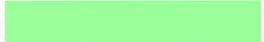




U.S. Citizenship  
and Immigration  
Services

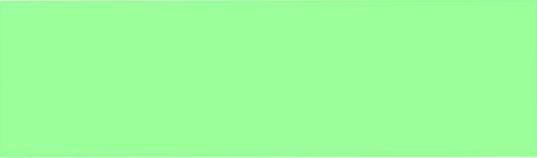
(b)(6)



Date: JUN 14 2013 Office: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:  


INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner stated that it is a wholesaler and retailer of medical supplies, clothing, and accessories. To continue to employ the beneficiary in what it designates as a programmer/analyst position, the petitioner endeavors 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 it would employ the beneficiary in a specialty occupation position. On appeal, present counsel asserted that the director's basis for denial was erroneous and contended that the petitioner satisfied all evidentiary requirements. In support of these contentions, counsel submitted a brief and additional evidence.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and present counsel's brief and attached exhibits in support of the appeal.

The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would employ the beneficiary in a specialty occupation position. 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, the position must also meet one of the following criteria:

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

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

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.

With the visa petition, previous counsel submitted a letter, dated January 27, 2009, from the petitioner's CEO. That letter states that the beneficiary continues to be responsible for performing the following duties:

- Develop e-commerce websites using Oracle, D2k, SQL Service, ASP, VB Script, Java Script, HTML, VB6, MTS, Crystal Reports 8.0, UML and COM technologies;
- Design, build, implement, and deploy e-commerce web applications;
- Develop Search Engine Optimization; keyword advertisement on the internet;
- Responsible for computerization of inventory and point of sale systems;
- Develop necessary programs for E-bay buying, accounting systems and private insurance and Medicare billing.

On October 19, 2009, the service center issued an RFE in this matter. The service center requested, *inter alia*, additional evidence that the petitioner would employ the beneficiary in a specialty occupation, including a more detailed description of the duties of the proffered position. The director also asked for the petitioner to state the minimum educational requirements for the position and to explain why the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty.

In response, the petitioner submitted, *inter alia*, vacancy announcements and a letter, dated November 18, 2009, from the petitioner's previous counsel. In that letter, previous counsel reiterated the duties described by the petitioner's CEO and added the following duties:

- Analyze, design, program, test, debug, implement, and maintain .NET server and web-based applications and the petitioner's website. Research and define user requirements and solve problems and mediate issues as required
- Maintain and improve the development life cycle including testing processes and methods, variable programming fundamentals, conditional execution, data structures, compilation and debugging tools

The AAO observes that counsel did not indicate any basis for his assertion that the proffered position includes those two additional duties. Further, the RFE asked for a more detailed description of the duties of the proffered position; it was not a request for the petitioner to add additional duties or change the job responsibilities of the proffered position.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. See 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated

job responsibilities. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If material changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. See 8 C.F.R. § 214.2(h)(2)(i)(E). Here, the information provided by the petitioner in its response to the director's RFE did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. Therefore, previous counsel's additions to the description of the duties of the proffered position will not be considered.

Previous counsel also stated, as to the job duties described:

The job duties as described above are complex involving professional responsibilities and extensive knowledge of the design, development, and implementation of computer software applications systems, the creation of multi-functional e-Commerce websites, and the development of the programs necessary for the petitioner's operations.

As to the minimum educational requirement for the proffered position, previous counsel stated:

The knowledge and specialized skills required to perform the job duties of the proffered position can be obtained only as part of at least a Bachelor's degree in Computer Engineering, Information Technology, Computer Science, or a related field awarded by accredited institutions of higher education in the United States.

The AAO observes that, in addition to the vacancy announcements submitted in response to the RFE, present counsel submitted other vacancy announcements for consideration. The AAO will address all of the vacancy announcements together, *infra*.

The director denied the petition on March 1, 2010, finding, as was noted above, that the petitioner had not established that the proposed position qualifies for classification as a specialty occupation. In that decision, the director found that the duties of the proffered position show that it is a computer programmer position, rather than a programmer analyst position, and analyzed the proffered position as such.

On appeal, counsel asserted that, contrary to the director's finding, the proffered position is a programmer analyst position and not a computer programmer position.<sup>1</sup> Counsel cited DOL's *Occupational Outlook Handbook (Handbook)* for the proposition that programmer analyst positions clearly require a minimum of a bachelor's degree or the equivalent in a specific specialty. Counsel

---

<sup>1</sup> It is noted for the record that the Labor Condition Application (LCA) submitted in support of the petition was certified for a Level I, entry-level computer programmer position. Accordingly, counsel's claim on appeal that the position is a programmer analyst position is at odds with the petitioner's attestations to the U.S. Department of Labor (DOL) that the proffered position is in fact that of a computer programmer.

stated that the *Handbook* indicates, "Only applicants with bachelor's degrees in a specialized field directly related to the type of business the organization conducts will be considered."

The AAO will now address the supplemental, alternative requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A). It will first address the alternative requirement of 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied if the petitioner demonstrates that the particular position here proffered normally requires a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into the position.

The AAO recognizes the *Handbook*, cited by counsel, as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>2</sup> The duties of the proffered position were very abstractly described by its CEO. Those duties have never been more concretely described, despite the formal request for more detail pertinent to those duties. Nevertheless, upon review of the job description provided, the AAO finds that the beneficiary will more likely than not perform the duties of a web developer. The *Handbook* describes the duties of a web developer, in the chapter entitled "Information Security Analysts, Web Developers, and Computer Network Architects, as follows:

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

Web developers typically do the following:

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

When creating a website, developers have to make their client's vision a reality. They work with clients to determine what sites should be used for, including ecommerce,

---

<sup>2</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2012 – 2013 edition available online.

news, or gaming. The developer has to decide which applications and designs will fit the site best.

The following are some types of web developers:

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

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

**Webmasters** maintain websites and keep them updated. They ensure that websites operate correctly and test for errors such as broken links. Many webmasters respond to user comments as well.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Information Security Analysts, Web Developers, and Computer Network Architects" <http://www.bls.gov/ooh/computer-and-information-technology/information-security-analysts-web-developers-and-computer-network-architects.htm#tab-2> (last visited June 5, 2013).

The *Handbook* describes in pertinent part the educational requirements of web developer positions as follows:

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

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

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

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

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

A preference for applicants with a bachelor's degree is not a minimum requirement. Further, even for those web developer positions that may require a degree, the *Handbook* does not indicate that the degree must be in any specific specialty. In any event, the *Handbook* clearly indicates that individuals with only high school diplomas may enter the occupation of web developer. Therefore, the *Handbook* offers little to no support for the proposition that web developer positions require a minimum of a bachelor's degree in a specific specialty or the equivalent for entry into the occupation.

The vacancy announcements submitted are the remaining evidence submitted to show that programmer analyst positions normally require a minimum of a bachelor's degree or the equivalent in a specific specialty. The proffered position as described, however, is a web developer position, not a programmer analyst position. In any event, a number of the announcements do not support a finding that the positions they announce require a minimum of a bachelor's degree in a specific specialty or its equivalent.

Further, even if all 12 positions were demonstrated to be for parallel positions in the petitioner's industry with organizations similar to the petitioner and required a minimum of a bachelor's degree in a specific specialty or its equivalent, the submission of 12 announcements is statistically insufficient to demonstrate a standard entry requirement.<sup>3</sup> Simply put, these vacancy announcements provide insufficient support for the proposition that programmer analyst positions normally require a minimum of a bachelor's degree in a specific specialty or its equivalent and have no bearing at all on web developer positions, such as the proffered position.

---

<sup>3</sup> 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").

As such, even if the job announcements supported the finding that the position of web developer for firms similar to and in the same industry as the petitioner required a bachelor's or higher degree in a specific specialty or its equivalent, 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.

The petitioner has not demonstrated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

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

As was observed above, the *Handbook* provides little to no support for the proposition that the petitioner's industry requires web developers to possess a minimum of a bachelor's degree or the equivalent in a specific specialty for entry into the occupation. The record contains no evidence pertinent to a professional association of web developers that requires a minimum of a bachelor's degree or the equivalent in a directly related specific specialty as a condition of entry. The record contains no letters or affidavits from others in the wholesale and retail distribution industry.

The vacancy announcements submitted are the remaining evidence that might bear on the requirements of the petitioner's industry in recruiting and hiring web developers. As was noted above, however, the vacancy announcements are not for web developer positions. In addition, none of the companies that placed those announcements have been shown to be in the petitioner's industry. Further, even if all of those announcements were placed by companies in the petitioner's industry for positions parallel to the proffered position, which according to the submitted LCA is an entry-level position, they would not indicate a standard minimum entry requirement of a bachelor's degree in a specific specialty or its equivalent, as several of them have not shown that the positions they announce require a minimum of a bachelor's degree in a specific specialty or its equivalent based on the equivalency standards required by the pertinent H-1B regulatory provisions.

For example, one of the vacancy announcements provided was placed by [REDACTED] of Minneapolis, Minnesota, for a programmer analyst. At one point it states that the position requires a minimum of a bachelor's degree in computer science, management information systems, a related field, or equivalent experience. It does not describe the experience it would accept as equivalent to a bachelor's degree in one of those subjects. Elsewhere, the announcement states that a bachelor's degree in one of those subjects or a related subject is *preferred*, making clear, thereby, that it is not a minimum requirement.

Another vacancy announcement was placed by [REDACTED] in St. Paul, Minnesota for a CMS programmer/analyst. It states that the position requires a "Degree in Computer Science or equivalent degree/experience." It does not make clear what experience or other degree it would consider to be equivalent to a degree in computer science. It does not make explicit that the degree required must be a minimum of a bachelor's degree, as opposed to an associate's degree.

Another announcement was placed by [REDACTED] for a programmer/analyst to work in Schaumburg, Illinois. It states that the position requires a "Bachelor's degree in Computer Science or comparable experience," but does not indicate what experience it would consider to be comparable to a bachelor's degree.

Another announcement was placed by the [REDACTED] of Quincy, Massachusetts for a Senior Programmer/Analyst. It states that the position requires a bachelor's degree in computer science or business. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business or business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. As such, an educational requirement that may be satisfied by an otherwise undifferentiated bachelor's degree in business or business administration is not a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent. As a general degree in business, without more, does not delineate a degree in a specific specialty, that announcement does not indicate that the position offered requires a minimum of a bachelor's degree in a specific specialty or its equivalent. Although the posting also indicates that four to seven years of related information systems experience is required, it is not clear whether this experience is required in addition to one of the stated degrees or as part of what the hiring corporation deems to be "equivalent" to a bachelor's degree in computer science or business. In either case, no evidence is presented that a general bachelor's degree in business and four years of information systems experience is equivalent to a bachelor's degree in a specific specialty.

Another announcement was placed by [REDACTED] for a "Mid level .Net Programmer" to work in Grand Prairie, Texas. It states that the position requires a bachelor's degree in "Information Technology, Computer Science, Math or Engineering." The AAO observes that the proffered position purports to be a programmer analyst position, rather than a programmer position. Further, "Information Technology, Computer Science, Math or Engineering" have not been shown by the petitioner to constitute a specific specialty. In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as 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). Here, the job posting does not indicate how each of the fields in the specified array (information technology, computer science, math and engineering) is directly related to the duties and responsibilities of the posted position. Absent such evidence, this vacancy announcement also does not state a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent.

Lastly, one vacancy announcement placed by [REDACTED] for a senior programmer analyst to work in Foxboro, Massachusetts states that the position requires a bachelor's degree in computer science or a related field or equivalent work experience. It does not indicate, however, what other subjects might be considered sufficiently closely related to computer science or what work experience would be considered equivalent to a bachelor's degree in computer science or in one of those fields.

The petitioner has not demonstrated that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar organizations and has not, therefore, satisfied the criterion of 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 demonstrates that, notwithstanding that other web developer positions in the petitioner's industry may not require a minimum of a bachelor's degree in a specific specialty, or its equivalent, the particular position proffered in the instant case is so complex or unique that it can be performed only by an individual with such a degree.

The record contains no evidence, however, that the proffered position is complex or unique as compared to other web developer positions. Without additional detail, which was, as was observed above, requested but not provided, the AAO is unable to discern anything unusually complex or unique about developing E-commerce websites, or designing, building, implementing, and deploying E-commerce web applications relative to the duties performed by other web developers.

The petitioner has not demonstrated that the particular position proffered is so complex or unique that it can be performed only by an individual with a degree; and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record contains no evidence that the petitioner has ever previously hired anyone to fill the proffered position, and the petitioner has not, therefore, provided any evidence for analysis under the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).<sup>4</sup>

---

<sup>4</sup> While a petitioner may believe or otherwise assert that a proffered position requires a degree in a specific specialty, 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

Finally, the AAO will address the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner demonstrates that 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, or its equivalent.

Again, however, nothing about the duties of the proffered position evinces specialization and complexity greater than other web developer positions, some of which, the *Handbook* suggests, may only require a minimum of a high school diploma. The petitioner has not demonstrated that developing websites and search engine optimization, being responsible for inventory and point-of-sale systems, and developing web applications are beyond the capabilities of a web developer without a minimum of a bachelor's degree in a specific specialty or its equivalent.

The petitioner has not demonstrated that 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 in a specific specialty or its equivalent. The petitioner has not, therefore, demonstrated that it has satisfied the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).<sup>5</sup>

---

long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. See *Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and 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 section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

<sup>5</sup> Counsel asserts on appeal that the duties of the proffered position "are far more complex than those of a Computer Programmer . . . ." In addition and as previously noted, prior counsel also asserted that the job duties of the proffered position are "complex." Again, however, based on the prevailing wage listed on the LCA submitted in support of the instant petition, it is clear that the petitioner has designated the proffered position as a Level I computer programmer, indicating that it is an entry-level computer programmer position for an employee who has only basic understanding of that occupation. 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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf). Therefore, it is not credible that the position is either (1) a programmer analyst or (2) a computer programmer position with specialized and complex duties, as such a higher-level position "far more complex than . . . a Computer Programmer" would be classified as at least a Level IV computer programmer position, requiring a significantly higher prevailing wage (which at that time was \$88,192 per year in Los Angeles County). While the petitioner did claim that it would pay the beneficiary an annual salary of \$100,000, this does not explain or reconcile why the petitioner designated the proffered position as being only a Level I computer programmer position on the submitted LCA. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

As 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), the AAO therefore finds that the director was correct in her determination that the record before her failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the evidence and argument submitted on appeal has not remedied that failure. Accordingly, the appeal will be dismissed and the petition denied on this basis.

Beyond the decision of the director, the petition must also be denied due to the petitioner's failure to provide a certified LCA that corresponds to the petition. Specifically, the job title on the LCA submitted with the petition reads "Programmer Analyst." As determined *supra*, however, the job as described by the petitioner is best classified as a web developer position. As such, the petitioner was required to provide at the time of filing an LCA certified for a web developer, in order for it to be found to correspond to the petition.<sup>6</sup>

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

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA that has been certified for the proper occupational classification or wage level, and the petition must be denied for this additional reason.

As a final note, the AAO recognizes that this is an extension petition. The director's decision does not indicate whether she reviewed the prior approvals of the previous nonimmigrant petitions filed on behalf of the beneficiary. If the previous nonimmigrant petitions were approved despite the same evidentiary deficiencies and inconsistencies that are contained in the current record, those approvals would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*,

---

<sup>6</sup> Even assuming *arguendo* that the proffered position is a complex programmer analyst position, as claimed, the LCA still would not correspond to the petition as it was certified (1) for an entry-level position and (2) for a computer programmer position.

19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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