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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: **FEB 22 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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

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

ON BEHALF OF PETITIONER:

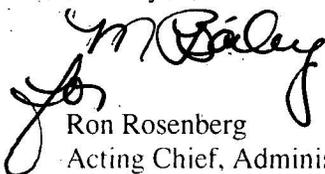
[REDACTED]

INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on July 7, 2011. In the Form I-129 visa petition, the petitioner describes itself as a seller of pedicure spa products and equipment established in 2002. In order to employ the beneficiary in what it designates as a systems analyst 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 on May 9, 2012, 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 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 petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. 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, and the petition will be denied.

Later in this decision, the AAO will also address an additional, independent ground, not identified by the director's decision, that the AAO finds also precludes approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner failed to submit a Labor Condition Application (LCA) that complies with the applicable statutory and regulatory provisions. For this additional reason, the petition may not be approved. It is considered an independent and alternative basis for denial.¹

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a systems analyst to work on a full-time basis at a rate of pay of \$24.66 per hour. In a support letter dated June 28, 2011, the petitioner stated that the proffered position would include the following duties:

1. Evaluate the computer system and online store on the basis of the [petitioner's] needs;
2. Develop, design and implement a computer system including a[n] inventory management system and an online store;

¹ The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

3. Monitor the performance of computer programs after implementation;
4. Improve and modify existing programs to increase operating efficiency or adapt to new requirements;
5. Direct, train and guide the [petitioner's] employees in the use of the programs;
6. Assist users to solve operating problems and provide technical assistance[.]

In its letter of support accompanying the initial I-129 petition, the petitioner described the minimum educational requirements for the proffered position as "a bachelor's degree in computer science, engineering, information science, or a related field."

The petitioner also provided (1) copies of diplomas from [redacted] issued to the beneficiary; (2) a statement from [redacted] indicating that the beneficiary holds the U.S. equivalent of a Bachelor of Science in Information Technology; (3) copies of documents related to the petitioner's business operations; (4) an organizational chart; (5) advertisements for the petitioner's products; (6) photos of the petitioner's locale; (7) an excerpt from the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* regarding the occupational category "Computer Systems Analysts"; and (8) job advertisements.

In addition, the petitioner submitted an 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 "Computer Systems Analysts" - SOC (ONET/OES Code) 15-1051, at a Level I (entry level) wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on October 11, 2011. The AAO notes that the director specifically requested that the petitioner submit probative evidence to establish that the proffered position is a specialty occupation. In the request, the petitioner was specifically asked to provide a more detailed description of the work to be performed by the beneficiary, including the specific job duties, the percentage of time to be spent on each duty, level of responsibility, etc. The director outlined the evidence to be submitted.

On November 4, 2011, the petitioner and counsel responded to the director's RFE by providing a revised description of the duties of the proffered position and additional evidence. Specifically, the petitioner provided the following description of the systems analyst position, along with the percentage of time that the beneficiary would spend performing each of the duties:

- Evaluate the computer system and online store on the basis of the [petitioner's] needs; (7.5%)
- Develop, design and implement a computer system including a[n] inventory management system and an online store; (10%)
- Monitor the performance of computer programs after implementation; (7.5%)
- Improve and modify existing programs to increase operating efficiency or adapt to new requirements; (7.5%)

- Direct, train and guide the [petitioner's] employees in the use of the programs; (2.5%)
- Assist users to solve operating problems and provide technical assistance; (5%)
- Meet with all department managers to get requirements, latest changes needed and design documents for all departments; (3.75%)
- Establish operational objectives and work plans to ensure the operation of the functions needed by each department; (3.75%)
- Research and Development to ensure all codes and documents are up to [the petitioner's] standards; (6.25%)
- Responsible for the development of all major components and modules and contribute to the overall design and maintenance system; (6.25%)
- Coding, Testing new codes, Fixing all bugs and maintaining and updating libraries; (20%) and
- Install and Configure Web Server and Database Server. (20%)

The AAO observes that the first six job duties are identical to the job duties provided by the petitioner in the initial submission. According to the petitioner, these duties will comprise 40% of the beneficiary's time. In response to the RFE, the petitioner now claims that the beneficiary will perform six additional duties, which were not mentioned in the initial petition. According to the petitioner, these duties will comprise 60% of the beneficiary's time.

The petitioner submitted additional evidence in response to the RFE, including several job postings; an internal e-mail regarding job openings with the petitioner; printouts from university websites; printouts from the petitioner's website; and information regarding a U.S. patent issued to the petitioner in 2002.

The director reviewed the information provided by the petitioner. 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 May 9, 2012. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition.

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, the AAO will make some preliminary findings that are material to the determination of the merits of this appeal.

When determining whether a position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks 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. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently

require to assist his or her adjudication. Further, 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."

In the instant case, the AAO observes that in response to the director's request for further evidence, counsel expanded the beneficiary's duties, adding the following duties to those provided with the initial petition:

- Meet with all department managers to get requirements, latest changes needed and design documents for all departments; (3.75%)
- Establish operational objectives and work plans to ensure the operation of the functions needed by each department; (3.75%)
- Research and Development to ensure all codes and documents are up to [the petitioner's] standards; (6.25%)
- Responsible for the development of all major components and modules and contribute to the overall design and maintenance system; (6.25%)
- Coding, Testing new codes, Fixing all bugs and maintaining and updating libraries; (20%) and
- Install and Configure Web Server and Database Server. (20%)

The initial duties substantially focused on evaluation of the petitioner's computer-related needs and development of a system to address those needs. The AAO notes that these additional duties comprise a full 60% of the beneficiary's time. Notably, the additional duties include substantial work with codes and servers.

The petitioner did not acknowledge or provide any explanation for failing to provide these additional duties that apparently, include primary and essential duties (including coding, testing new codes, fixing all bugs and maintaining and updating libraries and installing and configuring the web server and database server). The AAO finds it questionable that the petitioner's job description has been revised to include job duties, comprising 60% of the beneficiary's responsibilities that were not included in the initial petition.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

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Further, the AAO observes that the petitioner's claimed entry requirement of at least a bachelor's degree in "computer science, engineering, information science, or a related field" 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 two 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) of the Act (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, information science, or a related field." The AAO will now address the petitioner's statement that a degree in engineering is sufficient for the proffered position. 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. 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 the other acceptable disciplines (computer science and information science) 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.

Here and as indicated above, the petitioner, who bears the burden of proof in this proceeding, simply fails to establish either (1) that computer science, engineering, and information science in general are closely related fields, or (2) 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 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. Therefore, absent 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.

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.² 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 139, 147 (1st Cir. 2007).³

Further, upon review of the record of proceeding, the AAO notes that the enclosed LCA does not appear to correspond to the claimed duties and requirements of the proffered position. Consequently, as will be discussed below, the petitioner has failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

More specifically, the petitioner provided an LCA in support of the instant petition that indicates the occupational classification for the position is "Computer Systems Analysts" at a Level I (entry level) wage. Wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) occupational code classification. 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.⁴ Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified),

² It is not sufficient to assert that a few courses taken while obtaining a degree in engineering may be helpful in performing the duties of the proffered position. The petitioner has not demonstrates 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.

³ 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.

⁴ 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.

Level III (experienced), or Level IV (fully competent) 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.⁵ 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 as indicated by the job description.

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

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.

In the instant case, the petitioner and its counsel repeatedly claim that the nature of the proffered position involves complex, unique and/or specialized tasks. On appeal, in a letter dated May 24, 2012, the petitioner states that its "focus is to use technology to streamline its operations and also apply technology into its products so users can work more efficiently." The petitioner asserts that as a designer, manufacturer, and retailer of a full line of salon products, its business model is so unique that it has decided to create its own in-house IT department, and that it "intends to rely on the expertise of [the beneficiary] to recruit [p]rogrammers and required staff for the IT department." Further, the petitioner indicates that the computer system it seeks to have the beneficiary create is so specialized that the contractors it hired to do the job were unable to meet the petitioner's needs. The

⁵ 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.

petitioner also states that the individual hired for the proffered position must, in part, have had "experience in manufacturing"; "experience in management"; "experience with the Vietnamese Nail Industry"; and "be fluent in English and Vietnamese." In response to the RFE, counsel submitted a chart of the duties of the proffered position that characterizes 81.25% of the beneficiary's job duties as entailing a "high" level of responsibility. The petitioner indicates that it will be relying heavily on the beneficiary's extensive knowledge and expertise to create an IT department that is central to the petitioner's "focus" on the "use of technology to streamline its operations" and that the beneficiary's duties carry a high level of responsibility. This characterization of the proffered position appears to be at odds with a Level I position, i.e., a position that requires "only a basic understanding of the occupation."

Thus, upon review of the assertions made by the petitioner and counsel, the AAO must question the level of complexity, independent judgment and understanding actually required for the proffered position as the LCA is certified for a Level I entry-level position. This characterization of the position and the claimed duties and responsibilities as described by the petitioner and counsel conflict with the wage-rate element of the LCA selected by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, the selected wage rate 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. Moreover, the petitioner claims that knowledge of the Vietnamese language is required for the position. The AAO notes that a language requirement other than English in a petitioner's job offer generally is considered a special skill for all occupations, with the exception of Foreign Language Teachers and Instructors, Interpreters, and Caption Writers. In the instant case, the petitioner has not established that the foreign language requirement has been reflected in the wage-level for the proffered position.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. *See* section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A).

The AAO notes that the prevailing wage of \$24.66 per hour (\$51,293 per year) on the LCA corresponds to a Level I position for the occupational category of "Computer Systems Analysts" for Orange County (Westminster, CA).⁶ Notably, if the proffered position had been designated at a

⁶ For additional information regarding the prevailing wage for Computer Systems Analysts in Westminster, California, *see* the All Industries Database for 7/2010 - 6/2011 for Computer Systems Analysts at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatabase.com/OesQuickResults.aspx?code=15-1051&area=42044&year=11&source=1> (last visited February 13, 2013).

higher level, the prevailing wage at that time would have been \$65,083 per year for a Level II position, \$78,894 per year for a Level III position, and \$92,685 per year for a Level IV position.

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. Therefore, the petitioner has failed to establish that it would pay the beneficiary an adequate salary for his work, as required under the Act, if the petition were granted.

This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the demands, level of responsibilities and 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).

As noted below, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) specifies that certification of an LCA does not constitute a determination that an occupation is a specialty occupation:

Certification by the Department of Labor [DOL] of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.*

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position, that is,

specifically, that corresponds to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance with the pertinent LCA regulations.

The statements regarding the claimed level of complexity, independent judgment and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level I entry-level position. This conflict undermines the overall credibility of the petition. The AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed.

For the foregoing reasons, a review of the enclosed LCA indicates that the information provided does not correspond to the level of work and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and requirements in accordance with the pertinent LCA regulations. As a result, even if it were determined that the petitioner overcame the director's basis for denial of the petition (which it has not), the petition could not be approved for this independent reason.

The AAO will now specifically 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. Based upon a complete review of the record of proceeding, and for the specific reasons described below, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

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

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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 147 (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 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). In the interest of efficiency, the AAO hereby incorporates the above discussion and analysis regarding the duties and requirements of the proffered position into the analysis of each criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which follows below.

The AAO will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

The petitioner stated that the beneficiary would be employed in a systems analyst position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, 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 recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁷ As previously mentioned, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Computer Systems Analysts."

The AAO reviewed the chapter of the *Handbook* (2012-2013 edition) entitled "Computer Systems Analysts," including the sections regarding the typical duties and requirements for this occupational category.⁸ However, the *Handbook* does not indicate that "Computer Systems Analysts" comprise an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry.

The subchapter of the *Handbook* entitled "How to Become a Computer Systems Analyst" states the

⁷ All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

⁸ For additional information regarding the occupational category "Computer Systems Analysts," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Computer Systems Analysts, on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-1> (last visited February 13, 2013).

following about this occupational category:

A bachelor's degree in a computer or information science field is common, although not always a requirement. Some firms hire analysts with business or liberal arts degrees who know how to write computer programs.

Education

Most computer systems analysts have a bachelor's degree in a computer-related field. Because computer systems analysts are also heavily involved in the business side of a company, it may be helpful to take business courses or major in management information systems (MIS).

Some employers prefer applicants who have a Master of Business Administration (MBA) with a concentration in information systems. For more technically complex jobs, a master's degree in computer science may be more appropriate.

Although many analysts have technical degrees, such a degree is not always a requirement. Many systems analysts have liberal arts degrees and have gained programming or technical expertise elsewhere.

Some analysts have an associate's degree and experience in a related occupation.

Many systems analysts continue to take classes throughout their careers so that they can learn about new and innovative technologies and keep their skills competitive. Technological advances come so rapidly in the computer field that continual study is necessary to remain competitive.

Systems analysts must also understand the business field they are working in. For example, a hospital may want an analyst with a background or coursework in health management. An analyst working for a bank may need to understand finance.

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

When reviewing the *Handbook*, the AAO must again note that the petitioner designated the proffered position as a Level I (entry level) position on the LCA. As previously discussed, this designation is indicative of a comparatively low, entry-level position relative to others within the occupation. 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 reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results.

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 these positions. The *Handbook* indicates that there is a spectrum of degrees acceptable for positions in this occupation, including an associate's degree and degrees not in a specific specialty.

The narrative of the *Handbook* states that some analysts have an associate's degree and experience in a related occupation. The *Handbook* does not state that the experience gained by a candidate must be equivalent to at least a bachelor's degree in a specific specialty. While the *Handbook* indicates that a bachelor's degree in a computer or information science field is common, the *Handbook* does not report that such a degree is normally a minimum requirement for entry. The *Handbook* continues by stating that some firms hire analysts with business or liberal arts degrees who know how to write computer programs. According to the *Handbook*, many systems analysts have liberal arts degrees and have gained programming or technical expertise elsewhere. The *Handbook* reports that many analysts have technical degrees. The AAO observes that the *Handbook* does not specify a degree level (e.g., associate's degree, baccalaureate) for these technical degrees. Moreover, the *Handbook* specifically states that such a degree is not always a requirement.

The text of the *Handbook* suggests that a baccalaureate degree or higher may be a preference among employers of computer systems analyst in some environments, but that some employers hire employees with less than a bachelor's degree, including candidates that possess an associate's degree or a bachelor's degree in an unrelated specialty. Thus, the *Handbook* 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.⁹

The AAO notes that, on appeal, counsel refers to a 1989 unpublished decision in which the position of systems analyst proffered in that matter qualified as a "professional position." The AAO notes that the applicable statutory and regulatory scheme governing the designation of such a position in 1989 is not relevant to the determination of the current standards of whether a particular position

⁹ The AAO notes that in support of the H-1B petition, the petitioner has provided multiple copies of the chapter of the *Handbook* regarding "Computer Systems Analysts." Notably, in response to the RFE, counsel highlighted the section of the *Handbook* which states that employers usually prefer applicants with at least a bachelor's degree in a technical field such as computer science, information science, mathematics, or engineering. In a letter dated November 4, 2011, counsel stated, "While it is true that the Occupational Outlook Handbook (OOH) does not categorically provide that a System Analysis position requires a Bachelor's Degree, it does recognize that employer's usually prefer applicants with at least a Bachelor's Degree in a technical field such as Computer Science, Information Science, Mathematics or Engineering." Counsel continued by asserting that "even in employment positions where the employer forgoes a degree requirement[,] the employee will need to supplement his knowledge with formal training."

Clearly a *preference* by some employers for a candidate with a degree in one of several fields is not an indication that a baccalaureate (or higher degree) in a specific specialty, or its equivalent, is normally the minimum *requirement* for entry into these positions. Furthermore, the assertion that a candidate *without a degree* may need to "supplement his knowledge with formal training" is insufficient to demonstrate that a position qualifies as a specialty occupation.

constitutes a "specialty occupation."¹⁰ Moreover, the decision does not address the current standards for entry into system analyst positions as they have evolved since the decision was issued *more than twenty-years ago*. Further, even if such a determination required an identical analysis to the instant issue, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished 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.

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, particularly in light of the Level I wage designation on the LCA, 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)(1).

Next, the AAO reviews the record of proceeding 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.

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. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement. Furthermore, the petitioner did not submit any letters or affidavits from similar firms or individuals in the petitioner's industry attesting firms "routinely employ and recruit only degreed individuals."

¹⁰ The petitioner and counsel failed to provide a copy of the referenced 1989 decision. However, the AAO notes that prior to April 1, 1992, the H-1B category applied to persons of "distinguished merit and ability." The standard of "distinguished merit and ability" was defined in the regulations as "one who is a member of the professions or who is prominent in his or her field." On October 1, 1991, the *Immigration Act of 1990* ("IMMACT 90") deleted the term "distinguished merit and ability" from the general H-1B description; however, the implementation of this change was delayed until April 1, 1992.

In the Form I-129, the petitioner stated that it is a business involved in the sale of pedicure spa products and equipment established in 2002. The petitioner further stated that it has 60 employees, and a gross annual income of approximately \$7.5 million, with a net annual income of approximately \$125,000. The petitioner failed to designate its business operations under the North American Industry Classification System (NAICS) as requested on the Form I-129 petition.¹¹ In its June 28, 2011 letter, the petitioner described itself as a company that is "engaged in the sale of pedicure spa equipments [sic], furniture and products," both "[i]n-store and online."

The AAO notes that under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the petitioner must establish that "the degree requirement is common to *the industry in parallel positions among similar organizations.*" (Emphasis added.) That is, this prong requires the petitioner to establish that a requirement of a bachelor's 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. On appeal, for the purposes of this criterion, counsel seeks to characterize the petitioner's industry as "the sales and manufacturing industry."

For the petitioner to establish that organizations are similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such information, evidence submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and an organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner and counsel to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

In the instant case, the petitioner submitted several job postings in support of this criterion of the regulations. The AAO reviewed the job announcements submitted by the petitioner with the initial Form I-129 and in response to the RFE. However, the petitioner's reliance on the job postings is misplaced. Notably, the petitioner did not provide any independent evidence of how representative these job postings are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' 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. Contrary to the purpose for

¹¹ 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 viewed February 13, 2013).

which they were submitted, several of the announcements do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. Specifically, the posting for a business systems analyst at Gymboree lists a B.A. or B.S. in "Business" as an acceptable educational requirement. As previously mentioned, 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*, 484 F.3d at 147. The petitioner also submitted an announcement for a systems analyst (lead) at Data Exchange Group (DEX), which requires a bachelor's degree in computer science or engineering. There is no evidence in the record of proceeding to establish either (1) that computer science and engineering (including any and all engineering specialties) in general are closely related fields, or (2) that any and all engineering specialties are directly related to the duties and responsibilities of the advertised position.

Similarly, the postings for a systems support analyst at Northern Tool and Equipment, a business systems analyst at eBay, and a business systems data analyst at Sogeti all require simply a "bachelor's degree" or a "B.A./B.S." No specific specialty is required. In addition, the posting for a network engineer/systems support analyst at The Cimino Group, Inc. states a requirement of a "bachelor's degree" in the header; however, the posting itself requests "formal education" of a "degree in the field of computer science *and/or* at least five year's equivalent experience" (emphasis added). Thus, this posting does not specify that a bachelor's degree is the minimum educational requirement for the position. It appears that the advertising company would accept an associate's degree *or* some experience in lieu of education.¹²

Other job announcements submitted by the petitioner advertise positions that do not appear to be parallel to the proffered position. The posting for a systems analyst (lead) at Data Exchange Corp. (DEX) advertises a position where the incumbent leads "two or more concurrent customer software implementation projects, each of which typically involves leading a team of 5-10 systems analysts." The petitioner has not suggested anywhere in the record that the beneficiary would be responsible for leading two teams of five to ten systems analysts, or perform similar duties. Notably, according to the petitioner's organizational chart, the petitioner has no other systems analysts on staff at this time. Even if the petitioner demonstrated that the beneficiary would be managing such a team, the AAO must question the veracity of such managerial duties in light of the Level I wage designation on the LCA. Similarly, the posting for a senior business systems analyst at an unnamed organization describes the advertised position as managing and coordinating application support teams. Again, the petitioner has not established that the proffered position involves managerial duties of application support teams. In addition, the network engineer/systems support analyst position advertised by Cimino Group, Inc. will primarily "install, administer, and optimize company servers and related components." The AAO notes that the initial job duties detailed by the

¹² The advertising employer indicates that five years of experience may be sufficient for a candidate for the advertised position. Notably, when USCIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks.

petitioner in the Form I-129 did not involve server administration. Thus, the AAO cannot find that these positions are parallel to the proffered position.

Additionally, several of the job announcements appear to be for organizations that are not similar to the petitioner. One advertisement is for a systems analyst at ehealthclaim.net, which describes the advertising organization as "a software development firm and clearing house providing healthcare solutions to hospitals and physicians throughout the United States." From this limited description, the AAO cannot find that this organization is similar to the petitioner. There is no indication that the advertising organization is involved in the manufacture and sale of products similar to the petitioner, or that the scale and structure of the advertising organization's business operations are similar to that of the petitioner. Similarly, the advertisements from Ventura Foods, eBay, and an unnamed organization advertising senior business systems analyst in San Francisco lack sufficient descriptions of the organizations' characteristics such that the AAO can ascertain whether they are similar to the petitioner. Without further information, the advertisements appear to be for organizations that are not similar to the petitioner and the petitioner has not provided any probative evidence to suggest otherwise. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations.

The AAO reviewed all of the advertisements submitted by the petitioner with the initial petition and in response to the RFE.¹³ However, 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. Further, it must be noted that even if all of the job postings indicated that a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.¹⁴

¹³ In support of its appeal, the petitioner provided additional job postings. Notably, in the RFE, the director requested the petitioner submit probative evidence to establish eligibility under this criterion of the regulations. As previously mentioned, evidence requested in an RFE but not included in the petitioner's RFE response will not be considered if later submitted. See 8 C.F.R. §§ 103.2(b)(8)(iv) and (b)(11). See also *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, the AAO need not consider the sufficiency of the requested evidence submitted by the petitioner on appeal. Nevertheless, the AAO reviewed the job postings submitted with the appeal, but finds that the advertisements submitted have similar deficiencies to the advertisements submitted with the initial petition and in response to the RFE. The job advertisements do not 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.

¹⁴ According to the *Handbook's* detailed statistics on computer systems analysts, there were approximately 544,400 persons employed as computer systems analysts in 2010. *Handbook*, 2012-13 ed., available at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-6> (last accessed February 13, 2013). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in

Thus, based upon a complete review of the record of proceeding, the AAO finds that the petitioner has not established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. Thus, 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 record of proceeding contains information regarding the petitioner's business operations, including financial documents (statement of assets and liabilities, statement of profit and loss, unsigned federal tax return for 2009, quarterly wage and withholding reports); an organizational chart; advertisements of the petitioner's products; photos of the petitioner's premises; printouts from the petitioner's website; and a printout regarding a U.S. patent issued to the petitioner in 2002 for "[t]he ornamental design for a chair to facilitate pedicures and other care of the feet." On appeal, the petitioner and counsel provided documentation to demonstrate that the petitioner had previously hired three different companies to undertake the duties of the proffered position. The petitioner and counsel claim that these companies were unable to meet the petitioner's needs due to the petitioner's unique business model.

The AAO reviewed the record of proceeding in its entirety. However, as discussed previously, the petitioner itself does not require at least a baccalaureate degree in a *specific specialty*, or its equivalent. Moreover, the petitioner has not sufficiently developed relative complexity or uniqueness as an aspect of the proffered position. Additionally, the AAO 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 industry. *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 organizations similar to the petitioner in its industry commonly require, for positions parallel to the one here proffered, at least a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. The LCA indicates a wage level at a Level I (entry level) wage. As previously mentioned, 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."¹⁵ The petitioner has not credibly demonstrated that this position, which the petitioner characterized in the LCA as an entry-level position, is so complex or unique that it can be performed only by an individual with at least a baccalaureate degree in a specific specialty, or its equivalent. Thus, based upon the record of proceeding, including the LCA, it does not appear that the proffered position is so complex or unique that it can only be performed by an individual who has completed a baccalaureate program in a specific discipline that directly relates to the proffered position. The AAO observes that the record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

Moreover, the petitioner fails to demonstrate how the duties of the systems analyst as described in the record 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, while in response to the RFE counsel submitted printouts regarding various undergraduate programs, neither counsel nor the petitioner established how such a curriculum is necessary to perform the duties of the proffered position. While related courses may be beneficial, or even required, in performing certain duties of the proffered 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.

The AAO observes that the petitioner and counsel have indicated that the beneficiary's educational background and experience in the industry will assist him in carrying out the duties of the proffered position, and takes particular note of his academic credentials and professional experience working with computer systems. 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. In the instant case, the petitioner does not establish 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.

¹⁵ For additional information regarding wage levels as defined by DOL, see Employment and Training Administration (ETA), *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

The petitioner failed 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. Consequently, 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. In assessing this criterion, the AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To satisfy this criterion, 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").

The petitioner and its counsel have stated that, prior to advertising the proffered position, the petitioner contracted three different software companies to perform the duties that it now expects the beneficiary will perform. On appeal counsel provided documentation associated with these contracts. The AAO notes that as the petitioner failed to submit this evidence in response to the RFE, and instead submitted it for the first time on appeal, it need not consider this evidence. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). However, the AAO has reviewed the evidence and notes that the petitioner has failed to provide any documents to establish that the individuals who performed the work on these contracts held bachelor degrees in a specific specialty. On appeal, counsel refers to the job announcements discussed above, and asserts that these job announcements are evidence that "the people who performed the work on [the] contracts [for the petitioner] likely were in possession of bachelor's degree as that seems to be a common requirement to get hired by an IT company who places its employees with other companies." The AAO incorporates herein its above analysis regarding the job announcements, and reiterates that these job postings do not reflect a common requirement for a bachelor's degree in a specific specialty. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of

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proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 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).

Further, the AAO notes that the internal e-mail regarding job openings submitted in response to the RFE states the educational requirement for the proffered position as "[b]achelor degrees [sic] and be bilingual Vietnamese & English required." 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. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147 (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position").

The petitioner stated in the Form I-129 petition that it has 60 employees and was established in 2002 (approximately nine years prior to the filing of the H-1B petition). Thus, the submission of one internal email (which notably does *not* indicate a degree in a *specific specialty* is required) is insufficient to establish eligibility under this criterion of the regulations.

Upon review of the record of proceeding, the petitioner has not provided sufficient 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.

The AAO acknowledges that the petitioner believes 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 its letter dated May 24, 2012, the petitioner states that its "unique application of technology into its products requires programmers who understand the Vietnamese nail [and] pedicure market." However, the AAO notes that an "understand[ing of] the Vietnamese nail [and] pedicure market" is clearly not obtained through the completion of "a bachelor's degree in computer science, engineering, information science, or a related field."

On appeal, counsel asserts that the duties of the proffered position are so complex that the contractors previously hired to perform the tasks were not successful. Counsel again points to the petitioner's business model (design, manufacture, and sale of spa products) as evidence of the complexity of the position. The AAO observes that counsel states that the petitioner hopes to "add a salon management system" in the form of a "mobile application," which the beneficiary would design. Counsel indicates that the proffered position entails projects including a workflow management system, e-commerce system, salon management system, and an online marketplace. However, counsel does not establish how the beneficiary would specifically be involved in such

projects and how his duties would require the practical and theoretical application of a highly specialized body of knowledge usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. Moreover, the AAO reviewed the documentation submitted by the petitioner but finds that it fails to support assertion that the proffered position qualifies as a specialty occupation under this criterion of the regulations.

The AAO here reiterates its earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category of "Computer Systems Analysts," and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, 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 significantly higher prevailing wage. For instance, as previously mentioned, 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. 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. 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.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 145 (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's

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enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

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

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