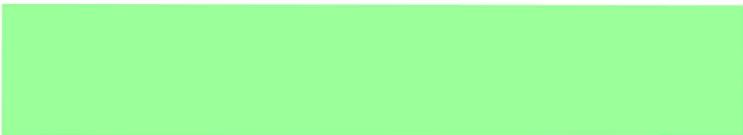


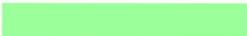


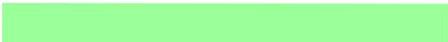
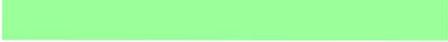
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JAN 11 2013**

OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:

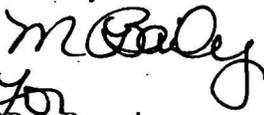


INSTRUCTIONS:

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

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

Thank you,


for
Ron Rosenberg

Acting Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a business analyst / information technology consulting services company established in 2007. In order to employ the beneficiary in what it designates as a business analyst (systems) position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on July 16, 2011, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

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

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

The primary issue for consideration is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

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

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the

attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

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

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to

establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

In the petition signed on May 17, 2011, the petitioner indicates that it wishes to employ the beneficiary as a business analyst (systems) on a full-time basis at the rate of pay of \$47,840 per year. In addition, the petitioner reports that the beneficiary will work at its corporate offices at [REDACTED] West Des Moines, Iowa and at its client's office at [REDACTED] Bentonville, Arkansas. In the May 17, 2011 letter of support, the petitioner states that the duties of the proffered position will entail the following:

- Perform major role in Requirement [sic] management, Providing [sic] Consistency [sic] with the Requirement [sic], Handling [sic] Change [sic] Management [sic] and Traceability [sic];
- Play important role in Implementing [sic] Requirement [sic] Management [sic] Tool [sic];
- Analyze operating procedures and policies on an ongoing basis and recommend and implement improvement plans where appropriate;
- Involved in gathering Business [sic] Requirement [sic];
- Elicit, [and] Analyze [sic] Business [sic] Requirement [sic];
- Work with System [sic] analyst in building lower level Use [sic] case, Functional [sic] Design [sic] and Functional [sic] Requirement [sic];
- Meet with client groups to determine user requirements and goals;
- Utilize Rational Unified Process (RUP) to configure and develop process, standards, and procedures;
- Involved in documentation of Requirements [sic], Specification [sic], Design [sic], Operations [sic] and Quality [sic] Testing [sic] Plans [sic];
- Conduct JAD sessions to facilitate discussion between the different users to resolve issues and come to an agreement;
- Conduct surveys, interviews, and JRP and JAD sessions and translate them into system Requirements [sic]. Suggest measures and recommendations to improve the current application performance of the system;
- Understand and articulate business requirements from user interviews and then convert requirements into technical specifications;
- Interview Subject [sic] Matter [sic] experts and carefully record the requirements in a format that can be reviewed and understood by both business and technical people;
- Create different Trace [sic] ability views to maintain the Trace [sic] ability of the requirements;
- Use the caliber tool to version control tool to manage the code and version the code base;
- Perform System [sic] Testing [sic] to ensure that the compiled software components of the Applications [sic] adhere to Project [sic] Standards [sic],

Performance [sic] Criteria [sic] and Functional [sic] specifications;

- Frequently update the requirement and defect status as per the current status of the testing project in the Test Director;
- Manage and store all the revised documents;
- Experience to set up meetings, manage calendar; and
- Experience with Clarity [sic] for Daily [sic] task handling, timesheet etc.

In addition, the petitioner states, "According to the industry standards, U.S. employers generally require incumbents in this position to hold, at a minimum, a Bachelor's Degree in Engineering, Computer Science, MIS, Mathematics, or related fields (or its foreign equivalent) and or equivalent experience in the job offered."

With the Form I-129, the petitioner submitted a copy of the beneficiary's academic credentials, indicating that he received a Master of Science in Manufacturing Engineering from [redacted] in Detroit, Michigan on December 18, 2008.

In addition, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification "Computer Systems Analysts" - SOC (ONET/OES Code) 15-1051.00, at a Level I (entry level) wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 2, 2011. The petitioner was asked to submit documentation to establish that a specialty occupation position exists for the beneficiary. The director outlined the specific evidence to be submitted.

On July 11, 2011, the petitioner and counsel responded to the director's RFE. In a letter signed on June 7, 2011, the petitioner provided a revised job description of the proffered position, which included the percentage of time that the beneficiary would spend performing each duty. The petitioner stated that the beneficiary "is expected to provide services in designing, developing, testing and implementing specialized software applications and modules in complex business computing environments, and providing high level technical support."

In addition, counsel provided the following summary of the duties of the proffered position:

- Systems requirement gathering 35%
- Systems requirement analysis, design and traceability 20%
- Software flow chart/prototype 10%
- Software coding, integration and testing 30%
- Analyst quality control management 5%

The director reviewed the information provided by the petitioner to determine whether the petitioner had established eligibility for the benefit sought. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed

to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on July 16, 2011. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition.¹

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

The AAO notes that with respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part the following:

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

* * *

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

* * *

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

¹ With the appeal, the petitioner and counsel provided copies of previously submitted documents and new evidence. With regard to the new documentation submitted on appeal that was encompassed by the director's RFE, the AAO notes that this evidence is outside the scope of the appeal. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. See 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted it with the initial petition or in response to the director's request for evidence. *Id.* The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, the AAO need not consider the sufficiency of such evidence submitted for the first time on appeal.

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

Thus, in adjudicating the petition pursuant to the preponderance of the evidence standard, USCIS examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. The "preponderance of the evidence" standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, the petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. As will be discussed, in the instant case, that burden has not been met.

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

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. To make this determination, the AAO turns to the record of proceeding. To ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

As a preliminary matter, it must be noted that the petitioner's claimed entry requirement of at least a bachelor's degree in "Engineering, Computer Science, Management Information Systems, Mathematics or related fields (or its foreign equivalent) and or equivalent experience in the job offered" for the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree

be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

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

Again, the petitioner states that its minimum educational requirement for the proffered position is a bachelor's degree in "Engineering, Computer Science, Management Information Systems, Mathematics or related fields." The AAO will now address the petitioner's statement that a degree in engineering is sufficient for the proffered position. The field of engineering is a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering. It is not readily apparent that a general degree in engineering or one of its other sub-specialties, such as chemical engineering or nuclear engineering, is closely related to the other acceptable disciplines (computer science, management information systems and mathematics) or that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the particular position proffered in this matter.²

Here and as indicated above, the petitioner, who bears the burden of proof in this proceeding, simply fails to establish either (1) that computer science, management information systems, mathematics and engineering in general are closely related fields or (2) that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the proffered position. Absent this evidence, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, under the petitioner's own standards. Accordingly, as the evidence of

² In the appeal, counsel cites [REDACTED] as supporting the petitioner's academic requirements for the proffered position. The AAO reviewed the information, but notes that [REDACTED] states the following:

[REDACTED] is not considered a credible source. [REDACTED] is increasingly used by people in the academic community, from freshman students to professors, as an easily accessible tertiary source for information about anything and everything. **However, citation of [REDACTED] in research papers may be considered unacceptable, because [REDACTED] is not considered a credible or authoritative source.**

This is especially true considering anyone can edit the information given at any time.

(Emphasis in original.) [REDACTED] available on the Internet at [REDACTED] (last visited January 2, 2013).

record fails to establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty* or its equivalent for entry into the particular position, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion. Therefore, absent evidence of a direct relationship between the claimed degrees required and the duties and responsibilities of the position, it cannot be found that the proffered position requires anything more than a general bachelor's degree.

As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position.³ USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).⁴

Furthermore, based upon a review of the record of proceeding, the AAO finds that there are additional discrepancies and inconsistencies with regard to the proffered position that preclude the approval of the petition. For instance, there are discrepancies between what the petitioner claims about the occupational classification and level of responsibility inherent in the proffered position set against the contrary occupational classification and level of responsibility conveyed by the wage level indicated on the LCA submitted in support of the petition.

As previously mentioned, in the instant case, the petitioner submitted an LCA in support of the petition that designated the proffered position to the corresponding occupational category of "Computer Systems Analysts" - SOC (ONET/OES) code 15-1051. The wage level for the proffered position in the LCA corresponds to a Level I (entry) position. The prevailing wage source is listed in the LCA as the OES (Occupational Employment Statistics) OFLC (Office of Foreign Labor

³ It is not sufficient to assert that a few courses taken while obtaining a degree in engineering may be helpful in performing the duties of the proffered position. The petitioner has not demonstrated how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here proffered.

⁴ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

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

Id.

Certification) Online Data Center.⁵ The LCA was certified on May 5, 2011. The AAO notes that by completing and submitting the LCA, and by signing the LCA, the petitioner attested that the information contained in the LCA was true and accurate.

Wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) occupational code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.⁶ The U.S. Department of Labor (DOL) emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is describes 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

⁵ The Occupational Employment Statistics (OES) program produces employment and wage estimates for over 800 occupations. See Bureau of Labor Statistics, U.S. Department of Labor, on the Internet at <http://www.bls.gov/oes/>. The OES All Industries Database is available at the Foreign Labor Certification (OFLC) Data Center, which includes the Online Wage Library for prevailing wage determinations and the disclosure databases for the temporary and permanent programs. The Online Wage Library is accessible at <http://www.flcdatacenter.com/>.

⁶ A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

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

In the instant case, the petitioner and counsel repeatedly claim that the duties of the proffered position are complex, unique and/or specialized. For instance, the petitioner states throughout the record that the beneficiary "is expected to provide services in designing, developing, testing and implementing specialized software applications and modules in complex business computing environments, and providing high level technical support." According to the petitioner, the beneficiary will "design and develop highly sophisticated software applications." The petitioner further states that the incumbent "must have strong technical skills, business intelligence and understanding of the technical designs and specifications." In addition, the petitioner asserts that the position involves "developing and directing software systems testing procedures for the testing team to follow" as well as "design[ing], analyz[ing] and conduct[ing] quality assurance on highly sophisticated business systems applications."

The AAO observes that this characterization of the position and the claimed duties and responsibilities conflict with the wage-rate element of the LCA, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. The wage rate specified in the LCA indicates that the proffered position only requires a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results. This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the assertions by the petitioner regarding the demands and level of responsibilities of the proffered position.

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

The AAO notes that the prevailing wage of \$47,840 per year on the LCA corresponds to a Level I for the occupational category of "Computer Systems Analysts" for Polk County (West Des Moines, Iowa).⁷ The petitioner stated in the Form I-129 petition and in the LCA that the offered salary for

⁷ For additional information regarding the prevailing wage for computer systems analysts in Polk County, see

the proffered position was \$47,840 per year. Notably, if the proffered position were designated as a higher level position, the prevailing wage at that time would have been \$60,424 per year for a Level II position, \$73,008 per year for a Level III position, and \$85,592 per year for a Level IV position.

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different wage level at a lower prevailing wage than the one that it claims it is offering to the beneficiary. As such, the petitioner has failed to establish that it would pay the beneficiary an adequate salary for his work, as required under the Act, if the petition were granted. Thus, even if it were determined that the petitioner overcame the director's ground for denying the petition (which it has not), for this reason also the H-1B petition cannot be approved. It is considered an independent and alternative basis for denial.

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

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

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

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

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with

the All Industries Database for 7/2010 - 6/2011 for Computer Systems Analysts at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatcenter.com/OesQuickResults.aspx?area=19780&code=15-1051&year=11&source=1> (last visited January 2, 2013).

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

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that corresponds to the claimed duties and requirements of the proffered position, that is, specifically, that corresponds to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance with the pertinent LCA regulations.

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

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

Furthermore, even if the proffered position were determined to be a Level I position, upon review of the Form I-129 and LCA, the AAO finds that for another reason the petitioner has failed to establish that it would pay the beneficiary an adequate salary for his work as required under the applicable statutory and regulatory provisions.

In the Form I-129 petition, the petitioner identified the proffered position as a computer programmer and stated (on page 5 and page 17) that the rate of pay for the proffered position would be \$47,840 per year. The petitioner's chief executive officer signed the Form I-129 on May 17, 2011 under penalty of perjury that the information supplied to USCIS on the petition and the evidence submitted with it was true and correct.

With the initial petition, the petitioner submitted an Employment Agreement between the petitioner and beneficiary that is dated May 3, 2011. The agreement states, in pertinent part, the following:

Upon signing this Offer Letter, you agree to the following:

Duration Requirement:

- To work for [the petitioner] as a full-time employee for at least one year (12 months) starting from the signing of this Offer Letter.
- If your employment ends within 12 months of the day you sign this Offer Letter for any reason, then you agree to reimburse [the petitioner] for all expenses that [the petitioner] had incurred for you, including, but not limited to your training, relocation, and all fees related to our H-1B visa.

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

The definition for the term "actual wage" is found at 20 C.F.R. § 655.731(a)(1), which states, in pertinent part, the following:

The actual wage is the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question. In determining such wage level, the following factors may be considered: Experience, qualifications, education, job responsibility and function, specialized knowledge, and other legitimate business factors. . . .

The prevailing wage is defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment. The regulation at 20 C.F.R. § 655.731(a)(2), states, in pertinent part, the following:

The prevailing wage for the occupational classification in the area of intended employment must be determined as of the time of filing the application. Except as provided in this section, the employer is not required to use any specific methodology to determine the prevailing wage and may utilize a State Employment Security Agency (SESA) (now known as State Workforce Agency or SWA), an independent authoritative source, or other legitimate sources of wage data.

The required wage rate means the rate of pay which is the **higher** of the actual wage for the specific employment in question or the prevailing wage rate. *See* 20 C.F.R. § 655.715. The regulation at 20 C.F.R. § 655.731(c), specifies, in pertinent part, the following regarding deductions from an H-1B employee's wages:

(9) "Authorized deductions," for purposes of the employer's satisfaction of the H-1B required wage obligation, means a deduction from wages in complete compliance with one of the following three sets of criteria (i.e., paragraph (c)(9)(i), (ii), or (iii))--

(i) Deduction which is required by law (e.g., income tax; FICA); or

(ii) Deduction which is authorized by a collective bargaining agreement, or is reasonable and customary in the occupation and/or area of employment (e.g., union dues; contribution to premium for health insurance policy covering all employees; savings or retirement fund contribution for plan(s) in compliance with the Employee Retirement Income Security Act, 29 U.S.C. 1001, et seq.), except that the deduction may not recoup a business expense(s) of the employer (including attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer, e.g., preparation and filing of LCA and H-1B petition); the deduction must have been revealed to the worker prior to the commencement of employment and, if the deduction was a condition of employment, had been clearly identified as such; and the deduction must be made against wages of U.S. workers as well as H-1B nonimmigrants (where there are U.S. workers); or

(iii) Deduction which meets the following requirements:

(A) Is made in accordance with a voluntary, written authorization by the employee (Note to paragraph (c)(9)(iii)(A): an employee's mere acceptance of a job which carries a deduction as a condition of employment does not constitute voluntary authorization, even if such condition were stated in writing);

* * *

(C) Is not a recoupment of the employer's business expense (e.g., tools and equipment; transportation costs where such transportation is an incident of, and necessary to, the employment; living expenses when the employee is traveling on the employer's business; attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer (e.g., preparation and filing of LCA and H-1B petition)).

* * *

(10) A deduction from or reduction in the payment of the required wage is not authorized (and is therefore prohibited) for the following purposes (i.e., paragraphs (c)(10)(i) and (ii)):

(i) A penalty paid by the H-1B nonimmigrant for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer.

(A) The employer is not permitted to require (directly or indirectly) that the nonimmigrant pay a penalty for ceasing employment with the employer prior to an agreed date. Therefore, the employer shall not make any

deduction from or reduction in the payment of the required wage to collect such a penalty.

- (B) The employer is permitted to receive bona fide liquidated damages from the H-1B nonimmigrant who ceases employment with the employer prior to an agreed date. However, the requirements of paragraph (c)(9)(iii) of this section must be fully satisfied, if such damages are to be received by the employer via deduction from or reduction in the payment of the required wage.

* * *

(ii) A rebate of the [\$750/\$1,500] filing fee paid by the employer, if any, under section 214(c) of the INA. The employer may not receive, and the H-1B nonimmigrant may not pay, any part of the [\$750] additional filing fee (for a petition filed prior to December 18, 2000) or [\$1,500] additional filing fee (for a petition filed on or subsequent to December 18, 2000), whether directly or indirectly, voluntarily or involuntarily. Thus, no deduction from or reduction in wages for purposes of a rebate of any part of this fee is permitted. Further, if liquidated damages are received by the employer from the H-1B nonimmigrant upon the nonimmigrant's ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer, such liquidated damages shall not include any part of the [\$750/\$1,500] filing fee (see paragraph (c)(10)(i) of this section).

Statutory and regulatory provisions therefore prohibit a petitioner from requiring an H-1B employee to pay a penalty for ceasing employment with the petitioner prior to a contracted date. *See* section 101(a)(15)(H)(i)(b) of the Act; 20 C.F.R. § 655.731(c)(9) and (10).

As noted above, the regulations prohibit a petitioner from payroll deductions of an H-1B employee's wages with regard to recouping a business expense of the employer "(including attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer, e.g., preparation and filing of LCA and H-1B petition)" and causing the employee's wages to fall below required wage levels. According to the Act, it is a violation for an employer to require a beneficiary to reimburse, or otherwise compensate, the employer for part or all of the cost of the American Competitiveness and Workforce Improvement Act (ACWIA) fee. *See* 212(n)(2)(C)(vi)(II) of the Act; *see also* 20 C.F.R. § 655.731(c)(10)(ii). Notably, the Act also states that "the Secretary of Homeland Security shall impose a fraud prevention and detection fee **on an employer filing a petition.**" *See* 214(c)(12)(A) of the Act (emphasis added).

The regulations at 20 C.F.R. § 655.731(c)(11) and (12) state that "[a]ny unauthorized deduction taken from wages is considered by the Department [of Labor] to be non-payment of that amount of wages" and that "[w]here the employer depresses the employee's wages below the required wage by imposing on the employee any of the employer's business expense(s), the Department will consider the amount to be an unauthorized deduction from wages."

In the Employment Agreement, the petitioner states that under certain conditions the beneficiary will be required to reimburse the petitioner for "all expenses that [the petitioner] had incurred for [the beneficiary], including, but not limited to [the beneficiary's] training, relocation, and all fees related to [the petitioner's] H-1B visa." When filing and signing the LCA, the petitioner declared that it would comply with the statements as set forth in the cover pages of the LCA and the DOL regulations at 20 C.F.R. § 655, Subparts H and I. In the instant case, the petitioner has failed to establish that it would comply with the applicable statutory and regulatory provisions regarding payment of the beneficiary's required wages, if the petition were approved.⁸ Thus, for this reason as well, the H-1B petition cannot be approved.

The AAO will now address the director's basis for denial of the petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. 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. For efficiency's sake, the AAO hereby incorporates the prior discussion and analysis regarding the inconsistencies and discrepancies in the record of proceeding regarding the beneficiary's proposed employment.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the DOL's *Occupational Outlook Handbook* (hereinafter the *Handbook*), on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO will now look at the *Handbook*, an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁹ As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Computer Systems Analysts."

⁸ Notably, USCIS may revoke the approval of an H-1B petition if it is determined that the petitioner violated terms and conditions of the approved petition of which the LCA is a part. See 8 C.F.R. §§ 103.2(b)(1) and 214.2(h)(11)(iii)(A)(3).

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

The AAO reviewed the chapter of the *Handbook* (2012-2013 edition) entitled "Computer Systems Analysts" including the sections regarding the typical duties and requirements for this occupational category.¹⁰ However, the *Handbook* does not indicate that "Computer Systems Analysts" comprise an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry.

The subchapter of the *Handbook* entitled "How to Become a Computer Systems Analyst" states the following about this occupational category:

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

Education

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

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

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

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

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

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

¹⁰ For additional information regarding the occupational category "Computer Systems Analysts," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Computer Systems Analysts, on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-1> (last visited January 2, 2013).

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Computer Systems Analysts, available on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited January 2, 2013).

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

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for these positions. The *Handbook* indicates that there is a spectrum of degrees acceptable for positions in this occupation, including an associate's degree and degrees not in a specific specialty.

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

The text of the *Handbook* suggests that a baccalaureate degree or higher may be a preference among employers of computer systems analyst in some environments, but that some employers hire employees with less than a bachelor's degree, including candidates that possess an associate's degree or a bachelor's degree in an unrelated specialty. Thus, the *Handbook* does not support the claim that the proffered position falls under an occupational group for which normally the minimum requirement for entry is a baccalaureate degree (or higher) in a specific specialty, or its equivalent.

In response to the RFE, the petitioner and counsel submitted an O*NET OnLine Summary Report for the occupational category "Computer Systems Analysts." The AAO reviewed the Summary Report in its entirety. However, upon review of the Summary Report, the AAO finds that it is insufficient to establish that the position qualifies as a specialty occupation normally requiring at least a bachelor's degree in a specific specialty, or its equivalent. The Summary Report for computer systems analysts has a designation of Job Zone 4. This indicates that a position requires considerable preparation. It does not, however, demonstrate that a bachelor's degree in any *specific*

specialty is required, and does not, therefore, demonstrate that a position so designated is in a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). The O*NET OnLine Help Center provides a discussion of the Job Zone 4 designation and explains that this zone signifies only that most, but not all of the occupations within it, require a bachelor's degree. See O*NET OnLine Help Center at <http://www.onetonline.org/help/online/zones>. Further, the Help Center discussion confirms that a designation of Job Zone 4 does not indicate any requirements for particular majors or academic concentrations. Therefore, despite the petitioner's and counsel's assertion to the contrary, the O*NET Summary Report is not probative evidence that the proffered position qualifies as a specialty occupation.¹¹

Further, in response to the RFE, counsel indicates in its July 5, 2011 letter that the occupational category "Computer Systems Analysts" has a Specialized Vocational Preparation (SVP) rating of 7.0 to < 8.0 and claims that, therefore, the proffered position is a specialty occupation. It must be noted that an SVP rating of 7.0 to < 8.0 is not indicative of a specialty occupation. This is obvious upon reading Section II of the *Dictionary of Occupational Titles' (DOT's)* Appendix C, Components of the Definition Trailer, which addresses the SVP rating system.¹² The section reads:

II. SPECIFIC VOCATIONAL PREPARATION (SVP)

Specific Vocational Preparation is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.

This training may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.

Specific vocational training includes training given in any of the following circumstances:

- a. Vocational education (high school; commercial or shop training; technical school; art school; and that part of college training which is organized around a specific vocational objective);
- b. Apprenticeship training (for apprenticeable jobs only);

¹¹ According to the O*NET OnLine Summary Report, only 42% of respondents possess a bachelor's degree or master's degree. See O*NET OnLine Help Center, Computer Systems Analysts, on the Internet at <http://www.onetonline.org/link/summary/15-1121.00>.

¹² Section II of the *DOT's* Appendix C, Components of the Definition Trailer, can be found on the Internet at the website http://www.occupationalinfo.org/appendxc_1.html#II.

- c. In-plant training (organized classroom study provided by an employer);
- d. On-the-job training (serving as learner or trainee on the job under the instruction of a qualified worker);
- e. Essential experience in other jobs (serving in less responsible jobs which lead to the higher grade job or serving in other jobs which qualify).

The following is an explanation of the various levels of specific vocational preparation:

Level	Time
1	Short demonstration only
2	Anything beyond short demonstration up to and including 1 month
3	Over 1 month up to and including 3 months
4	Over 3 months up to and including 6 months
5	Over 6 months up to and including 1 year
6	Over 1 year up to and including 2 years
7	Over 2 years up to and including 4 years
8	Over 4 years up to and including 10 years
9	Over 10 years

Note: The levels of this scale are mutually exclusive and do not overlap.

Thus, an SVP rating of 7.0 to < 8.0 clearly does not indicate that at least a four-year bachelor's degree is required, or more importantly, that such a degree must be in a specific specialty closely related to the occupation to which this rating is assigned. Therefore, the information is not probative of the proffered position being a specialty occupation.

In addition, in response to the RFE, counsel asserts that DOL rules and regulations as they relate to the "PERM" program for permanent labor certification are relevant to this proceeding. In support of this assertion, the petitioner and counsel submitted an excerpt from the *Federal Register*, Vol. 69, No. 247 at 77345 and Appendix A to the Preamble-Professional Recruitment Occupations-Education and Training Categories at 77377 (December 27, 2004). The AAO reviewed the information, however, the documentation is insufficient to establish that the proffered position qualifies for eligibility as a specialty occupation.

The *Federal Register* states that the purpose of the list of occupations at Appendix A is not for determining whether a position is a specialty occupation. In fact, the *Federal Register* specifically states that **"the list is not intended to be used to qualify an alien for purposes of eligibility under the H-1B and H-1B1 program (emphasis added)."** Moreover, the *Federal Register* clearly states that "[t]he primary purpose of the list of occupations is to provide employers with the necessary information to determine whether to recruit under the standards provided in the regulations for professional occupations or for nonprofessional occupations." The *Federal Register* continues by stating that "the only presumption the list of occupations should create is that if the

occupation involved in the application is on the list of occupations in Appendix A, employers must follow the recruitment regiment for professional occupations at § 656.17(e) of this final rule."

Thus, the AAO finds no merit in counsel's contention that the document is relevant to this matter. Counsel cites no statutory or regulatory authority, case law, or precedent decision to support it. Moreover, neither the statutory nor regulatory provisions governing USCIS adjudication of Form I-129 petitions provide for the approval of an H-1B specialty occupation petition on the grounds argued by the petitioner's counsel, or even indicate that an employer's recruitment regiment for permanent labor certification are relevant to USCIS adjudications of Form I-129 H-1B specialty occupation petitions.

Furthermore, as noted previously, in order to be classified as a specialty occupation, the position must require a degree in a specific specialty. The AAO is therefore not persuaded by counsel's claim that the proffered position is a specialty occupation because of the cited appendix. The appendix is a list of occupations for which a bachelor's degree or higher degree is a customary requirement. It does not, however, demonstrate that a bachelor's degree in a *specific specialty* is required, and does not, therefore, demonstrate that a position so designated qualifies as a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). Therefore, despite counsel's assertion to the contrary, the documentation is not probative of the proffered position qualifying as a specialty occupation.¹³

Counsel also asserts that the North American Free Trade Agreement (NAFTA) is relevant to this matter and claims that "[b]ased on the provisions of NAFTA, the occupation of Computer Systems Analyst/Business Analyst (Systems) undoubtedly falls within the 'specialty occupation' category." In support of this assertion, the petitioner and counsel submitted an excerpt from NAFTA, Chapter Sixteen: Temporary Entry for Business Persons, and an excerpt of Appendix 1603.D.1. The AAO reviewed the documents. However, the AAO finds that the documentation is not relevant to this matter.

Chapter 16 of NAFTA, entitled "Temporary Entry for Business Persons" was designed to facilitate the movement of business persons among the United States, Canada, and Mexico. This chapter contains the visa-related provisions relating to the temporary entry of business persons. NAFTA allows investment, trade, and professional commerce services to take place, and affects four nonimmigrant visa (NIV) categories in the U.S. Immigration and Nationality Act: Temporary Visitors for business (B-1); Treaty Trader and Investors (E); Intra-company transferees (L), and NAFTA professionals (TN).

The NAFTA Appendix 1603.D.1 is a list of professions with the minimum education requirements and alternative credentials for TN professional occupations. However, the AAO reminds counsel

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

that the NAFTA TN category should not be confused with the H-1B classification. It is a separate and distinct category.

As such, the AAO finds no merit in counsel's contention that the requirements for TN classification are relevant to these proceedings. In this instance also, counsel cites no statutory or regulatory authority, case law, or precedent decision to support the claim. Moreover, neither the statutory nor regulatory provisions governing USCIS adjudication of H-1B specialty occupation petitions provide for the approval of an H-1B petition on the grounds argued by the petitioner's counsel, or even indicate that NAFTA Appendix 1603.D.1 is relevant to USCIS adjudications of Form I-129 H-1B specialty occupation petitions. The petitioner is required to establish that the proffered position qualifies as a specialty occupation within the meaning of the controlling statutory and regulatory provisions. It may not rely on an appendix for another – separate and distinct – nonimmigrant classification to establish eligibility for H-1B classification. Therefore, despite counsel's assertion to the contrary, the documentation is also not probative of the proffered position qualifying as a specialty occupation.

Counsel claims that most computer systems analysts are specialty occupations and cites a legacy U.S. Immigration and Naturalization Services (INS) memorandum from the Nebraska Service Center Director, Terry Way. The memorandum is entitled "*Guidance Memorandum on H1B Computer Related Positions*," from Terry Way, NSC Director, to Center Adjudication's Officers (Nebraska Service Center, December 22, 2000).

The AAO finds that counsel's reliance on this December 22, 2000 service center memorandum is misplaced as the memorandum is irrelevant to this proceeding. By its very terms, the memorandum was issued by the then Director of the NSC as an attempt to "clarify" an aspect of NSC adjudications; and, framed as it was, as a memorandum to NSC "Adjudication's Officers," it was addressed exclusively to NSC personnel within that director's chain of command. As such, it has no force and effect upon the present matter, which was initially adjudicated by the California Service Center and is now before the AAO for review.

It is also noted that the legacy memorandum cited by counsel does not bear a "P" designation. According to the Adjudicator's Field Manual (AFM) § 3.4, "correspondence is advisory in nature. intended only to convey the author's point of view. . . ." AFM § 3.4 goes on to note that examples of correspondence include letters, memoranda not bearing the "P" designation, unpublished AAO decisions, USCIS and DHS General Counsel Opinions, etc. Regardless, the NSC no longer adjudicates H-1B petitions and, therefore, the memorandum is not followed by any USCIS officers even as a matter of internal, service center guidance.

Even if the AAO were bound by this memorandum either as a management directive or as a matter of law, it was issued more than a decade ago, during what the NSC Director perceived as a period of "transition" for certain-computer related occupations; that the memorandum referred to now outdated versions of the *Handbook* (the latest of those being the 2000-2001 edition); and that the memorandum also relied partly on a perceived line of relatively early unpublished (and unspecified) AAO decisions in the area of computer-related occupations, which did not address the computer-related occupations as they have evolved since those decisions were issued more than a decade

ago.¹⁴ In any event, the memorandum reminds adjudicators that a specialty occupation eligibility determination is not based on the proffered position's job title but instead on the actual duties to be performed. For all of the reasons articulated above, the memorandum is immaterial to this discussion regarding the job duties of the petitioner's proffered position and whether the petitioner has satisfied its burden of establishing that this particular position qualifies as a specialty occupation.

The fact that a person may be employed in a position designated as that of a computer systems analyst and may be involved in using information technology (IT) skills and knowledge to help an enterprise achieve its goals in the course of his or her job is not in itself sufficient to establish the position as one that qualifies as a specialty occupation. Thus, it is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding and as stated by the petitioner do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

As stated earlier, in determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

¹⁴ While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter.

The petitioner submitted several documents to establish eligibility under this criterion of the regulations. However, as discussed below, the AAO finds that the documentation does not establish a common degree requirement in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, postings or other documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). Notably, it is not sufficient for the petitioner and counsel to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

In the Form I-129 and supporting documents, the petitioner stated that it is a business analyst/information technology consulting services company established in 2007. The petitioner further stated that it has 34 employees and a gross annual income of \$3.3 million. The petitioner indicated that its net annual income is "Profit." The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 541511.¹⁵ The AAO notes that this NAICS code is designated for "Custom Computer Programming Systems." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This U.S. industry comprises establishments primarily engaged in writing, modifying, testing, and supporting software to meet the needs of a particular customer.

U.S. Dep't of Commerce, U.S Census Bureau, 2007 NAICS Definition, 541511 – Custom Computer Programming Systems, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited January 2, 2013).

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner and counsel submitted copies of job advertisements. The AAO notes that the petitioner did not provide any independent evidence of how

¹⁵ According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited January 2, 2013).

representative the job advertisements are of the particular advertising employers' recruiting history for the type of job advertised. As the advertisements are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

Upon review of the documents, the AAO finds that they do not establish that a requirement for a bachelor's degree, in a specific specialty, is common to the petitioner's industry in similar organizations for parallel positions to the proffered position.

For instance, the advertisements include a position with a radiology practice; a position with a community association management company; a position with a children's retail company; a position with [REDACTED] a position with [REDACTED] and a position with [REDACTED]. Without further information, the advertisements appear to be for organizations that are not similar to the petitioner and the petitioner has not provided any probative evidence to suggest otherwise. Furthermore, the petitioner and counsel submitted job postings for [REDACTED] and [REDACTED], for which little or no information regarding the employers is provided. Consequently, the record is devoid of sufficient information regarding the advertising organizations to conduct a legitimate comparison of the organizations to the petitioner. The petitioner and counsel failed to supplement the record of proceeding to establish that the advertising organizations are similar to it. That is, the petitioner has not provided any information regarding which aspects or traits (if any) it shares with the advertising organizations.

Moreover, some of the advertisements do not appear to be for parallel positions. For instance, the petitioner provided several job postings for positions, which require a degree and five years of experience. Notably, the position with [REDACTED] requires a degree and at least six years of experience. The advertisement for [REDACTED] indicates that a candidate must possess a degree and 5 to 8 years of relevant experience. (As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as an entry-level position.) Moreover, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.

Additionally, contrary to the purpose for which the advertisements were submitted, some of the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. For example, some of the postings state that a bachelor's degree is required, but they do not provide any further specification. Thus, they do not indicate that a bachelor's degree in a *specific specialty* that is directly related to the occupation is required. The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the specialty occupation claimed in the petition. Moreover, the AAO observes that the petitioner submitted advertisements stating that a degree in business is acceptable. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business, without further specification, does not support the assertion that a position is a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558.

The AAO reviewed all of the advertisements submitted in response to the RFE.¹⁶ However, as discussed, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry for parallel positions in organizations similar to the petitioner.

According to the *Handbook's* detailed statistics on computer systems analysts, there were approximately 544,400 persons employed as computer systems analysts in 2010. *Handbook*, 2012-13 ed., available at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-1> (last accessed January 2, 2013). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these job postings with regard to the common educational requirements for entry into parallel positions in similar organizations in the industry. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

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

In addition, in support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner submitted a letter from [REDACTED]. The letter is dated June 8, 2011. Notably, [REDACTED] signature line indicates that his job title is "Director, Professional Services" but there is no information regarding his job duties or his role at the company. He does not provide any information regarding the specific elements of his knowledge and experience that he may have applied in reaching his conclusion. [REDACTED] has failed to provide sufficient information regarding the basis of his claimed expertise on this particular issue. Furthermore, the letter does not provide any information regarding his experience giving opinions on such matters, nor does it cite specific instances in which his past opinions have been accepted or recognized as authoritative regarding this issue.

Furthermore, the letter contains a brief description regarding the company [REDACTED]. However, the letter lacks sufficient information regarding the company to conduct a meaningfully substantive comparison of its business operations to the petitioner. The petitioner failed to provide

¹⁶ As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed.

any supplemental information to establish that the organization is similar to the petitioner. Thus, from the onset, this prong of the regulations has not been established.

The AAO reviewed [REDACTED] opinion letter, however, the AAO observes that the letter does not indicate that similar companies in the industry commonly require at least a bachelor's degree in a specific specialty, or its equivalent, for parallel positions. Specifically, the letter states that "at a minimum, a Bachelor's Degree in a technical field" is required for the proffered position. Thus, contrary to the purpose for which the letter was submitted, it does not indicate that a bachelor's degree in a *specific specialty* that is directly related to the duties and responsibilities of the position is required. Again, the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the specialty occupation claimed in the petition. Moreover, [REDACTED] asserts a general industry educational standard for organizations similar to the petitioner (and for the proffered position), without referencing any supporting authority or any empirical basis for the pronouncement.

[REDACTED] states that [REDACTED] provides "highly skilled Business Systems/Software Development services (via [the company's] employees or contractors) to some of the nation's largest companies and/or their preferred IT project deployment vendors." [REDACTED] continues by stating, "We therefore have the knowledge and understanding of the prevailing industry requirements for Business Analyst (systems) and other positions in the same or related occupations." However, the letter lacks sufficient information to reasonably conclude whether or not [REDACTED] is referring to parallel positions. The letter fails to provide basic information regarding the positions, including the duties and responsibilities as well as the specific knowledge required to perform the duties. Moreover, the AAO observes that [REDACTED] did not provide any documentary evidence to corroborate that [REDACTED] currently or in the past employed individuals in parallel positions to the proffered position, nor did he provide any documentation to substantiate the claimed academic requirements. He failed to submit any probative evidence of [REDACTED] recruitment and hiring practices.

In summary, the conclusions reached by [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which he reached such conclusions. There is an inadequate factual foundation established to support the opinion and the AAO finds that the opinion is not in accord with other information in the record.

On appeal, the petitioner submitted an opinion letter from [REDACTED] an associate professor at [REDACTED]. The letter is dated September 8, 2011. As previously discussed, where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764; *see also Matter of Obaigbena*, 19 I&N Dec. 533. Nevertheless, even if the AAO were to consider [REDACTED] opinion letter, the AAO finds that the letter would not be probative in this matter. The AAO will briefly address a few of the deficiencies it observes in [REDACTED] letter.

provided a summary of his education and experience and attached a copy of his curriculum vitae. described his qualifications, including his educational credentials, professional experience, information regarding his research interests, as well as provided a list of the publications he has written. According to his curriculum vitae, completed a Ph.D. in Applied Mathematics in 1979. He has been a professor at The New York City College of Technology / CUNY since 1998. In the opinion letter, claims to have conducted "extensive research" in various fields. However, notably, upon review of curriculum vitae, the AAO observes that in the section entitled "Research Publications," indicated that since 1993, he has published two articles (one in 2003 and another in 2005). In the section entitled "Research and Fellowship," stated that since 1990, he has received three grants (in 2000, 2001 and 2003).

Based upon a complete review of letter and curriculum vitae, the AAO notes that, while may, in fact, be a recognized authority on various topics, he has failed to provide sufficient information regarding the basis of his claimed expertise on this particular issue. claims that he is "providing this evaluation based on [his] experience as an associate professor and evaluator of foreign credentials." does not discuss the beneficiary's credentials and he fails to establish how his experience as an evaluator of foreign credentials is relevant to determining whether the petitioner's proffered position is a specialty occupation.¹⁷ Neither self-endorsement nor his curriculum vitae establish his expertise pertinent to the current recruiting and hiring practices of organizations seeking to fill positions similar to the proffered position in the instant case. That is, without further clarification, it is unclear how his education, training, skills or experience would translate to expertise or specialized knowledge regarding the *current recruiting and hiring practices* of business analysts (systems) for organizations similar to the petitioner.¹⁸

opinion letter and curriculum vitae do not cite specific instances in which his past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication that he has published any work or conducted any research or studies pertinent to the educational requirements for business analysts (or parallel positions) in the petitioner's industry for similar organizations, and no indication of recognition by professional organizations that he is an authority on those specific requirements. The opinion letter contains no evidence that it was based on scholarly research conducted by in the specific area upon which he is opining. In reaching this determination, provides no documentary support for his ultimate conclusion regarding the education required for the position (e.g., statistical surveys, authoritative industry or government publications, or professional studies). asserts a general

¹⁷ Notably, the beneficiary in the instant case possesses a master's degree from in Michigan.

¹⁸ The petitioner's claimed entry requirement for the proffered position is at least a bachelor's degree in "Engineering, Computer Science, Management Information Systems, Mathematics or related fields (or its foreign equivalent) and or equivalent experience in the job offered." states that position requires a bachelor's degree in computer information systems, management information systems, a relevant discipline of engineering, or a related field.

industry educational standard for organizations similar to the petitioner, without referencing any supporting authority or any empirical basis for the pronouncement.

Furthermore, [REDACTED] claims that he "reviewed an outline of the job duties for the position of Business Analyst (Systems)." However, upon review of the opinion letter, there is no indication that [REDACTED] possesses any knowledge of the petitioner's proffered position beyond the job description. The fact that he attributes a degree requirement to such a generalized treatment of the proffered position undermines the credibility of his opinion. [REDACTED] does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations (or the client's business operations) or how the duties of the position would actually be performed. His opinion does not relate his conclusion to specific, concrete aspects of the particular position to demonstrate a sound factual basis for the conclusion about the educational requirements. [REDACTED] provides general conclusory statements regarding business analyst (systems) positions, but he does not provide a substantive, analytical basis for his opinion and ultimate conclusions.

Also, while [REDACTED] claims that the duties of the proffered position are complex, unique and/or specialized, it must be noted that there is no indication that the petitioner and counsel advised [REDACTED] that the petitioner submitted an LCA certified for a Level I position, thereby characterizing the proffered position as a low, entry-level position, for a beginning employee who has only a basic understanding of the occupation. As previously discussed, the wage-rate indicates that the beneficiary would be expected to perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised and his work closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results. It appears that [REDACTED] would have found this information relevant for his opinion letter. Moreover, without this information, the petitioner has not demonstrated that [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine parallel positions based upon the job duties and responsibilities.

In summary, and for each and all of the reasons discussed above, the AAO concludes that the advisory opinion rendered by [REDACTED] is not probative evidence to establish the proffered position as a specialty occupation.

The AAO may, in its discretion, use as advisory opinions or statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). As a reasonable exercise of its discretion, and for the reasons discussed above, the AAO finds the advisory opinion letter as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, the AAO hereby incorporates the above discussion and analysis regarding [REDACTED] opinion letter into its analyses of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Thus, based upon a complete review of the record, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2)

located in organizations that are similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

The AAO acknowledges that the petitioner and its counsel may believe that the proffered position involves complex or unique tasks. However, upon review of the record of proceeding, the AAO finds that the petitioner fails to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of business analyst (systems). That is, the AAO reviewed the record in its entirety and finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. The AAO hereby incorporates into this analysis this decision's earlier comments and findings regarding the information and evidence provided with regard to the proposed duties and requirements and the position that they are said to comprise. As reflected in those earlier comments and findings, the petitioner has not developed or established complexity or uniqueness as attributes of the proffered position that would require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent.

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

The petitioner and counsel assert that the duties of the position are complex, however, upon review of the record of proceeding, the AAO finds the claim unpersuasive. The petitioner has submitted conflicting and inconsistent information with regard to the nature of the position. This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the AAO incorporates by reference and reiterates its earlier discussion that the LCA indicates that the position is a low-level, entry position relative to others within the occupation. Based upon the wage rate, the beneficiary is only required to have a basic understanding of the occupation. Moreover, the wage rate indicates that the beneficiary will perform routine tasks that require limited, if any, exercise of independent judgment; his work will be closely supervised and monitored; he will receive specific instructions on required tasks and expected results; and his work will be reviewed for accuracy. Without further evidence, it is simply not credible that the petitioner's proffered

position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. A Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."¹⁹

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

The petitioner fails to demonstrate how the proffered position of business analyst (systems) is so complex or unique relative to other positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States. Consequently, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

To satisfy this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

While a petitioner may believe or otherwise assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition

¹⁹ For additional information on Level IV wage levels, see DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

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

In response to the RFE, counsel asserts that the petitioner "currently employs many individuals in the same position as the Alien beneficiary." Additionally, counsel states that "the Petitioner respectfully submits that its current, up-to-date minimum requirements for the 'Computer Systems Analyst' position is a U.S. bachelor's degree (or foreign equivalent) or equivalent." Notably, counsel does not assert that the petitioner requires a degree in a specific specialty. Again, the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the specialty occupation claimed in the petition.

The petitioner submitted copies of eight individuals' academic credentials, as well as an organizational chart. The chart includes entries with the names of each of these eight individuals and specifies their academic degrees and major fields of study. In addition, the organizational chart includes an entry stating "Other 20 Business Systems Analysts with Bachelor Degree or above." No further information is provided. The entry does not indicate that these twenty individuals possess degrees in a *specific specialty* directly related to the duties and responsibilities of the business systems analyst position.

Based upon counsel's statements and the organizational chart, the vast majority of the petitioner's staff serves in positions designated as "Business Systems Analysts." However, the petitioner did not provide the job duties and responsibilities for these positions, which it claims are similar to the proffered position. Thus, it cannot be determined whether the duties are the same or similar, or if the job title of "Business Systems Analysts" is a general job title utilized by the petitioner for a variety of positions. Moreover, the petitioner did not indicate the knowledge and skills required for the positions, or provide any information regarding the complexity of the job duties, independent

judgment required or the amount of supervision received. As a result, the petitioner has not established that the positions are the same or related to the proffered position.

The AAO reviewed the copies of the eight individuals' academic credentials. It must be noted that for one of the individuals, the petitioner only submitted a foreign provisional degree certificate. For this individual, the petitioner failed to provide an academic credential evaluation. In addition, the petitioner did not submit probative evidence to establish that these eight individuals are employed by the petitioner, such as copies of pay records or Quarterly Wage Reports (which the AAO observes were requested by the director in the RFE). The AAO notes that counsel stated in a letter (dated July 5, 2011) that the petitioner included copies of the eight individuals' recent pay stubs, however, the AAO reviewed the record and the documentation was not provided.

The petitioner stated in the Form I-129 petition that it was established in 2007 (approximately four years prior to the submission of the H-1B petition). The petitioner did not provide the total number of people it has employed to serve in the proffered position. Consequently, it cannot be determined how representative the petitioner's claim regarding *eight individuals over a four year period* is of the petitioner's normal recruiting and hiring practices. In addition, the submission of copies of eight degrees (including a foreign provisional certificate) over a four year period is not persuasive in establishing that the petitioner normally requires at least a bachelor's degree in a specific specialty for the position.

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

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

Upon review of the record of the proceeding, the AAO notes that the petitioner has not provided sufficient probative evidence to satisfy this criterion of the regulations. The AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupational category of "Computer Systems Analysts." The petitioner designated the position as a Level I position (the lowest of four assignable wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation."

Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a substantially higher prevailing wage. As previously discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems" and requires a significantly higher wage. While the petitioner claims that the duties of the proffered

position are specialized and/or complex, the petitioner's assertions are inconsistent with other evidence in the record of proceeding. The petitioner has not credibly demonstrated that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described and documented with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.

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

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

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143 (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.