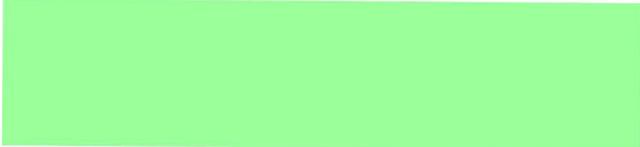


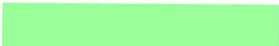
(b)(6)

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



U.S. Citizenship
and Immigration
Services



DATE: **JUL 16 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

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 software and services company established in 1996. In order to employ the beneficiary in what it designates as a computer systems analyst position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

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

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. The petition will be denied.

The issue on appeal before the AAO 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 providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

In the petition signed on April 10, 2012, the petitioner indicates that it wishes to employ the beneficiary as a computer systems analyst on a full-time basis at the rate of pay of \$79,102 per year.¹ In addition, the petitioner reports that the beneficiary will work at its office at [REDACTED]. In the April 10, 2012 letter of support, the petitioner states that the duties of the proffered position will entail the following:

As a Computer Systems Analyst with [the petitioner], [the beneficiary] will be responsible for working in the areas of implementation and customization of [the petitioner's] e2eHub software and other products from Oracle and Savvion for various [of the petitioner's] clients. Specifically, he will prepare the analysis and design for the software installations; make changes to the connectors for e2eHub or using Savvion's Managed Adapter Framework for the design of products based on customer requirements; and implement [the petitioner's] solutions for customers.

The AAO observes that the petitioner does not indicate its minimum academic requirement (if any) for the proffered position. However, with the initial petition, the petitioner submitted a copy of the beneficiary's foreign diploma and transcripts, as well as a credential evaluation from [REDACTED]. The evaluation indicates that the beneficiary's foreign education is "equivalent in level and purpose to a Bachelor of Engineering Degree in Electronics Engineering awarded by regionally accredited colleges and universities in the United States."

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B

¹ It must be noted for the record that the Form I-129 petition and the Labor Condition Application (LCA) indicates that the beneficiary's rate of pay will be \$79,102 per year. However, the petitioner's April 10, 2012 letter of support states that the beneficiary's "position in Santa Calara [sic] will be as a Computer Systems [sic] Analyst at an annual salary of \$79,110." In addition, the petitioner's offer of employment letter dated April 10, 2012 indicates that the beneficiary will be compensated at \$79,110 per year. No explanation for the variance was provided.

petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification "Computer Systems Analysts" - SOC (ONET/OES Code) 15-1121, at a Level II wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on August 3, 2012. 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. The AAO notes that the director specifically requested the petitioner to provide a more detailed description of the work to be performed by the beneficiary for the entire period requested, including the specific job duties, the percentage of time to be spent on each duty, level of responsibility, etc.

On September 11, 2012, the petitioner responded by submitting further information regarding the proffered position and additional evidence. In a letter dated September 7, 2012, 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 shall be required to study and analyze complex enterprise software and hardware systems with the objective of developing a design for the custom development and implementation of new and improved systems."

Specifically, the petitioner expanded on the previously submitted job description as follows:

<u>DAILY TASK ACTIVITY</u>	<u>TIME UTILIZED ON EACH TASK</u>
Responsible for software development cycle, including design, development, and unit testing	30%
Responsible for requirement gathering, development of new reports, writing functional specification and program specification, technical design, coding reviews and drafting detailed unit test plans	30%
Responsible for running various reports and monitoring process scheduler, implementing password controls	10%
Responsible for creating, planning, designing & execution of test scenarios, test cases, test script procedures and debugging	15%
Responsible for working with the Quality Control team during integration testing and resolving any issues uncovered during the debugging process	15%

The petitioner also stated that "a bachelor's degree in engineering or mathematics is essential [for the proffered position] in addition to relevant experience."

Further, the petitioner submitted a document entitled "Job Description – Computer Systems Analyst." The document indicates that the computer systems analyst's key responsibilities may include the following:

- Carrying out Implementation and functional design activities for BRM/BPM
- Creating functional requirements as an input to application design
- Developing and testing detailed functional designs for business solution components and prototypes
- Supervising and developing application build, test, and deploy activities using BRM/BPM components and tools
- Planning and executing data conversion activities (e.g., test data)
- Driving test planning and execution
- Analyzing and building [the petitioner's] e2eHub connectors using CDK (Connector Development Kit) to allow business flow across enterprise systems in Telco enterprise systems
- Data exchange analysis using Data Mapping Tools and Manager in BRM and/or e2eHub for CRM, Billing, Provisioning and other systems
- Using [the petitioner's] e2eHub Business Process Designer for modeling Telco processes
- Using Eclipse Java development and testing

Notably, the document also indicates that a "[m]inimum [of a] Bachelor's degree in Engineering or Science or Mathematics" is required for the computer systems analyst position.

In addition, the petitioner submitted, in part, (1) photographs of its office; (2) company publications; (3) an organizational chart; (4) printouts from www.searchbydegree.com, www.about.com, and <http://money.usnews.com/careers/best-jobs/computer-systems-analyst>; (5) job vacancy announcements; (6) its job vacancy announcement for the proffered position posted on its website; (7) an excerpt entitled "Summary Report for: 15-1121.00 – Computer Systems Analysts" from the Occupational Information Network (O*NET) OnLine; and (8) the petitioner's tax documents.

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 November 24, 2012. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition.²

² With the appeal, 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

Based upon a complete review of the record of proceeding, the AAO will make some preliminary findings that are material to the determination of the merits of this appeal.

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. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

The AAO notes that the petitioner and counsel have provided inconsistent information as to the academic requirements of the proffered position. The AAO observes that in the September 7, 2012 letter, submitted in response to the RFE, the petitioner indicates that the proffered position requires a bachelor's degree in engineering or mathematics. However, further in the letter, the petitioner claims that "the technical computer and software knowledge and skills required for the position cannot be attained by someone who does not possess a Bachelor's degree in Computer Science, MIS [Management Information Systems], Science or Maths." In addition, the document entitled "Job Description – Computer Systems Analyst," submitted in response to the director's RFE, indicates that a "Bachelor's degree in Engineering or Science or Mathematics" is required for the proffered position. Further, the job vacancy announcement for the proffered position, submitted in response to the RFE, indicates that the proffered position requires a "Bachelors [sic] Degree (or foreign equivalent) in CIS [Computer Information Systems], Computer Science or related field." Moreover, the AAO notes that in the appeal, counsel states that "[t]he petitioner's Computer Systems Analyst position requires a successful candidate to have at a minimum a U.S. Bachelor's degree in Computer Science or related fields, or its equivalent." No explanation for the variances was provided.³

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 Obaigbena*, 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.

³ The petitioner and counsel have provided inconsistent information as to the academic requirements of the

Furthermore, it must be noted that the petitioner's claimed entry requirement of at least a bachelor's degree in engineering, mathematics, computer science, management information systems, science, computer information systems, or computer science 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, mathematics, computer science, management information systems, science, computer information systems, or computer science. The petitioner has not established how each field is directly related to the duties and responsibilities of the proffered position. For instance, 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 (mathematics, science, computer information systems and computer science) or that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the particular position proffered in this matter.

Here and as indicated above, the petitioner, who bears the burden of proof in this proceeding, fails to establish either (1) that engineering, mathematics, computer science, management information systems, science, computer information systems, and computer science are closely related fields or (2) that engineering or any and all engineering specialties are directly related to the duties and

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).

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

As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree 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 147.⁴

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 15-1121. The wage level for the proffered position in the LCA corresponds to a Level II (qualified) position. The prevailing wage source is listed in the LCA as the OES (Occupational Employment Statistics) OFLC (Office of Foreign Labor Certification) Online Data Center.⁵ The LCA was certified on April 9, 2012. The AAO notes that

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.

⁵ The Occupational Employment Statistics (OES) program produces employment and wage estimates for

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 II wage rate is described by DOL as follows:

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

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.

U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance, Nonagric. Immigration Programs* (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

In the instant case, the petitioner repeatedly claims that the duties of the proffered position are complex, unique and/or specialized. For instance, in the April 10, 2012 letter of support, the petitioner states that the beneficiary "will function in a specialized capacity, in that he will use his special knowledge of [the petitioner's] and Savvion's products, services, client products or other interests and their application in international markets." In addition, the petitioner claims that the beneficiary "will use his advanced level of knowledge or expertise in specialized processes and procedures." The petitioner emphasizes the importance of the "advanced" and "highly developed and complex" knowledge that the beneficiary will use and claims that it is "at a higher level than others, and not generally known by others in the field through training and actual experience."

In the September 7, 2012 letter, submitted in response to the RFE, the petitioner states that "the beneficiary shall be required to study and analyze complex enterprise software and hardware systems with the objective of developing a design for the custom development and implementation of new and improved systems." The petitioner further states that "[f]unctional knowledge alone will not be enough since the beneficiary shall need to have technical knowledge of EAI (Enterprise Application Integration), OSS/BSS systems workflow, network traffic, database structures, performance planning and database sizing" for the proffered position. In addition, the petitioner asserts that "[k]nowledge of computer algorithms, database structures and software interfaces/APIs of complex systems is necessary" for the proffered position. In the appeal, the petitioner claimed that the beneficiary will report to the president/CEO.⁷

The AAO notes that this characterization of the position and the claimed duties, responsibilities and requirements conflict with the wage-rate element of the LCA, which, as reflected in the discussion above, is indicative of a comparatively low-level position relative to others within the occupation. That is, the position is designated as a Level II position, which is the second lowest of four assignable levels. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have attained, either through education or experience, a good understanding of the occupation. Furthermore, he will be expected to perform moderately complex tasks that require limited judgment.

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).

Here, the prevailing wage on the LCA corresponds to a Level II for the occupational category of

⁷ The organizational chart does not reflect that the beneficiary will directly report to the president/CEO. Instead, it reflects that the beneficiary will report to the practice manager – BPM.

"Computer Systems Analysts" for Santa Clara County (Santa Clara, California).⁸ Notably, if the proffered position were designated as a higher level position, the prevailing wage at that time would have been \$96,221 per year for a Level III position, and \$113,360 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. 591-92.

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

⁸ For additional information regarding the prevailing wage for computer systems analysts in Santa Clara County, *see* the All Industries Database for 7/2011 - 6/2012 for Computer Systems Analysts at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatacenter.com/OesQuickResults.aspx?code=15-1121&area=41940&year=12&source=1> (last visited July 10, 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 II 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.

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.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To make its determination whether the proffered position qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether 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."

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.

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.

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 July 10, 2013).

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

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

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

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

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Computer Systems Analysts, available on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited July 10, 2013).

When reviewing the *Handbook*, the AAO must again note that the petitioner designated the proffered position as a Level II position (out of four possible wage-levels). This designation is indicative that the beneficiary is expected to have a good understanding of the occupation and that he will perform moderately complex tasks that require limited judgment relative to others within the occupation. Thus, based upon the wage level designated by the petitioner in the LCA, the proffered position does not appear to be a particularly high-level or senior position.

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 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 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, the petitioner submitted printouts from www.searchbydegree.com, www.about.com, and <http://money.usnews.com/careers/best-jobs/computer-systems-analyst>. The AAO reviewed the printouts in their entirety. However, the printouts do not establish that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into computer systems analyst positions. For instance, the printout from www.searchbydegree.com reports that employers "prefer applicants who have at least a bachelor's degree in computer science, information science, or management information systems (MIS)." In addition, the printout from <http://money.usnews.com/careers/best-jobs/computer-systems-analyst> reports that "[m]ost employers prefer applicants with bachelor's degrees in a relevant field, such as computer science." However, obviously a *preference* is not a minimum degree *requirement*. Moreover, the printout from www.about.com reports that "[t]he typical minimum is a bachelor's degree" for computer systems analyst positions. Further, the printout also reports that "[c]ommon degrees required include those in computer science, information science or management information systems. But, systems analysts hold a variety of degrees." Thus, the printouts do not indicate that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into computer systems analyst positions.

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>.

The AAO notes that in response to the director's RFE, the petitioner claims that USCIS has previously approved H-1B cases for the proffered position of computer systems analyst. The record of proceeding does not contain copies of the visa petitions that the petitioner claims were previously approved. It must be emphasized that each petition filing is a separate proceeding with a separate record. See *Hakimuddin v. Dep't of Homeland Sec.*, No. 4:08-cv-1261, 2009 WL 497141, at *6 (S.D. Tex. Feb. 26, 2009); see also *Larita-Martinez v. INS* 220 F.3d 1092, 1096 (9th Cir. 2000) (stating that the "record of proceeding" in an immigration appeal includes all documents submitted in support of the appeal). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). As the director properly reviewed the record before her and as that record did not include the records of the prior approvals, it was impracticable for the director to provide the petitioner with an explanation as to why the prior approvals were erroneous, as the petitioner suggests.

Further, the AAO notes that on appeal, counsel 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.¹² In any event, the memorandum reminds adjudicators that a specialty occupation eligibility

¹² While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in

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).

Here and as already discussed, the petitioner has not established that its proffered position is one for

the administration of the Act, unpublished decisions are not similarly binding.

which the *Handbook*, or other authoritative source, reports an industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter. The petitioner did not submit any documentation from the industry's professional association stating that it has made a degree a minimum entry requirement. The petitioner also did not submit any letters or affidavits from firms or individuals in the industry in support of this criterion of the regulations.

In response to the director's RFE, the petitioner submitted copies of job advertisements in support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations. However, upon review of the documents, the AAO finds that the petitioner's reliance on the job announcements is misplaced.

In the Form I-129 and supporting documents, the petitioner stated that it is a software and services company established in 1996. The petitioner further stated that it has eight employees and a gross annual income of "1.7." The petitioner did not indicate its net annual income. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 541511.¹³ The AAO notes that this NAICS code is designated for "Custom Computer Programming Services." 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, 2012 NAICS Definition, 541511 – Custom Computer Programming Services, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited July 10, 2013).

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, 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 to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

Notably, the petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs

¹³ 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 July 10, 2013).

advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

Upon review of the documentation, the petitioner fails 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.

For example, the petitioner submitted two job postings 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 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 these advertising organizations.

Additionally, contrary to the purpose for which the advertisements were submitted, 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, one of the postings ([REDACTED]) states that a bachelor's degree is required, but it does not provide any further specification. Thus, it does 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 an advertisement ([REDACTED]) that states that a range of disparate fields (computer science, English, math, or a related technical field) are acceptable. Again, 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 disparate fields 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).

The AAO reviewed all of the advertisements submitted in response to the RFE.¹⁴ 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->

¹⁴ 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.

systems-analysts.htm#tab-1 (last visited July 10, 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.

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 claims that the proffered position involves complex and/or unique duties. In the instant case, the record of proceeding contains documentation regarding the petitioner's business operations, including copies of its Federal Income Taxes for 2010 and 2011; copies of its Quarterly Contribution Return and Report of Wages for 2011 (Quarters 3 and 4) and 2012 (Quarters 1 and 2); photographs of its office; company publications; an organizational chart; a copy of the Gold Partnership Certificate from Oracle; copies of letters, emails, and agreements from its clients ([REDACTED]);¹⁵

¹⁵ It must be noted for the record that several of the documents are in a foreign language, and they are not accompanied by an English translation. Any document submitted containing a foreign language must be accompanied by a full English language translation that has been certified by the translator as complete and accurate, and that the translator is competent to translate from the foreign language into English. *See* 8 C.F.R. § 103.2(b)(3). Because the petitioner failed to comply with the regulations by submitting a certified translation of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *Id.* Accordingly, the evidence that is in a foreign language is not probative and will not be accorded any weight in this proceeding. The AAO will not attempt to decipher or "guess" the meaning of documents that are not accompanied by a full, certified English language translation.

printouts from its website; and materials regarding the its [REDACTED]. However, upon review of the record of proceeding, the AAO finds that the petitioner has failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of management analyst. 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. Further, the AAO hereby incorporates into this analysis the 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 management analyst. Specifically, the petitioner failed to demonstrate how the computer systems analyst 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 required, in performing certain duties of a computer systems analyst 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.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the LCA indicates a wage level based upon the occupational classification "Computer Systems Analysts" at a Level II wage. This designation indicates that it is a position for an employee who has a good understanding of the occupation but who will only perform moderately complex tasks that require limited judgment. Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, 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."¹⁶

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

¹⁶ For additional information on wage levels, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

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 AAO observes that the petitioner has indicated that the beneficiary's academic background and experience in the industry will assist him in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not explain or clarify at any time in the record which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Consequently, as the petitioner fails to demonstrate that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent, 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 of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory

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

As previously noted, the petitioner claims that USCIS has previously approved H-1B cases submitted by the petitioner for the proffered position. As discussed, the petitioner did not submit a copy of the prior H-1B petitions and their respective supporting documents. As the record of proceeding does not contain sufficient evidence of the prior petitions to determine whether they are the same position, there are no underlying facts to be analyzed and, therefore, no prior, substantive reasons could have been provided to explain why deference to the approval of the prior H-1B petitions were not warranted. The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act.

The petitioner stated in the Form I-129 petition that it was established in 1996 (approximately sixteen 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 sixteen year period* is of the petitioner's normal recruiting and hiring practices. The petitioner has not persuasively established that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, 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.

The AAO acknowledges that the petitioner may believe that the proffered position involves specialized and complex duties. As previously mentioned, the petitioner provided documentation regarding its business operations, including copies of its Federal Income Taxes for 2010 and 2011;

copies of its Quarterly Contribution Return and Report of Wages for 2011 (Quarters 3 and 4) and 2012 (Quarters 1 and 2); photographs of its office; company publications; an organizational chart; a copy of the Gold Partnership Certificate from Oracle; copies of letters, emails, and agreements from its clients [REDACTED]¹⁷ printouts from its website; and materials regarding the its [REDACTED]. However, the petitioner has not provided sufficient evidence to satisfy this criterion of the regulations. The AAO notes that 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 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. The petitioner has not provided sufficient probative evidence to support its claim.

Further, the AAO incorporates by reference and reiterates its earlier discussion that the petitioner designated the proffered position as a Level II position. This designation is only appropriate for positions for which the petitioner expects the beneficiary to have a good understanding of the occupation to perform moderately complex tasks that require limited judgment relative to others within the occupation. The designation of the proffered position as a Level II position is not consistent with claims that the nature of the specific duties of the proffered position is specialized and complex. Without further evidence, it is simply not credible that the petitioner's proffered position is specialized and complex 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."¹⁸

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, or its equivalent. 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.

¹⁷ As previously mentioned, the documentation includes information in a foreign language and it is not accompanied by a certified English translation. For the reasons already discussed the information that is in a foreign language is not probative evidence in establishing the proffered position as qualifying as a specialty occupation. *See* 8 C.F.R. § 103.2(b)(3).

¹⁸ For additional information on Level IV wage levels, *see* U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

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 appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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