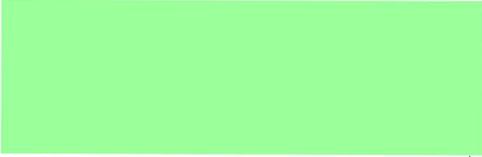
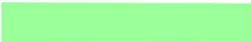


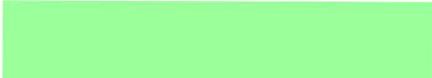


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JAN 04 2013** OFFICE: VERMONT 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:

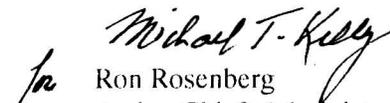
SELF-REPRESENTED

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 before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner describes itself as a business engaged in software development, manufacturing, training and computer consulting services. It states that it seeks to employ the beneficiary in what it identifies as Programmer Analyst position, and to classify him as a temporary 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 based upon his determination that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation in accordance with applicable statutory and regulatory provisions.

On appeal, the petitioner contends that the director's decision was erroneous and failed to take proper account of, and to properly weigh, the evidence in the record of proceeding regarding the work that the beneficiary would perform for the petitioner on a project at the petitioner's location.

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

As will be discussed below, upon review of the entire record of proceeding, including the submissions on appeal, the AAO concludes that the director's determination to deny the petition for its failure to establish the proffered position as a specialty occupation was correct. Accordingly, the appeal will be dismissed, and the petition will be denied.

The AAO will address the grounds for denial in the order in which they appear in the director's decision.

In deciding whether a proffered position qualifies as a specialty occupation, the AAO analyzes the evidence of record according to the statutory and regulatory framework below.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. See *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); see also *COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. See *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the

criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (hereinafter referred to as the *Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ In its chapter "Computer Programmers," the 2012-2013 edition of the *Handbook* describes this occupational classification as follows:

What Computer Programmers Do

Computer programmers write code to create software programs. They turn the program designs created by software developers and engineers into instructions that a computer can follow. Programmers must debug the programs—that is, test them to ensure that they produce the expected results. If a program does not work correctly, they check the code for mistakes and fix them.

Duties

Computer programmers typically do the following:

- Write programs in a variety of computer languages, such as C++ and Java
- Update and expand existing programs
- Debug programs by testing for and fixing errors
- Build and use computer-assisted software engineering (CASE) tools to automate the writing of some code
- Use code libraries, which are collections of independent lines of code, to simplify the writing

Programmers work closely with software developers and, in some businesses, their work overlaps. When this happens, programmers can do the work typical of developers, such as designing the program. This entails initially planning the

¹ 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/>.

software, creating models and flowcharts detailing how the code is to be written, and designing an application or system interface. For more information, see the profile on software developers. Some programs are relatively simple and usually take a few days to write, such as mobile applications for cell phones. Other programs, like computer operating systems, are more complex and can take a year or more to complete.

Software-as-a-service (SaaS), which consists of applications provided through the Internet, is a growing field. Although programmers typically need to rewrite their programs to work on different systems platforms such as Windows or OS X, applications created using SaaS work on all platforms. That is why programmers writing for software-as-a-service applications may not have to update as much code as other programmers and can instead spend more time writing new programs.

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-programmers.htm> (last visited December 11, 2012).

Upon review of the file, the AAO notes that there are obvious inconsistencies and inaccuracies in the information provided by the petitioner that calls into question the accuracy of the petitioner's assertions overall. For example, in the Form I-129, the petitioner claimed it had not ever filed an immigrant petition for any person in this petition, when, in fact, the petitioner has an approved I-140 immigrant visa petition on behalf of the beneficiary. Also, in the Form I-129 the petitioner answered that the beneficiary had not ever been given H-1B classification, whereas the beneficiary had prior periods of stay in H classification working for the petitioner within the last six years. (The AAO points out, however, that the petitioner did list prior periods of stay in H classification on the H Supplement Form.)

Moreover, the AAO notes substantive inconsistencies in the information that the petitioner has provided about the nature of the work that the petitioner claims that the beneficiary would perform.

The AAO observes, for instance, that section "B. The Job Duties of a Programmer Analyst" of the petitioner's September 29, 2009 letter of support, filed with the Form I-129, variously refers to an "Engineer" as well as to a "Programmer Analyst," suggesting that the proffered position would include computer-engineer services, which, the AAO notes would be outside the scope of a programmer analyst position. In this regard, the AAO refers the petitioner and counsel to paragraphs 11 and 12 of the aforementioned letter of support, with its discussions of "the engineer's" involvement in, and use of applications to, "develop a meaningful system."

In the same vein, the AAO observes that the scope of the duties that the above-referenced section B of the letter of support ascribes to the proffered position far and materially exceeds the job-description information presented in the September 8, 2009 "Employment Agreement as Programmer Analyst" between the beneficiary and the petitioner, which, in pertinent part, states the

petitioner's desire "to employ [the beneficiary] in the capacity of a Programmer Analyst providing programmer and other data processing (Programmer/Analyst) [sic] to at [sic] [the petitioner]."

Next, the AAO also finds that the aforementioned section "B. The Job Duties of a Programmer Analyst" of the petitioner's September 29, 2009 letter of support consists of six paragraphs of a general and relatively abstract discussion of the type of work that the petitioner appears to attribute to programmer analysts and to "engineers" as a general occupational category, and, by extension, to the proffered position itself. The AAO further finds that, as such, this section of the letter provides no more than a generalized overview of general functions that the petitioner appears to find generic to the Programmer Analysts occupational classification in general. As such, this narrative review does not provide any substantive information with regard to particular work, and associated educational requirements, that the petitioner's particular business operations would generate for the beneficiary if this petition were approved.

Next, under the heading "C. The Job Duties of a Programmer Are Sophisticated and Are Broken Down by Percentage of Time in the Following Manner," this September 29, 2009 letter of support submits the following duties (with related work-time percentages) as being among "the professional job duties of the alien beneficiary":

1. Research and analyze the processes of our clients (in both service and manufacturing sectors) and determine their process re-engineering needs, including analysis of currently existing information systems and on-going information systems enhancement projects; 15%
2. Design new process structures and information systems, program and implement software applications [and] packages customized to meet specific client needs; 30%
3. Analyze the communications, informational, database and programming requirements of clients; plan, develop, design, test and implement appropriate information systems; 10%
4. Review existing information systems to determine compatibility with projected or identified client needs, research and select appropriate systems, including ensuring forward compatibility of existing systems; 25%
5. Train clients on use of information systems and provide technical and debugging support; 10%
6. Review, repair and modify software programs to ensure technical accuracy & reliability of programs; 10%

Further, the AAO finds that, as evident in the listing of duties quoted above from the petitioner's letter of support, and as already reflected in this decision's earlier comments with regard to section

B of the letter, the petitioner failed to provide substantial, substantive information sufficient to establish that actual performance of the proposed duties would require the theoretical and practical application of at least a bachelors' degree level of a body of highly specialized knowledge in a specific specialty. Stated another way, as described in the record of proceeding the proposed duties and the position to which the petitioner ascribes them are not presented with sufficient specificity to distinguish the proposed duties, or the proffered position that they comprise, as more unique, specialized and/or complex than programmer analyst positions which may share those same generalized functions and yet not require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty, which requirement is essential for a specialty occupation defined at section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii).

With regard to the above, the AAO notes first that, as a review of this decision's earlier excerpt from the 2012-2012 *Handbook's* "Computer Programmer" chapter will confirm, the duties as described are clearly not those of Computer Programmers, the occupational classification for which the LCA submitted with this petition was certified. As will be briefly addressed towards the end of this decision, the fact that the LCA does not correspond to the petition is in itself sufficient to preclude approval of this petition.

In an RFE dated December 14, 2009, the director sought additional information from the petitioner that would indicate sufficient work and resources available to satisfy USCIS that the beneficiary will be performing services in a specialty occupation for the requested period of employment. Specifically, USCIS requested documentation and information regarding: the nature of the employment relationship between the petitioner and the beneficiary; an organizational chart showing details regarding the professionals within the organization as well as the work locations of personnel; the One Point Implementation Methodology (OPIM) project upon which the petitioner asserted that beneficiary would work; the life cycle of the OPIM project, including milestones and deliverables; and any materials to back-up market and profit projections.

On January 26, 2010, petitioner responded to the RFE with some of the documentation requested, and failed to produce probative information and documentation to address the director's material lines of inquiry regarding the organizational hierarchy, with specifics requested to state the employees' dates of birth, degree(s) held, employment-start dates; the work locations of the petitioner's personnel, including the beneficiary's work location; further elaboration regarding the sole project that it was claimed that the beneficiary would be working on; and whether the proffered position qualifies as a specialty occupation. Within the petitioner's support letter and in materials submitted in response to the RFE, the position title of programmer analyst was interchangeably used with the job title of "engineer" and "systems analyst." The use of different job titles is never explained by the petitioner.

Of critical importance to the outcome of this appeal, and directly bearing on each of the bases that the director specified for denial, the AAO finds as follows with regard to the submissions related to the asserted OPIM project upon which the beneficiary purportedly would work. None of those submissions conveys exactly what the end-product of the project would be, the particular scope of

the project, any persuasive indications of actual milestones that would be involved, persuasive indications that project staging and planning had taken place to any serious extent, or assignments of labor and divisions of responsibility consonant with what the petitioner claims to be a serious project under development. Further, the AAO finds no persuasive evidence in the record of proceeding of any particular role that that the beneficiary would play, let alone any persuasive evidence of particular work that he would perform, the period of such work, and the nature and educational level of any highly specialized knowledge that the beneficiary would apply in any specific specialty for the period of employment specified in the petition.

In this regard, the AAO notes also that the petitioner's RFE response did not provide any substantial evidence towards establishing the proffered position as a specialty occupation. In a letter dated January 26, 2010, the petitioner stated, verbatim:

The OPIM project (One Point Implementation Methodology) is practice the way we develop the products. This OPIM is a practice the way we develop the products. This OPIM is a practice we developed by our organization.

Initially we were planning to recruit 15 employees for this particular project. We divided this product into 3 parts. (1) Cloud Computing-Product[;] (2) SAAS CRM (Software as service)[;] (3) SAAS ERP[.]

Based on the various research as well as the Business Analyst and end user requirements, we were changing the model of the product. It may show so [sic] different statements based on the modifications.

The initial project development may take at least [one] year to finish. We are in the process of building the high level designs for this particular project.

There are a lot of ongoing developments in SAAS model of the project.

Why we are implementing these products?

The traditional software development, Servers and laptops will replace the SAAS model.

Here, it should be mentioned, the AAO concludes that the petitioner may be asserting that OPIM is a proprietary practice. The AAO found, however, that the OPIM process as described in materials submitted by the petitioner can be accessed at the Internet site http://merinoservices.com/erpln_baan.aspx (last visited December 11, 2012). This Internet site, for a company called Merino Services, clearly attributes the OPIM methodology to another company, Infor, which does not appear to be connected to the petitioner in any way.

The AAO finds that the RFE support letter, the RFE supplemental documents, and the initial petition materials, even when fully considered in the aggregate and with all of the allied documents

submitted with them in support of the petition, fail to adequately explain how the claimed programmer analyst position, with a focus on utilizing OPIM project/practice, would require a bachelor's degree in a particular field of study as required by statute, or that the position otherwise meets the specialty occupation statutory and regulatory scheme. In specific regard to the RFE response, the AAO finds that, notwithstanding the petitioner's use of unexplained, technical acronyms, it, too, establishes neither the substantive nature of the work that the beneficiary would actually perform nor a necessary correlation between the performance requirements of that work and attainment of at least a bachelor's degree, or the equivalent, in a specific specialty closely related to the position.

The director denied the petition on the grounds that the evidence of record does not establish that the job offered qualifies as a specialty occupation, with the director noting that it could not be determined where, when, or for whom the beneficiary's services would be required. In a timely appeal, the petitioner continues to maintain that the beneficiary will be working at the petitioner's place of employment, as stated on Form I-129 and on Form 9035. However, based upon its review of the totality of the evidence in the record of proceeding, the AAO finds that the petitioner failed to provide credible and persuasive evidence with regard to what the beneficiary would actually do, and where, and for what periods.

On appeal, in a letter dated April 29, 2010, the petitioner provides a very brief, supplemental discussion of the OPIM project which states, verbatim:

The product which we mentioned are meant for various industries. We are building this product to minimize the costing in IT infrastructure and web enabled. We already mentioned about our product range with the initial petition. This particular product is going to be built on Cloud Computing and will be implemented by using OPIM methodology.

Once we completed this product development we are going to sell the products in the following sectors. [The letter in support of the petitioner's appeal includes an attachment entitled, "Sectors Our Clients Come From."]

For all of the reasons discussed above, the AAO finds that the petitioner's submissions and statements fail to substantiate the petitioner's claims that the beneficiary would be employed at the location and in the work claimed in the petition. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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).

Strictly on the basis of the extent and quality of the totality of the evidence in the record of proceeding, the AAO finds that, in context with the nature of the petitioner's business – which, the record of proceeding indicates, also includes services to customers at sites other than the petitioner's own location - the weakness and unpersuasive weight of the overall evidence *both* regarding the claimed in-house project to which it is asserted that the beneficiary would be assigned, its duration, and its claimed location, *and also* regarding the substantive nature and duration of any work that the beneficiary would actually perform with regard to that project, renders it impossible for the AAO to reasonably conclude what work, if any, the beneficiary would actually perform at any particular location or for any particular duration if this petition were approved.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition will be denied for this reason.

While the AAO has just articulated its ultimate determination to dismiss this appeal, the AAO will nevertheless extend its discussion to each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Into its analysis of each of the criteria at 8 C.F.R. §214.2(h)(4)(iii)(A), the AAO hereby incorporates all of its earlier comments and findings regarding (a) the generalized nature of the descriptions of the proposed duties and, by extension, the proffered position to which the petitioner ascribes them; (b) the deficiencies in the evidence of the asserted OPIM project; and (c) the inconsistencies and conflicts in the information provided by the petitioner. The combined effect of these features of this record of proceeding fatally undermines the petitioner's attempt to establish the proffered position as a specialty occupation.

The petitioner stated that the beneficiary “will be working at the petitioner's office premises to implement the [OPIM] project,” and provided an attached document entitled, “One Point Implementation Methodology,” which enumerates some general insights into OPIM as a methodology. However, the AAO further finds that neither this OPIM attachment, nor any other documentation in this record of proceeding, conveys substantial details regarding specific duties that the beneficiary would actually perform. Likewise, the AAO finds, neither this document nor any other evidence of record identifies theoretical and practical applications of highly specialized knowledge in a specific specialty that the beneficiary would have to employ to perform the

proffered position.

Further, the AAO finds that the record of proceeding lacks a cogent narrative regarding the ways in which the position's duties would tie into the asserted OPIM project. In a similar vein, although the petitioner has identified job duties and a percentage breakdown of duties, the petitioner fails to describe the particulars of the position as applied to the specific and substantive nature of the work that the beneficiary would be expected to perform with respect to the petitioner's claimed OPIM project.

Further, the petitioner failed to establish that a body of highly specialized knowledge in a specific specialty, gained only by attainment of at least a bachelor's degree, or the equivalent, in a specific specialty, would have to be theoretically and practically applied in order to perform the duties of the position. Again, reading the "degree" references in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) logically and consonantly with the overarching "specialty occupation" requirements as defined at section 214(i)(1) of the Act and at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

Additionally, the AAO notes that, within the aforementioned support letter, the petitioner stated that appropriate fields of study for this position would be computer science, management information systems or engineering. In a footnote within the support letter, the petitioner also stated that alternative fields of study appropriate would be, "fields of study which [involve] extensive use of computational and mathematical sciences [such] as mathematics, statistics, economics, finance, accounting, etc." Such a range of acceptable degrees in such widely disparate specialties is in itself indicative of a position that does not require at least a bachelor's degree, or the equivalent, in a specific specialty. 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 accounting and engineering, would not meet the statutory requirement that the degree be "in the specific specialty."² Section 214(i)(1)(B) (emphasis added).

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 the normal minimum requirement for entry into the particular position.

When arguing that the programmer analyst position minimally requires a bachelor's degree, the petitioner quoted the U.S. Department of Labor's (DOL) 1996-97 edition of the *Occupational*

² Whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, 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.

Outlook Handbook (Handbook), stating that the minimum educational requirement for the position of programmer analyst is a bachelor's degree in computer science, electronics, management information systems, engineering or a related field. The AAO points out that the petitioner's assertion regarding the minimum educational requirements misinterprets the *Handbook*, and attempts to support its argument with outdated information – from the 1996-97 edition of this DOL resource for which a new edition is published every two years.

Moreover, the AAO recognizes that the petitioner applied information for the occupation of "MIS Engineers" despite the fact that petitioner has classified the position using the SOC code of 15-1021 for Computer Programmers. In any event, as the position descriptions fall short of communicating (1) the actual work that the beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular educational level of a body of highly specialized knowledge in a specific specialty closely related to the proffered position.

The petitioner stated that the beneficiary would be employed in a programmer 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.

In the LCA, the petitioner classified the proffered position under the occupational category "Computer Programmers." The AAO reviewed the chapter of the *Handbook* entitled "Computer Programmers," including the sections regarding the typical duties and requirements for this occupational category.³ However, contrary to the petitioner's assertion, the *Handbook* does not indicate that "Computer Programmers" comprise an occupational group that categorically requires at least a bachelor's degree, or the equivalent, in a specific specialty.

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

Most computer programmers have a bachelor's degree; however, some employers hire workers with an associate's degree. Most programmers specialize in a few programming languages.

³ For additional information regarding the occupational category "Computer Programmers," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Computer Programmers, on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm> (last visited December 11, 2012.).

Education

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

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

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

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Computer Systems Analysts, on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm> (last visited December 11, 2012).

The *Handbook* does not support the contention that at least a bachelor's degree in a specific specialty is normally required for this occupational category. Rather, the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty. The *Handbook* reports that "[m]ost computer programmers have a bachelor's degree."⁴ Furthermore, according to the *Handbook*, "[s]ome employers hire workers with an associate's degree." While the *Handbook's* narrative indicates that a bachelor's degree in computer science or a related subject is common, the *Handbook* specifically states that it is not always a requirement.

Next, the AAO will briefly address the type of position claimed in the petition – Computer Programmer Analyst – rather than the non-corresponding type of position specified claimed in the LCA – Computer Programmer.

⁴ 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 position. See 214(i)(1)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). Although a general-purpose bachelor's degree, such as a degree in liberal arts or business, may be a legitimate prerequisite for a particular position, the acceptance of 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); cf. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

(b)(6)

Consistent with its burden to prove eligibility for the benefit sought, it is incumbent upon the petitioner to provide persuasive evidence that the proffered position satisfies this criterion, notwithstanding the absence of *Handbook* support on the issue. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In the instant case, the petitioner has not established that the proffered position falls within an occupational category for which the *Handbook* indicates that inclusion is limited only to positions whose performance normally requires at least a bachelor's degree, or the equivalent, in a specific specialty. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that position is one for which a baccalaureate or higher degree or its equivalent in a specific specialty 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 regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

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 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

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. The record of proceeding does not contain any evidence from the industry's professional association to indicate that a degree is a minimum entry requirement. The petitioner also did not submit any letters or affidavits from firms or individuals in the industry.

As the record is devoid of evidence that at least a bachelor's degree in a specific specialty is the norm for entry into positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that the particular position proffered in this petition 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.

The petitioner does not assert or provide any 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. This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. The LCA indicates a wage level based upon the occupational classification "Computer Programmers" at a Level I (entry level) wage.

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.

The AAO observes that the wage-rate element of the LCA submitted with this petition is indicative of a comparatively low, entry-level position relative to others within the occupation. As the above quoted DOL comments on the Level I wage rate indicates, it assignment is appropriate for a position for a beginning-level worker who has only a basic understanding of the occupation; would be expected to perform routine tasks that require limited, if any, exercise of judgment; would work under close supervision; would receive specific instructions on required tasks and expected results; and would have his or her work closely monitored and reviewed for accuracy. Thus, the AAO finds, the wage-level specified in the LCA filed with this petition is indicative of a position for which relative complexity or uniqueness would not be attributes.

Thus, aside from all of the evidentiary and other issues that this decision has already noted with regard to the proffered position as presented in this petition, it does not appear that the proffered position is so complex or unique that it can only be performed by a person who has attained at least a bachelor's degree in a specific discipline that directly relates to the proffered position.

It is further noted that, although the petitioner asserts that a bachelor's degree is required to perform the duties of the proffered position, the petitioner failed to sufficiently demonstrate how the duties of the proffered position 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 would be required to perform them. That is, the record of proceeding does not establish that the requisite knowledge for the proffered position can only be obtained through a baccalaureate or higher degree program in a specific specialty, or the equivalent.

Additionally, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform any of the position. While a few related courses may be beneficial 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 proffered position.

The descriptions of the proposed duties do not establish that, even in the aggregate, that their nature is such as to comprise a position so complex or unique that only a specifically degreed individual could perform them. As reflected in this decision's previous comments regarding the proposed duties and the position that they are said to comprise, the record lacks credible evidence sufficient to even establish the nature of the work that the beneficiary would actually perform if this petition were approved. Accordingly, the record of proceeding lacks a sufficient evidentiary foundation to establish the relative complexity or uniqueness of the proffered position, and, therefore, precludes satisfaction of this particular criterion.

Therefore, as the evidence in this record of proceeding fails to show that the proffered 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, the petitioner has not 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, or the equivalent, in a specific specialty for the position.

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

While 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 perform any occupation as long as the employer artificially created a token degree requirement,

whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d 384.

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

The petitioner submitted an advertisement for the position of programmer analyst that it placed on August 12, 2009, roughly seven weeks prior to the submission of the H-1B petition. There are notable differences between the advertised position and the claimed duties of the proffered position as described in the petition, including the stated job duty of onsite and offshore team management, and the stated job location as in New York and New Jersey, as compared to the petitioner's multiple statements that the job would only be performed at the petitioner's premises.⁵

Moreover, the petitioner stated in the Form I-129 petition that it has 250 employees. The petitioner did not state the number of people it currently employs or previously employed to serve in the position of programmer analyst. Consequently, the petitioner's normal recruiting and hiring practices cannot be determined. Further, the petitioner failed to provide employment records or other evidence to establish that the individuals are employed by the petitioner; nor did the petitioner submit probative evidence to establish that the individuals are employed in the same or similar position as the proffered position. Thus, the documentation is not persuasive in establishing the petitioner's normal recruiting and hiring practices for programmer analyst positions.

⁵ These inconsistencies raise two weaknesses in the petitioner's case: (1) the job opportunity as advertised, contrary to the petitioner's point of view, is not a Level I job opportunity because it entails team management; and (2) by advertising for a position that would involve two different job locations, the petitioner revealed that it should have provided an itinerary, and included all locations on the LCA.

Upon review of the record, the petitioner has not provided sufficient evidence to establish that it normally requires at least a bachelor's degree, or the equivalent, in a specific specialty 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.

The petitioner does not assert that the nature of the specific duties of the proffered position is so specialized and complex. Furthermore, the petitioner did not submit any evidence to indicate 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.

First and foremost, the AAO incorporates by reference into this analysis its earlier comments and findings regarding the failure of the evidence in this record of proceeding to establish whatever duties the beneficiary would actually perform if this petition were approved. As this petition lacks a credible evidentiary foundation for establishing the actual nature and substantive requirements of any specific duties that the beneficiary would perform, there is no basis for the AAO to determine the actual nature of the duties that would be performed, and so also no basis for a determination that there is a usual association between attainment of at least a bachelor's degree in a specific specialty and whatever knowledge would have to be applied to perform the duties.

Additionally, of course, the AAO here also incorporates its earlier discussion and analysis regarding the implications of the submission of an LCA certified for a Level I wage level, which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation."⁶ The LCA Level I wage-level materially undermines the credibility of the petition's assertions relative to the issue of the relative level specialization and complexity of the asserted duties.

As the evidence in the record of proceeding fails 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, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the additional, supplement requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, it cannot be found that the proffered position qualifies as a specialty occupation.

⁶ For additional information regarding DOL guidance for prevailing wage determinations, 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.

Although not identified in the director's decision, there is an additional aspect of this petition that precludes its approval, even if the petitioner had succeeded in establishing the proffered position as a specialty occupation. The fatal defect here is the petitioner's submission of the certified LCA for the Computer Programmers occupational category. That material aspect of the LCA and the associated wage obligation does not correspond with the occupational category to which the position asserted in the petition belongs, namely, Computer Systems Analysts.

According to the Form I-129 and its allied documents, the petition was filed for a Computer Programmer Analyst. However, the LCA which the petitioner submitted to support the petition was certified for as different type of position and occupational category, namely, that of a Computer Programmer.

As with the 2012-2013 edition of the *Handbook*, the 2008-2009 edition, which was the edition current during the period when the petition was filed and when the LCA was certified, separately addressed computer programmers and computer systems analysts as belonging to separate occupational classifications with identifiably distinct SOC/O*NET codes.)

The chapter addressing computer programmers in the 2008-2009 official, printed Library Edition of the *Handbook* opened with the following heading:

Computer Programmers
(O*NET 15-1021.00)

U.S. Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook*, 2008-2009, Library Edition, Bulletin 2700, at page 126.

However, as indicated by the heading of the "Computer Systems Analysts" chapter, the 2008-2009 Library Edition of the *Handbook* identified computer programmer analysts as belonging not to the Computer Programmers occupational classification, but to the separate and distinct occupational classification Computer Systems Analysts. That heading read:

Computer Systems Analysts
(O*NET 15-1051.00)

U.S. Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook*, 2008-2009, Library Edition, Bulletin 2700, at page 140. Consequently, the LCA certified for Computer Programmers, which the petitioner filed in support of the petition, did not correspond with the petition.

The petitioner was required to, but failed to, provide at the time of the petition's filing an LCA certified for the Computer Systems Analyst occupational classification, with a SOC/O*NET code of 15-1051.00.

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 had been certified for the proper occupational classification, and the petition must be denied for this additional reason.

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.