on the advertisements is misplaced. The AAO notes that the petitioner did not provide any independent evidence of how representative the job advertisements are of the particular advertising employer's recruiting history for the type of job advertised. As the advertisements are only solicitations for hire, they are not evidence of the employer's actual hiring practices.

Upon review of the documents, the AAO finds that they 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.

All of the job postings submitted by the petitioner are for field service engineers. Notably, this job title encompasses a range of positions and occupations. Upon review of the evidence submitted, it does not appear that all of the advertisements are for parallel positions. The duties of some of the advertised positions are described in brief, general terms. Moreover, as previously discussed, the petitioner elected not to submit a detailed description of the proffered position. Thus, while it appears that some of the jobs may have some basic, general tasks in common with the proffered position, the petitioner has not established that the primary and essential tasks to be performed are parallel to the proffered position. The AAO notes that it appears that some of the advertised positions may be more senior positions. The petitioner provided a job posting for a position, which requires a degree and "5 years of experience in electronics troubleshooting and repairing." Another posting states a requirement of a degree and "2 – 5 years of hands on experience of maintaining/repairing PVD & Etching production tools." Thus, without further clarification, the petitioner has not sufficiently established that the duties and responsibilities of the advertised positions are parallel to the proffered position.

In the appeal, counsel states that "[a]ll of the postings require at least a bachelor's degree (or equivalent) in engineering or a related field" and claims that a degree in "engineering or a related field" is sufficient to establish that the proposed position qualifies as a specialty occupation. As previously discussed, 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. The AAO hereby incorporates its previous discussion on the matter. 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 directly related to the duties and responsibilities of the proffered position and the advertised positions. Moreover, 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). The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is

directly related to the specialty occupation claimed in the petition. Additionally, the AAO notes that the petitioner submitted an advertisement in which a "[c]andidate with exceptional experience may be exempt from degree requirements." The term "exceptional experience" is not further defined in the advertisement. Thus, it has not been established that the advertised position requires at least a bachelor's degree in a specific specialty, or its equivalent.

The AAO reviewed all of the advertisements submitted in response to the RFE.⁸ However, as discussed, 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 for parallel positions in organizations similar to the petitioner.

Moreover, 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 these few job advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the proffered position for organizations similar to the petitioner required a bachelor's or higher degree in a specific specialty, or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

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.

⁸ 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.

In the instant case, the AAO acknowledges that the petitioner and its counsel may believe that the duties of the proffered position are complex or unique. In support of this assertion, the petitioner submitted documentation regarding its business operations, including printouts from its website and the 2010 annual report of its holding company in the Netherlands. However, the AAO reviewed the record in its entirety and finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. The petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of customer support engineer. That is, the petitioner has not developed or established complexity or uniqueness as attributes of the proffered position (through the job duties, the petitioner's business operations or by any other means) that would require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent. Moreover, the petitioner and counsel 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.

More specifically, the petitioner failed to demonstrate how the 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 a few related courses may be beneficial or in some cases even required to perform certain duties of a customer support engineer 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 petitioner's proffered position.

Therefore, the evidence of record does not establish that this position is significantly different from other electronic engineering technician positions such that it refutes the *Handbook's* information to the effect that an associate's degree is acceptable for these positions. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than electronic engineering technician positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent. This is further evidenced by the petitioner's designation of the proffered position under the occupational category "Electronics Engineering Technicians" as a Level II position on the LCA, indicating that it is a position for an employee who has a good understanding of the occupation but who will only perform moderately complex tasks that require limited judgment. Furthermore, AAO incorporates by reference its earlier discussion regarding the inconsistencies in the record with regard to the nature and requirements of the proffered position. Therefore, it is simply not credible that the duties of the proffered are 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, as such a position would likely be classified as at a higher level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. 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 AAO observes that the petitioner has indicated that the beneficiary's educational background and experience in the industry 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 and counsel do not sufficiently 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. Upon review of the record of proceeding, the petitioner has failed to establish the proffered position as satisfying this prong of the criterion at 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. To this end, the AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

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

As previously discussed, the petitioner and counsel have provided inconsistent information as to the academic requirements of the proffered position. With the initial petition and in response to the RFE, the petitioner submitted a copy of its job vacancy announcement (printed March 28, 2011) for the proffered position. (The petition was submitted April 12, 2011, thus it appears that the advertisement was posted shortly before the H-1B petition was filed.) Notably, the announcement indicates that a "Bachelor of Science: Electronic Engineering / Mechanical Engineering or closely related field" is required for the proffered position.

The petitioner stated in the Form I-129 petition that it was established in 1984 (approximately 27 years prior to the submission of the H-1B petition). The petitioner did not provide the total number of people it has employed to serve in the proffered position but claims that it employs approximately 1,600 individuals. Consequently, it cannot be determined how representative the submission of *one job vacancy announcement over a 27 year period* is of the petitioner's normal recruiting and hiring practices. The petitioner has not persuasively established that it normally requires at least a bachelor's degree in a specific specialty for the position.

On appeal, counsel submits a letter from the petitioner's Human Resources Manager, [REDACTED]. In the letter, [REDACTED] asserts that "[the petitioner] has always required a bachelor's degree in an engineering field or equivalent for its Customer Support Engineer positions." In support of her assertion, [REDACTED] provides job vacancy announcements dated August 26, 2010. Notably, these announcements indicate that the proffered "position requires a BS degree in an engineering field or equivalent experience." The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the specialty occupation claimed in the petition. The AAO hereby incorporates by reference its earlier discussion on the petitioner's stated requirement of a degree in an engineering field for the proffered position. Here, the petitioner, who bears the burden of proof in this proceeding, simply fails to establish that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the proffered position.

In the instant case, the petitioner claims that the position of customer support engineer is not a new position. The director asked the petitioner to indicate the number of persons employed in similar positions and to submit documentation to establish how many of those persons have a baccalaureate or higher degree, as well as evidence as to the particular field of study in which the degree was attained. However, the petitioner elected not to submit such information. The petitioner did not

submit any documentation regarding employees who currently or in the past have served in the proffered position. The petitioner did not submit documentation (e.g., diplomas, transcripts, pay records) to establish that it normally requires at least a baccalaureate in a specific specialty, or its equivalent, for the position.

Upon review of the record, the petitioner has not provided any 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 finds that the petitioner has not provided probative evidence to satisfy this criterion of the regulations.

As previously discussed, the AAO acknowledges that the record of proceeding contains an opinion letter from [REDACTED]. However, the AAO finds that the opinion letter does not merit probative weight towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) or establishing the proffered position as a specialty occupation.

The petitioner and its counsel claim 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. In support of this claim, the petitioner submitted documentation regarding its business operations, including printouts from its website and a 2010 annual report for its holding company. Upon review of the record of the proceeding, the AAO finds that the petitioner has not provided sufficient probative evidence to satisfy this criterion of the regulations. In the instant case, the petitioner has not presented the proposed duties with sufficient specificity and substantive content to establish relative specialization and complexity as distinguishing characteristics of the duties of the proffered position, let alone that they are at a level that would require knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, also, the proposed duties have not been described with sufficient specificity to establish their nature as more specialized and complex than the nature of the duties of other positions in the pertinent occupational category whose performance does not require the application of knowledge requiring attainment of at least a bachelor's degree in a specific specialty, or its equivalent.⁹

As the evidence in the record of proceeding does not establish that the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with

⁹ The AAO notes again the petitioner has designated the proffered position as a Level II position on the LCA under the occupational category "Electronics Engineering Technicians," indicating that it is a position for an employee who has a good understanding of the occupation but who will only perform moderately complex tasks that require limited judgment. Therefore, it is simply not credible that the position is one with specialized and complex duties, as such position would likely be classified as a Level IV position, requiring a significantly higher prevailing wage.

the attainment of 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)(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. The appeal will be dismissed and the petition denied for this reason.

A beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner has failed to establish that the proffered position requires a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the AAO need not and will not address the beneficiary's qualifications further.

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

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