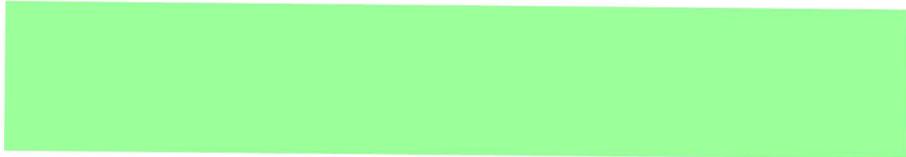


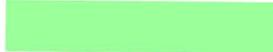
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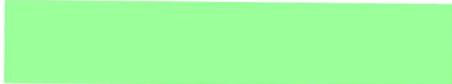
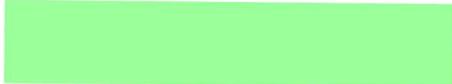
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

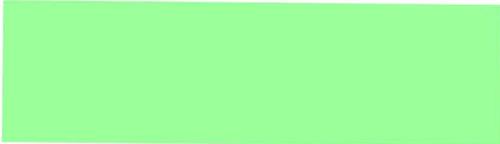


DATE: **JUL 16 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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 and supporting documentation, the petitioner describes itself as a distributor and importer of natural stone established in 1975. In order to employ the beneficiary in what it designates as a software engineer 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 it 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 response to the director's RFE; (4) the director's notice of intent to deny (NOID); (5) the response to the director's NOID; (6) the director's denial letter; and (7) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed. 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 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 12, 2012, the petitioner indicates that it wishes to employ the beneficiary as a software engineer on a full-time basis at the rate of pay of \$58,000 per year. In the letter of support dated April 12, 2012, the petitioner states that the beneficiary will be responsible for the following duties:

- Designing, implementing and maintain [sic] Business solutions thorough [sic] all phases of the project lifecycle (requirements, design, development, testing, release, prototypes) and producing required deliverables;
- Installing Business Solutions, which involves the full product implementation process, including gather requirements design, configuration, data migration, testing, training and support;
- Installing SQL Server 200 and setting ob ODBC; launching eEnterprise utilities and initializing the DYNAMICS database; crating [sic] a Template for Client Installations and installing the client from the Template; setting up the company user classes, users, user access, security, user preferences;
- Performing post installation administration tasks such as eEnterprise, SQL maintenance, database backup procedures, optimizing performance and troubleshooting various errors;
- Monitoring and managing database backups, logs and journals; installing, maintaining and upgrading database software; restoring and recovering data as required, maintaining availability and integrity of data bases [sic] through

multiple access schemes;

- Facilitating sharing of common data by overseeing proper key and index management and data dictionary maintenance;
- Monitoring relational databases to optimize database performance, resource use, and physical implementation of databases; addressing variety of data integration issues including migration between disparate databases, integrating, maintaining, capacity planning issues, preparing new applications; ensuring that the database(s) is updated accurately and regularly;
- Controlling access, performance monitoring and tuning; reviewing, developing, and designing data models using standard diagramming techniques in conjunction with application development teams;
- Creating logical data models and translating into physical database structures that integrate with existing or proposed database structures; developing and implementing maintenance procedures;
- Collaborating in the design and development of new database to meet new user needs and respond to/anticipate technological innovations; devising, developing and implementing disaster recovery and archiving procedures;
- Planning and coordinating database security measures; communicating regularly with internal technical, applications and operational staff, to ensure the database integrity and security; [and]
- Creating, procuring and maintaining various database related documents such as manuals and programmers handbooks.

In addition, the petitioner states that "[d]ue to the highly specialized nature of these duties, the position of a Software Engineer should have at least a bachelor's degree (or its equivalent) in electrical engineering, computer science, software engineering, or a related field."

With the Form I-129 petition, the petitioner submitted a copy of the beneficiary's Master of Science degree in Electrical Engineering and transcript from [REDACTED]. The degree was awarded on May 28, 2010.

The petitioner also 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 of "Software Developers, Applications" - SOC (ONET/OES Code) 15-1132, at a Level I (entry level) wage.

Further, in support of the Form I-129 petition, the petitioner submitted (1) an excerpt entitled

"Software Developers" from the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (hereinafter the *Handbook*), 2012-13 edition; (2) job vacancy announcements; and (3) materials regarding its business operations, including printouts from its website, copies of brochures, and a copy of its 2009 Federal Income Tax Return.

The director found the initial evidence insufficient to establish eligibility for the benefit sought and issued an RFE on August 20, 2012. The petitioner was asked to submit probative evidence 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 proffered position, to include specific details of the beneficiary's role within the petitioner's organization and a description of how, when, where, and with and for whom these duties occur, specific job duties, a description of the projects the beneficiary will work on, the percentage of time to be spent on each duty, level of responsibility, and hours per week of work.

On September 4, 2012, the petitioner and counsel responded to the RFE. In a letter dated August 27, 2012, the petitioner provided additional information regarding the proffered position as follows:

[The beneficiary] will be responsible for software design, development, implementation, and engineering, in addition to systems analysis which will directly result in the expanding success of our business by improving productivity of various departments throughout [the petitioner's] headquarters & all of its national & international branches.

* * *

The Software Engineer serves as the technical expert for the team and provides gap programming to extend system functionality to meet client and business specific requirements. Additionally, [the beneficiary] will be responsible for developing new software & customizing the aforementioned existing software (**proprietary & customized in-house**).

* * *

He will be responsible for upgrading and modifying existing proprietary software and systems, adding new features and optimizing the performance of the existing features. This includes, but is not limited to database restructuring, SQL query optimization, interface optimization, development of new functionalities & development of new interfaces & integration with MAS500 ERP software.

In addition, the petitioner provided a pie chart, which includes the percentage of time the beneficiary would spend performing the duties of the position. The chart indicates the following:

Design, Install, Implementation of Business Solutions, data migration, testing,

release, deliverables 15%

Installing SQL Server 200 and setting up ODBC; launching eEnterprise utilities and initializing the DYNAMICS database 15%

Performing post installation administration tasks Monitoring and managing database backups, logs and journals; 10%

[I]nstalling, maintaining and upgrading database software, restoring and recovering data as required 10%

Monitoring relational databases to optimize database performance, resource use, and physical implementations of databases; 10%

Controlling access, performance monitoring and tuning; reviewing, developing, and designing data models using standard diagramming techniques 10%

Collaborating in the design and development of new databases to meet new user needs and respond to/anticipate technological innovations 10%

Planning and coordinating database security measures 10%

Creating, procuring and maintaining various database related documents such as manuals and programmer handbooks 10%

The petitioner also submitted documents in support of the petition, including: (1) an organizational chart; (2) photographs of its IT and software department; and (3) a copy of its 2010 Federal Income Tax Return.

The director reviewed the information provided by the petitioner and counsel, but found the evidence insufficient to establish eligibility for the benefit sought and issued a NOID on November 5, 2012. The petitioner was asked to submit probative evidence to establish (1) that a specialty occupation position exists for the beneficiary; and (2) that there exists a reasonable and credible offer of employment if the position offered is determined to be a specialty occupation. The director outlined the specific evidence to be submitted.

On November 30, 2012, the petitioner responded to the NOID with a brief and additional evidence. Specifically, the petitioner submitted, in part, (1) articles from India regarding the petitioning company; (2) a printout from its website regarding its information technology and internal systems; (3) photographs of its "Server Rack Organization"; (4) diagrams of its networks; (5) an organizational chart of its IT department; and (6) IT employees' resumes.

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 December 12, 2012. Counsel submitted an appeal of the denial of the H-1B petition.¹

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."

Upon a review of the record of proceeding, the AAO finds that there are discrepancies and inconsistencies with regard to the proffered position. 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 discussed, the petitioner submitted an LCA in support of the petition that designated the proffered position to the corresponding occupational category of "Software Developers, Applications" - SOC (ONET/OES) code 15-1132. The wage level for the proffered position in the

¹ 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 and NOID, 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 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 and NOID. *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.

LCA corresponds to a Level I (entry). The prevailing wage source is listed in the LCA as the OES (Occupational Employment Statistics) OFLC (Office of Foreign Labor Certification) Online Data Center.² The LCA was certified on April 18, 2012. 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.³

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 worker) 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.⁴ 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 the U.S. Department of Labor's (DOL's) "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

² 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/>.

³ For additional information regarding prevailing wage determinations, 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.

⁴ 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.

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

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 and counsel repeatedly claim that the duties of the proffered position are complex, unique and/or specialized. For instance, in the April 12, 2012 letter of support, the petitioner stated that the beneficiary will be responsible for "[m]onitoring and managing database backups, logs and journals." In addition, the petitioner stated that "[d]ue to the highly specialized nature of these duties, the position of a Software Engineer should have at least a bachelor's degree (or its equivalent) in electrical engineering, computer science, software engineering, or a related field." Further, the petitioner claimed that "the complex and specialized job duties of the position [of] Software Engineer qualifies as an H-1B occupation." The petitioner also stated that "[a]n individual must have at least a Bachelor's degree because it is at this level that one attains the specialized body of knowledge of engineering science and technology principles and processes needed to perform the specialized and complex scientific job duties." In the August 27, 2012 letter, submitted in response to the director's RFE, the petitioner stated that the software engineer "serves as the technical expert for the team." The petitioner further stated that the proffered position requires the beneficiary "to utilize the theoretical and practical application of highly specialized knowledge of complex data management, software systems, to design, develop, and implement customizations to [the petitioner's] proprietary software." In addition, the petitioner claimed that the beneficiary "will be employed full-time performing specialized and complex job duties which require at least a bachelor's degree in the specific specialty of Computer Science, Software Engineering, or Electrical Engineering."

Additionally, in response to the director's NOID, the petitioner stated that "[t]he position of Software Engineer at [the petitioning company] is both unique and complex" and "the duties associated with the position of Software Engineer for [the petitioning company] are so specialized and complex." In the appeal, counsel states that "the offered position is responsible for performing highly complex and specialized software engineering duties for a large, complex global organization with uniquely sophisticated IT operations."

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, entry-level position relative to others within the occupation. 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.

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 \$57,096 per year on the LCA corresponds to a Level I for the occupational category of "Software Developers, Applications" for Orange County (Orange, California).⁵ The petitioner stated in the Form I-129 petition and LCA that the offered salary for the proffered position was \$58,000 per year. Notably, if the proffered position were designated as a higher level position, the prevailing wage at that time would have been \$73,528 per year for a Level II position, \$89,939 per year for a Level III position, and \$106,371 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).

⁵ For additional information regarding the prevailing wage for software developers, applications in Orange County, see the All Industries Database for 7/2011 - 6/2012 for Software Developers, Applications at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdcenter.com/OesQuickResults.aspx?code=15-1132&area=42044&year=12&source=1> (last visited July 10, 2013).

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 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 academic 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.

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 above 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 turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

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

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁶ As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Software Developers, Applications." The AAO reviewed the chapter of the *Handbook* entitled "Software Developers" but did not find that the duties of the proffered position correspond to this occupational classification.⁷ The *Handbook* describes the duties of "Software Developers" in the subsection entitled "What Software Developers Do" and states the following about the duties of this occupation:

Software developers are the creative minds behind computer programs. Some

⁶ All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

⁷ For additional information regarding the occupational category "Software Developers," *see* U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Software Developers, on the Internet at <http://www.bls.gov/ooh/Computer-and-Information-Technology/Software-developers.htm#tab-1> (last visited July 10, 2013).

develop the applications that allow people to do specific tasks on a computer or other device. Others develop the underlying systems that run the devices or control networks.

Duties

Software developers typically do the following:

- Analyze users' needs, then design, test, and develop software to meet those needs
- Recommend software upgrades for customers' existing programs and systems
- Design each piece of the application or system and plan how the pieces will work together
- Create flowcharts and other models that instruct programmers how to write the software's code
- Ensure that the software continues to function normally through software maintenance and testing
- Document every aspect of the application or system as a reference for future maintenance and upgrades
- Collaborate with other computer specialists to create optimum software

Software developers are in charge of the entire development process for a software program. They begin by understanding how the customer plans to use the software. They design the program and then give instructions to programmers, who write computer code and test it. If the program does not work as expected or people find it too difficult to use, software developers go back to the design process to fix the problems or improve the program. After the program is released to the customer, a developer may perform upgrades and maintenance.

Developers usually work closely with computer programmers. However, in some companies, developers write code themselves instead of giving instructions to programmers. For more information, see the profile on computer programmers.

Developers who supervise a software project from the planning stages through implementation sometimes are called IT (information technology) project managers. These workers monitor the project's progress to ensure that it meets deadlines, standards, and cost targets. IT project managers who plan and direct an organization's IT department or IT policies are included in the profile on computer and information systems managers. For more information, see the profile on computer and information systems managers.

The following are types of software developers:

Applications software developers design computer applications, such as word processors and games, for consumers. They may create custom software for a specific customer or commercial software to be sold to the general public. Some

applications software developers create complex databases for organizations. They also create programs that people use over the Internet and within a company's intranet.

Systems software developers create the systems that keep computers functioning properly. These could be operating systems that are part of computers the general public buys or systems built specifically for an organization. Often, systems software developers also build the system's interface, which is what allows users to interact with the computer. Systems software developers create the operating systems that control most of the consumer electronics in use today, including those in phones or cars.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Software Developers, on the Internet at <http://www.bls.gov/ooh/Computer-and-Information-Technology/Software-developers.htm#tab-2> (last visited July 10, 2013).

In the section of the *Handbook* entitled "Work Environment," the *Handbook* states that software developers work in the following industries:

Software developers held 913,100 jobs in 2010.

Many software developers work for computer systems design and related services firms or software publishers. Some work in computer and electronic product manufacturing industries. Some developers telecommute (work away from the office).

The following table shows the industries where software developers are most commonly employed.

Computer systems design and related services	32%
Computer and electronic product manufacturing	10
Finance and insurance	8
Software publishers	7

Handbook, 2012-13 ed., Software Developers, on the Internet at <http://www.bls.gov/ooh/Computer->

and-Information-Technology/Software-developers.htm#tab-3 (last visited July 10, 2013).

The AAO reviewed the record of proceeding, but is not persuaded by the petitioner's claim that the proffered position falls under the occupational category for software developer positions. The AAO notes that in the Form I-129 the petitioner designated its business operations under the North American Industry Classification System (NAICS) code 423320 – "Brick, Stone, and Related Construction Material Merchant Wholesalers."⁸ The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This industry comprises establishments primarily engaged in the merchant wholesale distribution of stone, cement, lime, construction sand, and gravel; brick; asphalt and concrete mixtures; and/or concrete, stone, and structural clay products.

U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 423320 – Brick, Stone, and Related Construction Material Merchant Wholesalers, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited July 10, 2013). The AAO notes that this industry is not one of the industries employing the largest numbers of software developers according to the *Handbook*.

Upon review of the record of proceeding and the chapter regarding "Software Developers" in the *Handbook*, the AAO finds that the petitioner has not provided sufficient evidence to demonstrate that its software engineer position has the same or similar duties, tasks, knowledge, work activities, etc. that are generally associated with "Software Developers." For example, the AAO notes that the petitioner does not claim that the beneficiary will analyze users' needs, then design, test, and develop software to meet those needs. In addition, the petitioner does not claim that the beneficiary will create flowcharts and other models that instruct programmers how to write the software's code. Additionally, the petitioner does not assert that the beneficiary will design the program and then give instructions to programmers, who write computer code and test it. Further, the petitioner does not assert that the beneficiary will design computer applications, such as word processors and games, for consumers. The petitioner also does not claim that the beneficiary will create custom software for a specific customer or commercial software to be sold to the general public. This is further illustrated by the fact that the petitioner is not in the computer systems design and related services industry. The duties of the proffered position, to the extent that they are depicted in the record of proceeding, indicate that the beneficiary may perform a few general tasks in common with this occupational group, but not that the beneficiary's duties would constitute a software developer position, and not that they would require the range of specialized knowledge that characterizes this occupational category.

As the petitioner has not demonstrated that the proffered position falls under the occupational category of "Software Developers," the AAO will not further address this occupational category as it is not relevant to this proceeding.

⁸ 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 U.S. Dep't of Commerce, U.S. Census Bureau, NAICS, on the Internet at <http://www.census.gov/eos/www/naics/> (last visited July 10, 2013).

The director reviewed the job description provided by the petitioner and found that the proffered position falls under the occupational classifications of "Computer Support Specialists" and "Network and Computer Systems Administrators." The *Handbook* states the following about the occupational category of "Computer Support Specialists":

Computer support specialists provide help and advice to people and organizations using computer software or equipment. Some, called technical support specialists, support information technology (IT) employees within their organization. Others, called help-desk technicians, assist non-IT users who are having computer problems.

Duties

Technical support specialists typically do the following:

- Test and evaluate existing network systems
- Perform regular maintenance to ensure that networks operate correctly
- Troubleshoot local area networks (LANs), wide area networks (WANs), and Internet systems

Technical support specialists, also called computer network support specialists, usually work in their organization's IT department. They help IT staff analyze, troubleshoot, and evaluate computer network problems. They play an important role in the daily upkeep of their organization's networks by finding solutions to problems as they occur. Solving an IT problem in a timely manner is important because organizations depend on their computer systems. Technical support specialists may provide assistance to the organization's computer users through phone, email, or in-person visits. They often work under network and computer systems administrators, who handle more complex tasks. For more information, see the profile on network and computer systems administrators.

Help-desk technicians typically do the following:

- Pay attention to customers when they describe their computer problems
- Ask customers questions to properly diagnose the problem
- Walk customers through the problem-solving steps
- Set up or repair computer equipment and related devices
- Train users to use new computer hardware or software, including printing, installation, word processing, and email
- Give information to others in the organization about what gives customers the most trouble and other concerns customers have

Help-desk technicians, also called computer user support specialists, usually provide technical help to non-IT computer users. They respond to phone and email requests for help. Sometimes they make site visits so that they can solve a problem in person. Help-desk technicians may solve a range of problems that vary with the industry and

the particular firm. Some technicians work for large software companies and for support service firms and must give instructions to business customers on how to use complex programs. Others work in call centers answering simpler questions from consumers. Some technicians work for organizations and help non-IT workers with their computer problems.

Handbook, 2012-13 ed., Computer Support Specialists, on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-support-specialists.htm#tab-2> (last visited July 10, 2013).

The subchapter of the *Handbook* entitled "How to Become a Computer Support Specialist" states, in part, the following about this occupation:

Because of the wide range of skills for different computer support jobs, there are many paths into the occupation. A bachelor's degree is required for some computer support specialist positions, but an associate's degree or postsecondary classes may be enough for others. After being hired, many workers enter a training program that lasts for several months.

Education

Training requirements for computer support specialists vary, but many employers prefer to hire applicants who have a bachelor's degree. More technical positions are likely to require a degree in a field such as computer science, engineering, or information science, but for others the applicant's field of study is less important. Some lower level help-desk jobs or call-center jobs require some computer knowledge, but not necessarily a postsecondary degree.

Handbook, 2012-13 ed., Computer Support Specialists, available on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-support-specialists.htm#tab-4> (last visited July 10, 2013).

The typical duties of the occupational category "Computer Support Specialists" as described in the *Handbook* contain some aspects in common with the beneficiary's duties as described by the petitioner. However, the AAO finds that the occupational category as described in the *Handbook* does not fully encompass the duties of the proffered position. It is further noted that the *Handbook* does not report that, as an occupational group, "Computer Support Specialists" require at least a bachelor's degree in a specific specialty. More specifically, the *Handbook* states that there are many paths into the occupation. The *Handbook* reports that a bachelor's degree is required for some computer support specialist positions, but an associate's degree or postsecondary classes may be enough for others. The narrative of the *Handbook* reports that training requirements for computer support specialists vary, but many employers prefer to hire applicants who have a bachelor's degree. The *Handbook* further states that more technical positions are likely to require a degree in a field such as computer science, engineering, or information science, but for others the applicant's field of study is less important. In addition, the *Handbook* states that some lower level

help-desk jobs or call-center jobs require some computer knowledge, but not necessarily a postsecondary degree. Thus, for this occupation, a baccalaureate or higher degree in a specific specialty, or its equivalent, is not normally the minimum requirement for entry.

The AAO will now look at the "Network and Computer Systems Administrators" chapter of the 2012-13 edition of the *Handbook*. The AAO finds that many of the duties described by the petitioner reflect the duties of a network and computer systems administrator position. The *Handbook* states the following about this occupation:

Computer networks are critical parts of almost every organization. Network and computer systems administrators are responsible for the day-to-day operation of these networks. They organize, install, and support an organization's computer systems, including local area networks (LANs), wide area networks (WANs), network segments, intranets, and other data communication systems.

Duties

Network and computer systems administrators typically do the following:

- Determine what the organization needs in a network and computer system before it is set up
- Install all network hardware and software and make needed upgrades and repairs
- Maintain network and computer system security and ensure that all systems are operating correctly
- Collect data to evaluate the network's or system's performance and help make the system work better and faster
- Train users on the proper use of hardware and software when necessary
- Solve problems quickly when a user or an automated monitoring system lets them know about a problem

Administrators manage an organization's servers. They ensure that email and data storage networks work properly. They also make sure that employees' workstations are working efficiently and stay connected to the central computer network. Some administrators manage telecommunication networks at their organization.

In some cases, administrators help network architects who design and analyze network models. They also participate in decisions about buying future hardware or software to upgrade the organization's network. Some administrators provide technical support to computer users, and they may supervise computer support specialists who help users with computer problems.

Handbook, 2012-13 ed., Network and Computer Systems Administrators, on the Internet at <http://www.bls.gov/ooh/Computer-and-Information-Technology/Network-and-computer-systems-administrators.htm#tab-2> (last visited July 10, 2013).

The subchapter of the *Handbook* entitled "How to Become a Network and Computer Systems Administrator" states, in part, the following about this occupation:

Network and computer systems administrators must often have a bachelor's degree, although some positions require an associate's degree or professional certification along with related work experience.

Education

A bachelor's degree in fields related to computer or information science is most common. However, because administrators work with computer hardware and equipment, a degree in computer engineering or electrical engineering usually is acceptable as well. These programs usually include classes in computer programming, networking, or systems design.

Some positions require an associate's degree or a postsecondary certificate in a computer field with related work experience.

Because network technology is continually changing, administrators need to keep up with the latest developments. Many continue to take courses throughout their careers. Some businesses require that an administrator get a master's degree.

Handbook, 2012-13 ed., Network and Computer Systems Administrators, on the Internet at <http://www.bls.gov/ooh/Computer-and-Information-Technology/Network-and-computer-systems-administrators.htm#tab-4> (last visited July 10, 2013).

Upon review of the chapter of the *Handbook* regarding "Network and Computer Systems Administrators," the AAO observes that 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 entry into the occupation. The *Handbook* states that network and computer systems administrators must often have a bachelor's degree, although some positions require an associate's degree or professional certification along with related work experience. Thus, the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty. The narrative of the *Handbook* states that a bachelor's degree in fields related to computer or information science is most common. The *Handbook* further reports that because administrators work with computer hardware and equipment, a degree in computer engineering or electrical engineering usually is acceptable as well. Furthermore, the *Handbook* states that some positions require an associate's degree or a postsecondary certificate in a computer field with related work experience. The *Handbook* does not conclude that normally the minimum requirement for entry into this position is at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the *Handbook* does not support the claim that normally the minimum requirement for entry into jobs falling under this occupational category is at least a bachelor's degree in a specific specialty, or its equivalent.

It is incumbent upon the petitioner to provide persuasive evidence that the proffered position

qualifies as a specialty occupation under this criterion, notwithstanding the absence of *Handbook* support on the issue. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." As previously discussed, 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).

Upon review of the record, 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 a 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 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 first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

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

In the Form I-129 petition, the petitioner describes itself as a distributor and importer of natural stone established in 1975, with 600 employees in the United States. The petitioner claims that it has a gross annual income of "\$340 Million". The petitioner did not provide its net annual income. As previously discussed, the petitioner designated its business operations under the NAICS code 423320 – "Brick, Stone, and Related Construction Material Merchant Wholesalers."

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 advertising organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

In support of the assertion that the proffered position is a specialty occupation under this criterion of the regulations, the petitioner submitted copies of three job advertisements with the initial petition. The AAO notes that the petitioner did not provide any independent evidence of how representative the job posting 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 actual hiring practices of these employers.

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

For example, the petitioner has submitted advertisements for organizations that do not appear to be similar to the petitioner. More specifically, the advertisements include positions with [REDACTED] (a company in the engineering industry), and [REDACTED] (a company in the engineering services industry). 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. 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 the advertising organizations.

Furthermore, the petitioner has not established that the advertisements are for parallel positions. For instance, the petitioner provided a posting for a software engineer position, which requires a candidate to possess a degree and "[a]t least 3 years of relevant industry experience." Another submission is for a software engineer position with [REDACTED] which requires a candidate to possess a degree, plus the following:

- * Minimum of three (3) years programming for software intensive projects using a minimum of one (1) of the programming languages C, C++, Python, JAVA
- * Minimum of five (5) years working on software intensive projects for government or industry customers demonstrating increasing levels of technical expertise and responsibility

* * *

- * Minimum of two (2) years programming experience conducting software development and integration on Linux

These advertised positions appear to be for more senior positions than the proffered position. As previously discussed, the petitioner designated the proffered position on the LCA through the wage level as an entry-level position. Moreover, there is a lack of information regarding the day-to-day tasks, complexity of the job duties, supervisory duties, independent judgment required and the amount of supervision received. The petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position. Without further information, the petitioner has not established that the advertised positions are parallel to the proffered position.

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, the petitioner submitted a posting for Performance Software, which states that a "BS degree required with preference for Computer Science, Electrical Engineering, Computer Engineering or Computer Systems Engineering." Obviously, a *preference* for a degree in these fields are not an indication of a minimum *requirement*.

The AAO reviewed all of the advertisements submitted in support of the petition.⁹ 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.

It must be noted that even if all of the job postings indicated that a requirement of a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.

Moreover, although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these job advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

Thus, based upon a complete review of the record, the AAO finds that the petitioner has not

⁹ 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.

established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry for positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. Thus, for the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

The AAO acknowledges that the petitioner and its counsel may believe that the proffered position involves complex or unique tasks. In the instant case, the petitioner submitted documentation regarding its business operations, including printouts from its website, copies of brochures, copies of its 2009 and 2010 Federal Income Tax Returns, organizational charts, photographs of its IT and software department, articles from India regarding the petitioning company, a printout from its website regarding its information technology and internal systems, photographs of its "Server Rack Organization," and diagrams of its networks. However, upon review of the record of proceeding, the AAO finds that the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. 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.

In the instant case, the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. Specifically, the petitioner failed to demonstrate how the duties of the position as 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 the proffered position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here 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 "Software Developers, Applications" at a Level I (entry level) wage. The wage level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.¹⁰

¹⁰ 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

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."

Therefore, the evidence of record does not establish that this position is significantly different from other network and computer systems administrator positions such that it refutes the *Handbook's* information to the effect that an associate's degree or a postsecondary certificate with related work experience is acceptable for such positions. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique than 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 educational background 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 and counsel do not sufficiently 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. Upon review of the record of proceeding, the petitioner has failed to establish the proffered position as satisfying this prong of the criterion at 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 merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree 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.

In response to the director's NOID, the petitioner asserts that "[a]ll software engineers and IT staff employed by [the petitioner] hold baccalaureate degrees in Computer Science, Electronics Engineering, Information Technology, or MIS [Management Information Systems]." The petitioner further states, "Please refer to the organizational chart and the resumes confirming employees and their credentials (degrees) at Exhibits 5 and 8." The AAO observes that in support of its assertion, the petitioner only submitted an organizational chart and resumes of six of its employees in the IT department.¹¹ The petitioner did not submit the employees' academic credentials until the appeal.¹²

¹¹ The petitioner should note that the evidentiary weight of a resume is insignificant. It represents a claim by an individual, rather than evidence to support that claim.

¹² With regard to the academic credentials, the AAO notes that this evidence was encompassed by the director's NOID but only submitted on appeal. It is, therefore, outside the scope of the appeal. As previously discussed, 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

Notably, the organizational chart indicates that the beneficiary is the only software engineer in the petitioner's IT department. Thus, the AAO finds that the resumes and academic credentials are irrelevant to this matter as the employees are not in the proffered position.

Moreover, the petitioner stated in the Form I-129 petition that it was established in 1975 (approximately 37 years prior to the H-1B submission). The petitioner did not provide the total number of people it currently employs, or in the past has employed, to serve in the proffered position but claims that it currently employs approximately 600 individuals in the United States. Consequently, it cannot be determined how representative the petitioner's claim regarding *six individuals over a 37 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.

Upon review of the record, the petitioner has not provided sufficient 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 and counsel may believe that the nature of the specific duties of the position in the context of its business operations 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. As previously noted, the petitioner submitted documentation regarding its business operations, including printouts from its website, copies of brochures, copies of its 2009 and 2010 Federal Income Tax Returns, organizational charts, photographs of its IT and software department, articles from India regarding the petitioning company, a printout from its website regarding its information technology and internal systems, photographs of its "Server Rack Organization," and diagrams of its networks. The AAO reviewed all of the evidence in the record, however, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the petitioner has not established that the nature of the specific duties that the beneficiary will perform are more

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; *see also Matter of Obaighena*, 19 I&N Dec. 533. 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.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted for the first time on appeal.

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 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. 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."

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.

As previously mentioned, 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 1043, *aff'd*, 345 F.3d 683; *see also Soltane v. DOJ*, 381 F.3d 145 (noting that the AAO conducts appellate review on a *de novo* basis).

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