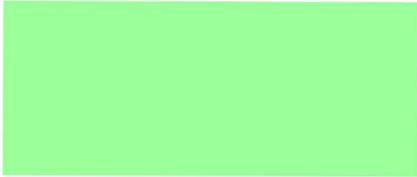


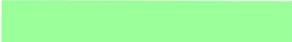


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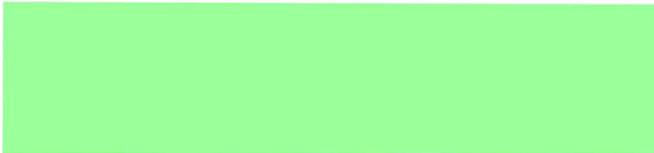


DATE: **JAN 03 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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:

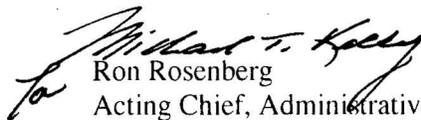


INSTRUCTIONS:

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,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a “computer animation and graphic design for e-commerce and market services” company established in 2004. In order to employ the beneficiary in what it designates as a project manager position, the petitioner seeks to classify her 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 the basis of her determination that the petitioner had failed to demonstrate that the position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director’s request for additional evidence (RFE); (3) the petitioner’s response to the RFE; (4) the director’s letter denying the petition; and (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director’s ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, the AAO finds an additional aspect which, although not addressed in the director’s decision, nevertheless also precludes approval of the petition, namely, providing as the supporting Labor Condition Application (LCA) for this petition an LCA which does not correspond to the petition, in that: (1) the occupational category (Technical Directors/Managers) does not correspond to the proffered position and its constituent duties as described in the record of proceeding; and (2) the LCA was certified for a wage level below that which is compatible with the levels of responsibility, judgment, and independence the petitioner claimed for the proffered position through its descriptions of its constituent duties.¹ For these additional reasons, the petition must also be denied.

In its May 23, 2011 letter of support, the petitioner stated that the duties of the proffered position would include the following:

- Leading discussions and meetings with clients regarding project objectives, budgets, timelines, and web development parameters;
- Researching product branding and marketing ideas in order to define market niches, thereby generating user interface contents, flowcharts, wireframes, and manuals;

¹ The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that the AAO identified this additional ground for denial.

- Reviewing deliverables (contents, graphics, source codes, SEO,² etc.) using applicable industry standards and requirements;
- Quality assurance reviews;
- Managing a team of graphic designers and independent contractors to ensure that web development projects are in line with clients' requirements, budgets, and timelines; and
- Managing the operational aspects of web development projects in order to ensure that the work is done within the scope of clients' requests.

In its October 20, 2011 letter, the petitioner added the following duties:

- Leading the conceptualization, design, and execution of a broad range of web visual design projects;
- Developing and directing the visual design team in order to ensure that goals and objectives are met;
- Leading the development of the customer's web visual design language for existing and new features and functionality;
- Working collaboratively with the graphic design team and customers for web product management, project management, web editorial, and web development;
- Triaging projects and driving a team to meet deliverables and timelines on concurrent projects in a fast-paced environment;
- Pushing the team to "think outside the box" and explore creative boundaries;
- Sharing in the creation, maintenance, and implementation of UI³ design standards and guidelines;
- Developing innovative approaches to web visual design;
- Leveraging social media, and mobile and emerging technologies with the ultimate goal of improving usability, and increasing engagement and task completion;
- Continuously monitoring contemporary and competitive landscapes to identify new opportunities and ensure completeness;

² The petitioner did not explain its use of the abbreviation "SEO."

³ The petitioner did not explain its use of the abbreviation "UI."

- Driving visual design consistency across all web properties, including mobile web;
- Leveraging various reporting and research resources;
- Analytics reporting for strategic and tactical decision-making;
- Conducting performance reviews;
- Coaching and training staff as appropriate;
- Mentoring staff;
- Ensuring continuing development of skills;
- Resourcing, load balancing, and delegation of daily tasks; and
- Evaluating budget requirements, reporting variances, and recommending adjustments to budgets that support business needs and goals.

The record contains multiple claims regarding the complexity, specialization of the duties and associated level of responsibility of the proffered position. For example, after describing the proposed duties as “specialized and complex,” the petitioner made the following statements in its May 23, 2011 letter:

[The beneficiary] is required to manage a team of Graphic Designers, all of whom are equipped with specialized knowledge and skills. . . .

* * *

[The beneficiary] will be serving a leading/managerial role. . . .

* * *

The proffered position is a specialty occupation due to the required highly specialized knowledge [that is required]. . . .

In similar fashion, the petitioner stated the following in its October 20, 2011 letter:

The technical and technological complexity of [the proffered position] calls for an individual in [a] specialty occupation. . . .

* * *

The proffered position is a specialty occupation due to the required highly specialized knowledge [that is required] . . . [The petitioner’s minimum educational requirement] has been the standard in the industry due to the technical sophistications of [the] job duties. . . .

* * *

In addition to the above demanding job duties, [the beneficiary] also is expected to manage a team of Graphic Designers, all of whom are equipped with specialized knowledge and skills. . . .

In his October 25, 2011 letter, counsel argued as follows:

For each website development project, graphic and or multimedia designers are only responsible for creating the graphic and contents. The ultimate responsibility lies in [the beneficiary]. [The beneficiary] is the one who will be the driving force of completion in those web development projects. In addition to managing the work flow of professional graphic designers and periodically review[ing] the progress for each web design project, the [beneficiary] must also understand and define whether certain website parameters can be managed or achieved with the modern computer information systems in web coding and or computer languages and be able to explain and document records thereof to clients for status report or adjustments. The [beneficiary] is required to digest all relevant information, organize a project structure amidst the wealth of information/demands provided by the clients, and develop action steps towards the realization of the project. . . .

Finally, the AAO highlights the proposed job duties of the beneficiary to conduct performance reviews; to coach, train, and mentor staff; and to delegate daily tasks to other staff members.

As will now be discussed, these assertions materially conflict with both the occupational category and the wage level designated in the LCA that the petitioner submitted with the petition. The LCA submitted by the petitioner in support of the instant position specifies the occupational classification for the position as “Technical Directors/Managers,” SOC (O*NET/OES) Code 27-2012.05, at a Level I (entry level) wage. The *Prevailing Wage Determination Policy Guidance*⁴ issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

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 [emphasis in original].

The petitioner’s assertions regarding the proposed duties’ level of complexity, uniqueness, and specialization, as well as the level of independent judgment and responsibility and the occupational understanding required to perform them, are materially inconsistent with the petitioner’s submission of

⁴ Available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf (last accessed November 21, 2012).

an LCA certified for a Level I, entry-level position. The LCA's wage level (Level I, the lowest of the four that can be designated) is only appropriate for a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels quoted above, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; will be expected to perform routine tasks requiring limited, if any, exercise of judgment; will be closely supervised and her work closely monitored and reviewed for accuracy; and will receive specific instructions on required tasks and expected results.

This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the proffered position's demands and level of responsibilities. 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. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) makes clear that certification of an LCA does not constitute a determination that a position qualifies for classification as a specialty occupation:

Certification by the Department of Labor 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 the content of 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 an LCA that corresponds to the claimed duties of the proffered position. Specifically, it has failed to submit an LCA that corresponds to the level of work and responsibilities that the petitioner claims

for the proffered position and to the wage-level appropriate for such a level of work and responsibilities in accordance with the requirements of the pertinent LCA regulations.

The statements of record regarding the claimed level of complexity, specialization, and occupational understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level I entry-level position, and this conflict undermines the overall credibility of the petition. The record contains no explanation for this inconsistency regarding the proposed position's wage level. Thus, even if it were determined that the petitioner had overcome the director's ground for denying this petition (which it has not), the petition could still not be approved due to the petitioner's failure to submit an LCA certified for the proper wage classification.

Moreover, the petitioner's certification of the LCA under the O*NET occupational code classification of "Technical Directors/Managers" constitutes a second reason why the submitted LCA does not correspond to the petition, as the proposed duties as described in the record of proceeding do not comprise the type of position (Technical Directors/Managers) designated in the LCA.

The appropriate wage level is determined only after selecting the most relevant O*NET occupational code classification. The aforementioned *Prevailing Wage Determination Policy Guidance* issued by the DOL states that "[t]he O*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification" for determining the prevailing wage for the LCA.

The O*NET Summary Report for the occupational category "Technical Directors/Managers" summarizes that occupation as follows:

Coordinate activities of technical departments, such as taping, editing, engineering, and maintenance, to produce radio or television programs.

* * *

Tasks

- Supervise and assign duties to workers engaged in technical control and production of radio and television programs.
- Monitor broadcasts to ensure that programs conform to station or network policies and regulations.
- Observe pictures through monitors, and direct camera and video staff concerning shading and composition.
- Act as liaisons between engineering and production departments.
- Test equipment to ensure proper operation.

- Schedule use of studio and editing facilities for producers and engineering and maintenance staff.
- Train workers in use of equipment such as switchers, cameras, monitors, microphones, and lights.
- Confer with operations directors to formulate and maintain fair and attainable technical policies for programs.
- Discuss filter options, lens choices, and the visual effects of objects being filmed with photography directors and video operators.
- Follow instructions from production managers and directors during productions, such as commands for camera cuts, effects, graphics, and takes.

See Employment & Training Administration, U.S. Dep't of Labor, O*Net OnLine, Summary Report for Technical Directors/Managers, available at <http://www.onetonline.org/link/summary/27-2012.05> (accessed November 21, 2012).

These duties do not correspond to the duties of the proffered position. The beneficiary would not produce radio or television programs by coordinating the activities of technical departments, such as taping, editing, engineering, and maintenance. She would not “[s]upervise and assign duties to workers engaged in technical control and production of radio and television programs.” Nor would she “[m]onitor broadcasts to ensure that programs conform to station or network policies and regulations.” The beneficiary would not “[o]bserve pictures through monitors, and direct camera and video staff concerning shading and composition”; act as a liaison “between [the] engineering and production departments”; or “[t]est equipment to ensure proper operation.” Nor would the beneficiary “[s]chedule [the] use of studio and editing facilities for producers and engineering and maintenance staff”; “[t]rain workers in [the] use of equipment such as switchers, cameras, monitors, microphones, and lights”; “[c]onfer with operations directors to formulate and maintain fair and attainable technical policies for programs”; or [d]iscuss filter options, lens choices, and the visual effects of objects being filmed with photography directors and video operators.” Finally, the beneficiary would not “[f]ollow instructions from production managers and directors during productions, such as commands for camera cuts, effects, graphics, and takes.” As such, the beneficiary would not perform any of the duties listed by O*Net as among those normally performed by technical directors and managers.

Furthermore, despite the fact that the petitioner selected the occupational category of “Technical Directors/Managers” as the most relevant O*NET occupational code classification on the LCA, counsel argues on appeal that the proffered position “is equivalent to a Computer and Information Manager position,” and submits an excerpt from the U.S. Department of Labor’s (DOL) *Occupational Outlook Handbook* (the *Handbook*) discussing the duties of computer and information systems managers.

Given that the petitioner submitted an LCA certified for a “Technical Director/Manager” position, these assertions and arguments made by counsel further indicate that the LCA does not correspond to the instant petition. Moreover, for the reasons discussed above, the AAO finds that, as described in the record of proceeding, the proffered position indeed is not that of technical director or manager.

DOL guidance specifies that when ascertaining the proper occupational classification, a determination should be made by “consider[ing] the particulars of the employer’s job offer and compar[ing] the full description to the tasks, knowledge, and work activities generally associated with an O*NET-SOC occupation to insure the most relevant occupational code has been selected.” *See Prevailing Wage Determination Policy Guidance*. In this case, the petitioner has provided no explanation of its apparently erroneous claim that the position’s primary and essential tasks, knowledge, and work activities are those generally associated with the occupational category of “Technical Directors/Managers” as depicted by O*Net. As such, it has not established that this LCA actually corresponds to this petition for this additional reason, and, therefore, the petition could not be approved even if it were determined that the petitioner had overcome the director’s ground for denying this petition (which it has not).

As reflected in this decision’s earlier discussion regarding the fact that the LCA does not correspond to the petition, that conflict between the petition and the LCA in itself precludes approval of this petition, independently from and regardless of the merits of the petition. Also, as previously noted, the conflict between the LCA and the petition also adversely affects the merits of the petition, because it materially undermines the credibility of the petition’s statements therein with regard to the nature and level of work that the beneficiary would perform. That being said, the AAO will now continue to address the evidence in the record of proceeding.

The AAO will now address the director’s determination that the proffered position is not a specialty occupation. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

To meet its burden of proof on the specialty occupation issue in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term “specialty occupation” as one 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 term “specialty occupation” is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [(1)] 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 requires [(2)] 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, the 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.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not rely simply upon a proffered position’s title. The specific duties of the 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 beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 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 will now discuss the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

The AAO will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which is satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.⁵ As discussed above, the AAO does not agree with the petitioner’s claim made on the LCA that the duties of the proffered position align with those of technical directors and managers. Nor does the AAO agree with counsel’s assertion that the proposed duties align with those of computer and information systems managers. The *Handbook* states the following with regard to the duties of such positions:

Computer and information systems managers, often called information technology managers (IT managers or IT project managers), plan, coordinate, and direct computer-related activities in an organization. They help determine the information

⁵ The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. The AAO’s references to the *Handbook* are from the 2012-13 edition available online.

technology goals of an organization and are responsible for implementing computer systems to meet those goals. . . .

Computer and information systems managers typically do the following:

- Analyze their organization's computer needs and recommend possible upgrades to top executives
- Plan and direct installing and upgrading computer hardware and software
- Ensure the security of an organization's network and electronic documents
- Assess the costs and benefits of a new project to justify spending to top executives
- Learn about new technology and look for ways to upgrade their organization's computer systems
- Determine short- and long-term personnel needs for their department
- Plan and direct the work of other IT professionals, including computer systems analysts, software developers, information security analysts, and computer support specialists
- Negotiate with technology vendors to get the highest level of service for their organization

Few managers do all of these duties. There are various types of computer and information systems managers, and the specific duties of each are determined by the size and structure of the firm. Smaller firms may not employ every type of manager.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Computer and Information Services Managers," <http://www.bls.gov/ooh/Management/Computer-and-information-systems-managers.htm#tab-2> (accessed November 21, 2012).

While it is acknowledged that several of these duties appear similar to those proposed for the beneficiary, a study of the *Handbook's* discussion of the educational requirements normally required for entrance into this field yields information that undermines the petitioner's claim that the proffered position actually falls within this occupational category when that information is considered in conjunction with the assertions of the petitioner made on the LCA. For example, the *Handbook* states that "[c]omputer and information systems managers usually spend 5-10 years in an IT occupation before being promoted to a manager." *Id.* at <http://www.bls.gov/ooh/Management/Computer-and-information-systems-managers.htm#tab-4>. However, as noted previously, the petitioner submitted an LCA certified for a Level I, entry-level position. The LCA's Level I wage-

level is only appropriate for a low-level, entry position relative to others within the occupation and, in accordance with the relevant DOL explanatory information on wage levels quoted above, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; will be expected to perform routine tasks requiring limited, if any, exercise of judgment; will be closely supervised and her work closely monitored and reviewed for accuracy; and will receive specific instructions on required tasks and expected results. These characteristics of the proffered position do not align with the general thrust of the computer and information systems manager positions described in the *Handbook*.

Moreover, the petitioner's submission of an LCA certified for a technical director/manager rather than for a computer and information systems manager undermines further counsel's argument that the duties of the proffered position are actually those of a computer and information systems manager. Counsel does not explain why, if the proposed duties are actually those of a computer and information systems manager, the petitioner did not submit an LCA certified for such a position.

Several of the duties of the proffered position appear to fall within those described in the *Handbook* as normally performed by web developers. The *Handbook* describes the duties of that occupation as follows:

Information security analysts, web developers, and computer network architects all use information technology (IT) to advance their organization's goals Web developers create websites to help firms have a public face. . . .

* * *

Web developers design and create websites. They are responsible for the look of the site. They are also responsible for the site's technical aspects, such as performance and capacity, which are measures of a website's speed and how much traffic the site can handle. They also may create content for the site.

Web developers typically do the following:

- Meet with their clients or management to discuss the needs of the website and the expected needs of the website's audience and plan how it should look
- Create and debug applications for a website
- Write code for the site, using programming languages such as HTML or XML
- Work with other team members to determine what information the site will contain
- Work with graphics and other designers to determine the website's layout
- Integrate graphics, audio, and video into the website

- Monitor website traffic

When creating a website, developers have to make their client's vision a reality. They work with clients to determine what sites should be used for, including ecommerce, news, or gaming. The developer has to decide which applications and designs will fit the site best.

The following are some types of web developers:

Web architects or programmers are responsible for the overall technical construction of the website. They create the basic framework of the site and ensure that it works as expected. Web architects also establish procedures for allowing others to add new pages to the website and meet with management to discuss major changes to the site.

Web designers are responsible for how a website looks. They create the site's layout and integrate graphics; applications, such as a retail checkout tool; and other content into the site. They also write web-design programs in a variety of computer languages, such as HTML or JavaScript.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Information Security Analysts, Web Developers, and Computer Network Architects," <http://www.bls.gov/oooh/computer-and-information-technology/information-security-analysts-web-developers-and-computer-network-architects.htm#tab-2> (accessed November 21, 2012).

The *Handbook* states the following with regard to the duties of such positions:

Educational requirements for web developers vary with the setting they work in and the type of work they do. Requirements range from a high school diploma to a bachelor's degree. An associate's degree may be sufficient for webmasters who do not do a lot of programming.

However, for web architect or other, more technical, developer positions, some employers prefer workers who have at least a bachelor's degree in computer science, programming, or a related field.

Web developers need to have a thorough understanding of HTML. Many employers also want developers to understand other languages, such as JavaScript or SQL, as well as have some knowledge of multimedia publishing tools, such as Flash. Throughout their career, web developers must keep up to date on new tools and computer languages.

Some employers prefer web developers who have both a computer degree and have taken classes in graphic design, especially when hiring developers who will be heavily involved in the website's visual appearance.

Id. at <http://www.bls.gov/ooh/Management/computer-and-information-technology/information-security-analysts-web-developers-and-computer-network-architects.htm#tab-4>.

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty is normally required for this occupational category. Rather, the *Handbook* states that educational requirements vary by setting and the type of work, and range from a high school diploma to a bachelor's degree. Such statements do not suggest that a bachelor's degree or the equivalent, in a specific specialty, is normally required for entry. While the AAO acknowledges the *Handbook's* statement that some employer's prefer workers with at least a bachelor's degree in computer science, programming, or a related field for more technical positions, the petitioner's submission of an LCA certified for a comparatively low, entry-level position relative to others within the occupation signifies that the beneficiary is only expected to possess a basic understanding of the occupation. Furthermore, the statement that "some" employers "prefer" a bachelor's degree is problematic for two reasons. First, the *Handbook's* usage of the word "some" does not even necessarily mean a majority of employers would impose such a requirement for more technical positions, let alone establish such a credential as a minimum hiring requirement. Second, employer "preferences" are not synonymous with normal minimum hiring requirements.

For all of these reasons, the *Handbook* does not indicate that the proffered position falls under an occupational group for which inclusion normally is limited to positions which normally require at least a bachelor's degree, or the equivalent, in a specific specialty.

Nor does the record of proceeding contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion in this occupational category would be sufficient in and of itself to establish the proffered position as, in the words of this criterion, a "particular position" for which "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

Finally, the AAO notes again that the petitioner designated the proffered position as a Level I position on the LCA. As previously discussed, this designation is indicative of a comparatively low, entry-level position relative to others within its occupation, and it signifies that the beneficiary is only expected to possess a basic understanding of the occupation.

As the evidence in the record of proceeding does not establish that a baccalaureate degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively 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 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

Nor do the four job-vacancy announcements submitted by counsel satisfy the first alternative prong described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). First, counsel has not submitted any evidence to demonstrate that these advertisements are from companies "similar" to the petitioner. The petitioner has submitted no evidence to establish that these advertisers are similar to the petitioner in size, scope, and scale of operations, business efforts, expenditures, or other fundamental dimensions.⁶ Second, the petitioner has not established that these four positions are "parallel" to the proffered position.⁷ Nor does the petitioner submit any evidence regarding how representative these advertisements are of the industry's usual recruiting and hiring practices with regard to the positions advertised. Simply 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,

⁶ As noted, the petitioner described itself on the Form I-129 as a "computer animation and graphic design for e-commerce and market services" company and provided a North American Industry Classification System (NAICS) Code of 541430, "Graphic Design Services." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "541430 Graphic Design Services," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (accessed November 21, 2012). However, the AAO notes that [REDACTED] appears to be a contract staffing firm, and it provided no information regarding the company for which it is recruiting a "Web Projects/Analytics Manager." [REDACTED] appears to be a similar type of company. [REDACTED] is a children's publishing and media company. The petitioner did not provide any information regarding the unnamed company located in Cypress, California that is recruiting a Web Project Manager.

⁷ All four of these positions involve supervisory duties. However, the wage-level designated by the petitioner on the LCA indicates that the proffered position would involve only limited, if any, exercise of the beneficiary's judgment, that she would work under close supervision, and that her work would be closely monitored. It is difficult to envision how these attributes assigned to the proffered position by the petitioner by virtue of its wage-level designation on the LCA would be parallel to the four positions described in these job vacancy announcements.

165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).⁸

Therefore, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty as 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.

Next, the AAO finds that the petitioner did not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree."

In this particular case, the petitioner has failed to credibly demonstrate that the duties the beneficiary will perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

The record of proceeding does not contain evidence establishing relative complexity or uniqueness as aspects of the proffered position, let alone that the position is so complex or unique as to require the theoretical and practical application of a body of highly specialized knowledge such that a person with a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. Rather, the AAO finds, that, as reflected in this decision's earlier quotation of duty descriptions from the record of proceeding, the petitioner has not distinguished either the proposed duties, or the position that they comprise, from generic web developer duties, which, the *Handbook*

⁸ Furthermore, according to the *Handbook* there were approximately 302,300 persons employed as information security analysts, web developers, and computer network architects in 2010. *Handbook* at <http://www.bls.gov/ooh/computer-and-information-technology/information-security-analysts-web-developers-and-computer-network-architects.htm#tab-6> (accessed November 21, 2012). 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 four submitted vacancy announcements 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 these four job-vacancy announcements established that the employers that issued them routinely recruited and hired for the advertised positions only persons with at least a bachelor's degree in a specific specialty closely related to the positions, it cannot be found that four job postings that appear to have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

indicates, do not necessarily require a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

The petitioner therefore failed to establish how the beneficiary's responsibilities and day-to-day duties constitute a position so complex or unique that it can be performed only by an individual with at least a bachelor's degree, or the equivalent, in a specific specialty.

Additionally, the AAO incorporates here by reference and reiterates its earlier discussion regarding the LCA and its indication that the proffered position is a low-level, entry position relative to others within the occupation, as this factor is inconsistent with the relative complexity and uniqueness required to satisfy this criterion. Based upon the wage rate, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment; that the beneficiary's work will be closely supervised and monitored; that she will receive specific instructions on required tasks and expected results; and that her work will be reviewed for accuracy.

Consequently, as it did not show that the particular position for which it filed this petition is so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO turns next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

The AAO's review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and with regard to employees who previously held the position in question.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. 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 the performance requirements of the proffered position.⁹ 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, or the equivalent, in a specific specialty.

It should be noted that a petitioner may believe or otherwise assert that a proffered position requires a 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

⁹ Any such assertion would be undermined in this particular case by the fact that the petitioner indicated in the LCA that its proffered position is a comparatively low, entry-level position relative to others within the occupation.

perform any occupation as long as the employer artificially created a token degree-requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See generally Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. *See* section 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 actual performance requirements of the position necessitate a petitioner's history of requiring a particular degree in its recruiting and hiring for the position. *See generally Defensor v. Meissner*, 201 F. 3d at 387. 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 proposed 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 evidence of eligibility under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), the petitioner submits a copy of a job posting it placed on its website and information regarding the educational qualifications of its "team of graphic and web-multimedia designers." However, none of this evidence satisfies this criterion.

The job posting placed on the petitioner's website does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). First, there is no evidence that this posting was placed on the petitioner's website prior to June 1, 2011, the date on which this petition was filed. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Furthermore, counsel acknowledges on appeal that this job posting "is not limited to the proffered Project Manager position." This job posting, therefore, is of little probative value.

Nor are the educational credentials of the petitioner's "team of graphic and web-multimedia designers" particularly relevant to the AAO's analysis under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), as those are not the positions being proffered by the petitioner in this petition. Even if that were not the

case, these materials would still not establish that the petitioner requires a bachelor's degree or the equivalent in a specific specialty, as [REDACTED] both stated in their affidavits that the petitioner "required a Bachelor's degree in Graphic Design, Fine Arts, Information Systems, or other closed [sic] related disciplines." Graphic design, fine arts, and information systems do not constitute a specific specialty.

For all of these reasons, the petitioner has not satisfied 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next, the AAO finds that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered position's 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.

Both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, the petitioner's designation of an LCA wage-level I is indicative of duties of relatively low complexity.

As earlier noted, the *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

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 [emphasis in original].

The pertinent guidance from the Department of Labor, at page 7 of its *Prevailing Wage Determination Policy Guidance* describes the next higher wage-level as follows:

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.

The above descriptive summary indicates that even this higher-than-designated wage level is appropriate for only "moderately complex tasks that require limited judgment." The fact that this higher-than-here-assigned, Level II wage-rate itself indicates performance of only "moderately complex tasks that require limited judgment," is very telling with regard to the relatively low level of complexity imputed to the proffered position by virtue of its Level I wage-rate designation.

Further, the AAO notes the relatively low level of complexity that even this Level II wage-level reflects when compared with the two still-higher LCA wage levels, neither of which was designated on the LCA submitted to support this petition.

The aforementioned *Prevailing Wage Determination Policy Guidance* describes the Level III wage designation as follows:

Level III (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. . . .

The *Prevailing Wage Determination Policy Guidance* describes the Level IV wage designation as follows:

Level IV (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

Here the AAO again incorporates its earlier discussion and analysis regarding the implications of the petitioner's submission of an LCA certified for the lowest assignable wage-level. By virtue of this submission the petitioner effectively attested that the proffered position is a low-level, entry position relative to others within the occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II). The AAO also finds that, separate and apart from the petitioner's submission of an LCA with a wage-level I designation, the petitioner has also failed to provide sufficiently detailed documentary evidence to establish that the nature of the specific duties that would be performed if this petition were approved 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.

For all of these reasons, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As the petitioner has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

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 143, 145 (3d Cir. 2004) (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 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.