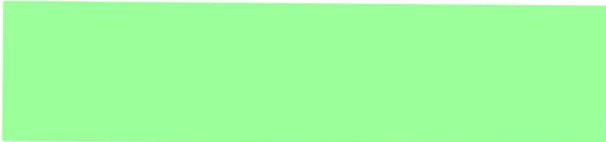
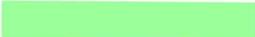


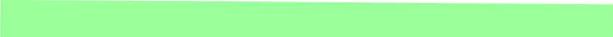


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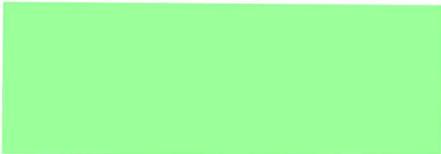


DATE: JUN 21 2013 Office: VERMONT SERVICE CENTER File: 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

*for Michael T. Kelly*  
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.

The petitioner, through counsel, submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center. On the Form I-129 visa petition, the petitioner describes itself as an IT consultancy business with 94 employees, established in [REDACTED]. In order to employ the beneficiary in a position to which it assigned the job title of "Business Analyst," the petitioner seeks to classify her 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 on the specialty occupation issue was erroneous. In support of this assertion, counsel for the petitioner submitted a brief and additional evidence.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's notice denying the petition; and (5) the petitioner's 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's decision 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, and the petition will be denied.

Later in this decision, the AAO will also address additional, independent grounds, not identified by the director's decision, that the AAO finds also preclude approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the petitioner (1) provided a credential evaluation that fails the unequivocal standard at 8 C.F.R. § 214.2(h)(4)(iii)(D)(I) that evaluations of training and/or experience be produced by an official who has authority to grant college level credit, for training and/or work experience in the specific specialty, at an accredited U.S. college or university, which has a program for granting such credit in the specialty; (2) failed to secure work for the beneficiary for the entire requested H-1B validity period at the time that it filed the H-1B visa petition; and (3) failed to establish that it will have a valid "employer-employee relationship" with the beneficiary of this petition. Thus, for these reasons as well, the appeal will be dismissed and the petition will be denied, with each considered as an independent and alternative basis for denial.<sup>1</sup>

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof

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<sup>1</sup> The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. See *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that

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

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

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position that it designates as a business analyst to work on a part-time basis at a salary of \$30.00 per hour.

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 "Management Analysts" – SOC (ONET/OES Code) 13-1111.00, at a Level I wage.

In its support letter, dated May 2, 2012, the petitioner stated that the proffered position requires "a Baccalaureate Degree in Computer Science, Computer Applications, Information Systems, Management, Business Administration, Engineering or a related quantitative technical or business discipline."

The petitioner also stated that the beneficiary holds a Bachelor of Science degree in Management from [REDACTED] and is enrolled in a Master of Science program in Information Technology at the [REDACTED]. The petitioner also indicated that the beneficiary had completed coursework at the [REDACTED].

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<sup>2</sup> The AAO notes that the beneficiary was previously briefly enrolled at [REDACTED]

With the petition, the petitioner submitted, *inter alia*, the following documents: (1) the petitioner's letter of support; (2) a copy of the Staffing Vendor Agreement, dated June 3, 2011, between [REDACTED] and the petitioner; (3) a copy of a document entitled "Authorization Letter," pursuant to the Independent Contractor Agreement (Staffing Vendor Agreement) dated June 3, 2011, executed by the petitioner on April 12, 2012 and by [REDACTED] on April 24, 2012 (hereinafter, the Authorization Letter); (4) a copy of a letter from [REDACTED] the end client, addressed "To whom it may concern," dated April 27, 2012 (hereinafter, the [REDACTED] Letter); (5) a copy of a letter from [REDACTED] addressed to the United States Immigration Service, dated April 24, 2012 (hereinafter, the [REDACTED] Letter); and (6) a copy of a document by the petitioner addressed "To whom it may concern," dated May 3, 2012 (hereinafter, the EBS Document).

In its support letter, dated May 2, 2012, the petitioner provided the following description of the proffered position:

Analyze our client's existing business, financial accounting and billing systems and propose changes in equipment, processes and procedures that would result in overall system enhancement. Conduct business process analysis, needs assessment, and preliminary cost/benefit analysis to align information technology solutions with business initiatives; Prepare functional, system and design specifications for Business applications; Study[] work procedures, information flows, production methods, inventory controls and cost analysis, Document findings and recommend new business and financial systems; Assist cross-functional team in drafting and designing the work flow and business operation procedures customized to client's needs. Respond to request for proposals, make presentations to senior management and be responsible for maintaining relationship with the client. Ensure timely submission of proposals and will be responsible for quantitative and qualitative goals for the account. Participate in Daily/weekly client meetings with Project Team Lead and Manager.

The Authorization Letter stated that the services to be rendered by the beneficiary are "Systems Integration & Test Engineer," but did not list the job duties.

The [REDACTED] Letter stated that the beneficiary's duties encompass the following:

- Review business requirements, functional specifications, project schedules, documentation and test plans.
- Perform Manual testing on [REDACTED] codes on different legacy boxes on both DVR and non DVR STBs.
- Track the issues which are found during the test executions.
- Add equipment and inventory on [REDACTED] billing systems.
- Actively participate in daily scrum meeting and weekly [REDACTED] meeting

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an *unaccredited* for-profit private undergraduate and graduate university in [REDACTED] See U.S. Dep't of Education, The Database of Accredited Postsecondary Institutions and Programs, available on the Internet at

<http://www.ope.ed.gov/accreditation/InstAccrDetails> [REDACTED]

[REDACTED] (last visited June 5, 2013).

- with project Team Lead and Manager.
- Document test results and report the status of assigned test tasks and issues to project Lead.
  - Involved in understanding the current business process, defining scope of the project along with position statement.

The [REDACTED] Letter stated that the beneficiary's job duties are the following:

- Reviewed business requirements, functional specifications, project schedules, documentation and test plans.
- Performed Manual testing on [REDACTED] codes on different legacy boxes and both DVR and non DVR STBs.
- Tracked the issues which were found during the test executions.
- Added equipment and inventory on the [REDACTED] and on [REDACTED] billing systems.
- Actively participated in daily scrum meeting and weekly [REDACTED] meeting with project Team Lead and Manager.
- Document test results and report the status of assigned test tasks and issues to project Lead.
- Involved in understanding the current business process, defining scope of the project along with position statement.

The EBS Document stated the same job duties and minimum educational requirements for the position that were stated in the petitioner's letter of support. The EBS Document further stated that "[a]s with any Programmer analyst<sup>3</sup>, the usual minimum requirement for performance of the job duties is a bachelor[']s degree in Computer Science, Computer Applications, Information Systems, Business Administration, Engineering or related field."

On July 30, 2012, the director denied the petition. 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. Counsel for the petitioner submitted a timely appeal of the denial of the H-1B petition.

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. 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.

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).

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<sup>3</sup> The AAO notes that, in the EBS Document, the petitioner referred to the proffered position as "Programmer analyst," whereas the petitioner had assigned the job title of "business analyst" to the proffered position (and attested to that job title) in the Form I-129.

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 normally the minimum requirement for entry into the particular position that is the subject of the petition.

On the Form I-129, the petitioner stated that the beneficiary would be employed in a business analyst position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, the specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally* *Defensor v. Meissner*, 201 F.3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in a specific specialty as the minimum for entry into the occupation, as required by the Act.

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>4</sup> As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Management Analysts."

The AAO reviewed the chapter of the *Handbook* entitled "Management Analysts," including the sections regarding the typical duties and requirements for this occupational category.<sup>5</sup> The director indicated that the position at the ultimate end-client, [REDACTED] appears to be an IT position with IT duties, not a management position. Upon review of the job descriptions provided by the petitioner, [REDACTED] the AAO finds that the proffered position most closely falls under the occupational classification of "Computer Systems Analysts." The AAO notes that the *Handbook* does not support a conclusion that either Management Analysts or Computer Systems Analysts constitute occupational groups to which entry normally requires at least a bachelor's degree, or its equivalent, in a specific specialty.

The "Management Analysts" chapter of the 2012-2013 edition of the *Handbook* describes the duties of such positions as follows:

Management analysts, often called management consultants, propose ways to improve an organization's efficiency. They advise managers on how to make organizations more profitable through reduced costs and increased revenues.

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<sup>4</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet at <http://www.bls.gov/ooh/>. The AAO's references to the *Handbook* are to the 2012-2013 edition available online.

<sup>5</sup> For additional information regarding the occupational category "Management Analysts," *see* U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Management Analysts, available on the Internet at <http://www.bls.gov/ooh/business-and-financial/management-analysts.htm#tab-1> (last visited June 5, 2013).

## Duties

Management analysts typically do the following:

- Gather and organize information about the problem to be solved or the procedure to be improved
- Interview personnel and conduct on-site observations to determine the methods, equipment, and personnel that will be needed
- Analyze financial and other data, including revenue, expenditure, and employment reports, including, sometimes, building and using sophisticated mathematical models
- Develop solutions or alternative practices
- Recommend new systems, procedures, or organizational changes
- Make recommendations to management through presentations or written reports
- Confer with managers to ensure that the changes are working

Although some management analysts work for the organization that they are analyzing, most work as consultants on a contractual basis.

Whether they are self-employed or part of a large consulting company, the work of a management analyst may vary from project to project. Some projects require a team of consultants, each specializing in one area. In other projects, consultants work independently with the client organization's managers.

Management analysts often specialize in certain areas, such as inventory management or reorganizing corporate structures to eliminate duplicate and nonessential jobs. Some consultants specialize in a specific industry, such as healthcare or telecommunications. In government, management analysts usually specialize by type of agency.

Organizations hire consultants to develop strategies for entering and remaining competitive in the electronic marketplace.

Management analysts who work on contract may write proposals and bid for jobs. Typically, an organization that needs the help of a management analyst solicits proposals from a number of consultants and consulting companies that specialize in the needed work. Those who want the work must then submit a proposal by the deadline that explains how they will do the work, who will do the work, why they are the best consultants to do the work, what the schedule will be, and how much it will cost. The organization that needs the consultants then selects the proposal that best meets its needs and budget.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Management Analysts, available on the Internet at <http://www.bls.gov/oooh/business-and-financial/management-analysts.htm#tab-2> (last visited June 5, 2013).

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

Most management analysts have at least a bachelor's degree. The Certified Management Consultant (CMC) designation may improve job prospects.

### **Education**

A bachelor's degree is the typical entry-level requirement for management analysts. However, some employers prefer to hire candidates who have a master's degree in business administration (MBA). In 2010, 28 percent of management analysts had a master's degree.

Few colleges and universities offer formal programs in management consulting. However, many fields of study provide a suitable education because of the range of areas that management analysts address. Common fields of study include business, management, accounting, marketing, economics, statistics, computer and information science, and engineering.

Analysts also routinely attend conferences to stay up to date on current developments in their field.

### **Certification**

The [REDACTED] offers the Certified Management Consultant (CMC) designation to those who meet minimum levels of education and experience, submit client reviews, and pass an interview and exam covering the [REDACTED] Code of Ethics. Management consultants with a CMC designation must be recertified every 3 years. Management analysts are not required to get certification, but it may give jobseekers a competitive advantage.

### **Work Experience**

Many analysts enter the occupation with years of work experience. Organizations that specialize in certain fields try to hire candidates who have experience in those areas. Typical work backgrounds include management, human resources, and information technology.

### **Advancement**

As consultants gain experience, they often take on more responsibility. At the senior level, consultants may supervise teams working on more complex projects and become more involved in seeking out new business. Those with exceptional skills may eventually become partners in their consulting organization and focus on attracting new clients and bringing in revenue. Senior consultants who leave their consulting company often move to senior management positions at non-consulting organizations.

*Id.*, Management Analysts, available on the Internet at <http://www.bls.gov/ooh/business-and-financial/management-analysts.htm#tab-4> (last visited June 5, 2013).

The *Handbook* does not support the assertion that at least a bachelor's degree in a *specific specialty* is normally the minimum requirement for entry into the Management Analyst occupation. While the *Handbook* indicates that a bachelor's degree is the typical entry-level requirement, the *Handbook* does not indicate that a degree in a *specific specialty* is normally the minimum requirement for entry into these positions. The *Handbook* reports that many fields of study provide a suitable educational path for these positions. The *Handbook* identifies common areas of study to include business, management, accounting, marketing, economics, statistics, computer and information science, and engineering. However, counsel has not submitted any evidence to establish that the fields of business, management, accounting, marketing, economics, statistics, computer and information science, and engineering encompass a specific specialty. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 marketing and computer information science, 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.<sup>6</sup> Section 214(i)(1)(B) of the Act (emphasis added).

Furthermore, the *Handbook* indicates that a common field of study for this occupation is business and that some employers prefer to hire candidates who have an advanced degree in business administration. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. Therefore, the *Handbook's* recognition that a general, non-specialty "background" in business administration is sufficient for entry into the occupation strongly suggests that a bachelor's degree *in a specific specialty* is not a normal, minimum entry requirement for this occupation. Accordingly, as the *Handbook* indicates that working as a management analyst does not

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<sup>6</sup> Whether read with the statutory "the" or the regulatory "a," both readings denote a singular "specialty." Section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Still, the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. As just stated, this also includes even seemingly disparate specialties provided the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

normally require at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation, it does not support the proffered position as being a specialty occupation.

Next, the AAO observes that the "Computer Systems Analysts" chapter of the 2012-2013 edition of the *Handbook* describes such positions as follows:

Computer systems analysts study an organization's current computer systems and procedures and make recommendations to management to help the organization operate more efficiently and effectively. They bring business and information technology (IT) together by understanding the needs and limitations of both.

### **Duties**

Computer systems analysts typically do the following:

- Consult with managers to determine the role of the IT system in an organization
- Research emerging technologies to decide if installing them can increase the organization's efficiency and effectiveness
- Prepare an analysis of costs and benefits so that management can decide if computer upgrades are financially worthwhile
- Devise ways to make existing computer systems meet new needs
- Design and develop new systems by choosing and configuring hardware and software
- Oversee installing and configuring the new system to customize it for the organization
- Do tests to ensure that the systems work as expected
- Train the system's end users and write instruction manuals, when required

Analysts use a variety of techniques to design computer systems such as data-modeling systems, which create rules for the computer to follow when presenting data, thereby allowing analysts to make faster decisions. They also do information engineering, designing and setting up information systems to improve efficiency and communication.

Because analysts work closely with an organization's business leaders, they help the IT team understand how its computer systems can best serve the organization.

Analysts determine requirements for how much memory and speed the computer system needs, as well as other necessary features. They prepare flowcharts or diagrams for programmers or engineers to use when building the system. Analysts also work with these people to solve problems that arise after the initial system is set up.

Most systems analysts specialize in certain types of computer systems that are specific to the organization they work with. For example, an analyst might work predominantly with financial computer systems or engineering systems.

In some cases, analysts who supervise the initial installation or upgrade of IT systems from start to finish may be called IT project managers. They monitor a project's progress to ensure that deadlines, standards, and cost targets are met. 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 examples of types of computer system analysts.

**Systems analysts** specialize in developing new systems or fine-tuning existing ones to meet an organization's needs.

**Systems designers or systems architects** specialize in helping organizations choose a specific type of hardware and software system. They develop long-term goals for the computer systems and a plan to reach those goals. They work with management to ensure that systems are set up to best serve the organization's mission.

**Software quality assurance (QA) analysts** do in-depth testing of the systems they design. They run tests and diagnose problems to make sure that certain requirements are met. QA analysts write reports to management recommending ways to improve the system.

**Programmer analysts** design and update their system's software and create applications tailored to their organization's needs. They do more coding and debugging the code than other types of analysts, although they still work extensively with management to determine what business needs the applications are meant to address. Other occupations that do programming are computer programmers and software developers. For more information, see the profiles on computer programmers and software developers.

*Id.*, Computer Systems Analysts, available on the Internet at <http://www.bls.gov/ooh/Computer-and-Information-Technology/Computer-systems-analysts.htm#tab-2> (last visited June 5, 2013).

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

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

### **Education**

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

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

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

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

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

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

### **Advancement**

With experience, systems analysts can advance to project manager and lead a team of analysts. Some can eventually become information technology (IT) directors or chief technology officers. For more information, see the profile on computer and information systems managers.

### **Important Qualities**

**Analytical skills.** Analysts must interpret complex information from various sources and be able to decide the best way to move forward on a project. They must also be able to predict how changes may affect the project.

**Communication skills.** Analysts work as a go-between with management and the IT department and must be able to explain complex issues in a way that both will understand.

**Creativity.** Because analysts are tasked with finding innovative solutions to computer problems, an ability to "think outside the box" is important.

**Teamwork.** The projects that computer systems analysts work on usually require them to collaborate and coordinate with others.

*Id.*, Computer Systems Analysts, available on the Internet at <http://www.bls.gov/ooh/Computer-and-Information-Technology/Computer-systems-analysts.htm#tab-4> (last visited June 5, 2013).

As evident in the excerpt above, the *Handbook* does not report that a bachelor's degree in a specific specialty is a normal requirement for entry into the "Computer Systems Analysts" occupational category. The *Handbook* states that "[m]ost computer systems analysts have a

bachelor's degree in a computer-related field," but "many analysts have technical degrees," and "[s]ome analysts have an associate's degree and experience in a related occupation."

When reviewing the *Handbook*, the AAO must note again that the petitioner designated the prevailing wage for the proffered position as wage for a Level I (entry level) position on the LCA.<sup>7</sup> This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.<sup>8</sup> That is, in accordance with the relevant DOL explanatory information on wage levels, this Level I wage rate is only appropriate for a position in which the beneficiary is only required to have a basic understanding of the occupation and would be expected to perform routine tasks that require limited, if any, exercise of judgment. This wage rate also indicates that the beneficiary 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.

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<sup>7</sup> Wage levels should be determined only after selecting the most relevant Occupational Information Network (O\*NET) code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. 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.

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

<sup>8</sup> The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is describes as follows:

**Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level 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.

*Id.*

When, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies the criterion, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In support of the proposition that the proffered position is a specialty occupation, on appeal, the petitioner provided an opinion letter, dated October 31, 2012, by [REDACTED] (evaluator), Associate Professor, Department of Computer Systems Technology, [REDACTED] ([REDACTED]), entitled "[REDACTED]".

The evaluator claims that the opinion letter is based upon his "experience as associate professor and evaluator of foreign credentials in the Computer Systems Technology Department of the [REDACTED]. The evaluator's resume indicates that he has served as an associate professor at [REDACTED] since 1998. The evaluator provided the following information regarding his work in the position: "Conducted research in the area of databases and software modeling and optimization" and "Taught Computer Science courses." No further information regarding his job duties in this position was provided.

In the opinion letter, the evaluator states that he has "conducted extensive research in the fields of technology management, algorithm design, application development, architectural design, biomathematics and mathematic modeling." Upon reviewing his resume, under the section "Research Grant & Fellowship," the evaluator's most recent entry is for a grant in July 2003 for a research project entitled "[REDACTED]" (His resume indicates he also received a grant in 2000 and another grant in 2001. All other grants were received in 1990 or earlier.) Under "Research Publications," the two most recent entries are dated 2003 and 2005. All other entries for this section are from the late 1980's and early 1990's. The evaluator also stated in the opinion letter that he has served in the "capacity of a professional consultant and software developer for numerous companies." A review of his resume indicates that he served in various positions with several companies from 1981 to 1998. Based upon the information provided, the evaluator has not established that his education, training, skills or experience have provided him with expertise or specialized knowledge of the current educational requirements in the petitioner's industry for the type of position here proffered among organizations that are similar to the petitioner.

The AAO notes that the evaluator states that he has "cultivated familiarity with the duties performed by such specialists at the mid-size tier of IT practice," but he does not provide any

further specific information to establish his expertise on this issue. The evaluator's resume includes information regarding his professional experience, background and accomplishments. The AAO finds that neither the resume nor any other evidence in the record of proceeding establishes the evaluator as an authority in the area in which he pronounces his opinion, namely, the current entry requirements for business analysts among organizations that are similar to the petitioner. It is not evident how the evaluator's education, training, skills or experience would translate to expertise or specialized knowledge regarding the present hiring requirements for business analysts (or parallel positions) with IT consultancy businesses similarly situated to the petitioner.

The evaluator states that he "reviewed an outline of the job duties" for the proffered position. He then provided a job summary and description of the duties and responsibilities, which, the AAO finds, expand the duties of the proffered position as depicted to USCIS by the petitioner. No explanation for the variance in the description was provided.

A review of the opinion letter indicates that the evaluator did not identify the specific elements of his knowledge and experience that he may have utilized to reach his conclusions. Furthermore, it must be noted that his conclusions are not supported by independent, objective evidence demonstrating the manner in which he reached such conclusions. He does not provide any evidence in support of his opinion regarding the educational requirements for the position (e.g. cite studies, surveys, empirical evidence). Thus, there is an inadequate factual foundation to support the opinion and the AAO finds that the opinion is not in accord with other information in the record.

Also, the conclusions reached by the evaluator lack the requisite specificity and detail. For example, the opinion letter contains no evidence that it was based on scholarly research conducted by the evaluator in the specific area upon which he is opining. There is no evidence that he has visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. Based upon his resume, he has not performed any research or published any work pertinent to the industry's *educational requirements* for business analysts to work in organizations similar to the petitioner, or been recognized by professional organizations as an authority on those requirements. As the evaluator has not established his credentials as a recognized authority on the hiring/entry standards for this occupation, his opinion in this area merits no special weight. Upon review, the opinion letter rendered by the evaluator is not probative. He has not provided sufficient facts that would support the contention that the proffered position requires at least a bachelor's degree in a specific specialty. The evaluator does not provide a substantive, analytical basis for his opinion. He has not provided a sufficient factual basis by which one may reasonably conclude that his opinion is well founded and reliable.

The AAO may, in its discretion, use as advisory opinions or statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). As a reasonable exercise of its discretion the AAO discounts the evaluator's opinion as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Upon review of the totality of the evidence in the entire record of proceeding, the AAO concludes that the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is normally required for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the particular position that is the subject of this petition 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)(1).

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This first alternative prong 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)).

The petitioner submitted copies of 21 job vacancy announcements to support its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations.

In order for the petitioner to establish that another organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Here, the petitioner submits no evidence demonstrating that any of the advertising companies are similar in size and scope to that of the petitioner, a 94-person IT consultancy business. Thus, the record is devoid of sufficient information regarding the 21 advertising companies to conduct a meaningful comparison of each of these firms to the petitioner. Without such evidence, other firms' job advertisements are 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 another organization share the same general characteristics, 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) may be considered. It is not sufficient for the petitioner to claim that the organizations are similar and in the same industry without providing a legitimate basis for such an assertion. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

As previously mentioned, in support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner

submitted copies of 21 job vacancy advertisements. The advertisements provided, however, do not establish that a bachelor's degree or the equivalent in a *specific specialty* is required by the advertising employers.

Specifically, none of the 21 advertisements indicate that a bachelor's degree in a specific specialty is a requirement for entry into those positions. For instance, 15 of the advertisements indicate that a Bachelor's degree (in no particular specialty) is required. In addition, several advertisements list a requirement or preference for a Bachelor's degree in one of several majors, including a general degree in business administration. Finally, the advertisement for a "Junior Business Analyst – Agile Development" position with [REDACTED], states that it "requires a four-year college degree (e.g., B.S., B.A., Computer Science, Business Information Systems preferred," stating a preference, but not a requirement for a degree in a computer-related 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).

Accordingly, the aggregate of the advertisements does not reflect a common degree requirement.

Further, the record lacks evidence that substantiates how representative this selection of advertisements is of even the firms' own usual recruiting and hiring practice, let alone those of similar firms in the industry.<sup>9</sup>

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<sup>9</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 just 21 job advertisements with regard to determining the common educational requirements for entry into parallel positions in similar companies. *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 business analyst at an IT consultancy business 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.

In addition, even if all of the job postings indicated that a bachelor's or higher degree in a specific specialty or its equivalent were required, the petitioner fails to establish that the submitted advertisements are relevant as the record does not indicate that the posted job announcements are for parallel positions in similar organizations in the same industry.

Thus, for the reasons discussed above, the petitioner's reliance on the job vacancy advertisements is misplaced. As a result, the petitioner has not established that similar companies in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.

Thus, based upon a complete review of the record, the AAO finds that the petitioner has not established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is common in 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.

In the instant case, the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position of business analyst. Specifically, the petitioner failed to demonstrate how the business analyst duties described require the theoretical and practical application of a body of highly specialized knowledge such that a person who has attained a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. In the brief on appeal, dated November 1, 2012, counsel for the petitioner stated the following:

[T]he position offered to the beneficiary is considered as a specialty occupation based on "the complexity of the duties alone."

While some of the courses listed on the copy of the beneficiary's transcript for the Bachelor of Science degree in Management from [REDACTED] may be beneficial in performing certain duties of an business analyst position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate (or higher) degree in a specific specialty, or its equivalent, are 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 AAO incorporates by reference and reiterates its earlier discussion that the LCA indicates a wage level based upon the occupational classification "Management Analysts" at a Level I (entry level) wage. This wage level designation is appropriate for positions for which the petitioner expects the beneficiary to have a basic understanding of the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any,

exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

By way of comparison, the AAO notes that a position classified at a Level IV (fully competent) position is designated by the DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems." Thus, the wage level designated by the petitioner in the LCA for the proffered position is not consistent with claims that the position would entail any particularly complex or unique duties or that the position itself would be so complex or unique as to require the services of a person with at least a bachelor's degree in a specific specialty.

The evidence of record does not establish that this position is significantly different from other business analyst positions such that it refutes the *Handbook's* information that there are various acceptable degrees for these positions, including a general-purpose degree such as business administration, for entry into the occupation. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique than positions in the pertinent occupation that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

Consequently, as the petitioner fails to demonstrate how the proffered position is so complex or unique relative to other business analyst positions that can be performed by a person without at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or the equivalent, for the position.

Of course, the AAO will necessarily review and consider whatever evidence the petitioner may have submitted with regard to its history of recruiting and hiring for the proffered position and with regard to the educational credentials of the persons who have held the proffered position in the past. Here, there is no such evidence, as the petitioner has not previously employed anyone in the proffered 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 the performance requirements of the position.

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").

A review of the list that the petitioner provided of what it claims are its current employees working in the proffered position and their degrees indicates that the petitioner has accepted several degrees for the position. Thus, the record of proceeding does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

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

Upon review of the record of the proceeding, the AAO notes that the petitioner has not provided sufficient evidence to satisfy this criterion of the regulations. The AAO acknowledges that the petitioner believes its proffered position involves specialized and complex duties. However, upon review of the record, there is insufficient evidence to establish that the duties of the business analyst position require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty.

The AAO finds that the petitioner has not provided probative evidence to satisfy this criterion of the regulations. In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish their nature as more specialized and complex than the nature of the duties of other positions in the pertinent occupational category whose performance does not require the application of knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty, or its equivalent.

Additionally, in this regard, the AAO here incorporates into this analysis its earlier comments and findings with regard to the implication of the Level I wage-rate designation (the lowest of four possible wage-levels) in the LCA. That is, that the proffered position's Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category of "Management Analysts" and hence one not likely distinguishable by relatively specialized and complex duties. As noted earlier, DOL indicates that a Level I designation is

appropriate for "beginning level employees who have only a basic understanding of the occupation."

The petitioner has submitted insufficient evidence to satisfy this criterion of the regulations. That is, the petitioner has not established that the nature of the duties of the position 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 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.

In light of the fact that the evidence of record does not establish the proffered position as a specialty occupation, the AAO need not examine the evidence regarding the beneficiary's qualifications. This is because the issue of the beneficiary's qualifications to serve in a specialty occupation position is not relevant when the petitioner has failed to establish that the proffered position is a specialty occupation position. However, in this particular instance, it behooves the AAO to go beyond the decision of the director in order to identify, for the petitioner's benefit, some material defects in the evidence that would preclude a finding that the beneficiary is qualified to serve in any specialty occupation position pursuant to the pertinent beneficiary-qualification regulations at 8 C.F.R. § 214.2(h)(4)(iii)(C) and (D).

In this matter, the petitioner and its counsel relied upon a credential evaluation, submitted on appeal and dated October 30, 2012, produced by [REDACTED] and entitled "[REDACTED]" (hereinafter, the [REDACTED] Evaluation) that fails to comport with the particular regulatory requirements at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) and 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

First, the experience-equivalency component of the [REDACTED] Evaluation clearly fails the unequivocal standard at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) that evaluations of training and/or experience be produced by an official who has authority to grant college level credit, for training and/or work experience in the specific specialty, at an accredited U.S. college or university, which has a program for granting such credit in the specialty. As such, the petition could not be approved even if the petitioner had established the proffered position as a specialty occupation.

By its own terms, this document's ultimate conclusion – that the beneficiary has attained the U.S. equivalent of a Master of Science degree in Computer Information Systems - is based, in part, on the author's evaluation of the beneficiary's work experience.<sup>10</sup> However, the record of

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<sup>10</sup> The AAO also notes that the [REDACTED] Evaluation is also based, in part, on the beneficiary's coursework at the [REDACTED]. As previously noted, the [REDACTED] is an *unaccredited* university in [REDACTED]. See U.S. Dept. of Education, The Database of Accredited Postsecondary Institutions and Programs, available on the Internet at <http://www.ope.ed.gov/accreditation/InstAccrDetails.asp> [REDACTED]

proceeding contains no documentation establishing the evaluator as a properly authorized official within the meaning of 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

Next, the AAO observes that the [REDACTED] evaluator misstated the so-called “3 for 1 rule” at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) as “the equivalency ratio mandated [by] the Bureau [sic] of United States [Citizenship and] Immigration Services (USCIS) of [the] Department of Homeland Security (DHS) of three years of work experience to one year of college training (*3 for 1 rule*).” There is no such mandate for a simple 3-to-1 straight chronological equivalency ratio whereby any three years of experience in a particular specialty categorically merits recognition as equivalent to one year of college course-work in that specialty. Rather, as is clearly evident in the regulation, to qualify for credit, the petitioner must have “clearly demonstrated” that the claimed years of experience satisfy the stringent, unambiguous, and multi-level standards specified at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). The [REDACTED] Evaluation neither articulates nor correctly summarizes those joint and multiple standards; and the [REDACTED] Evaluation also is not supported by documentation adequate to meet those standards.

For emphasis and instructional purposes, the AAO here excerpts from 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) the following regulatory language that applies to establishing the duration and substantive level and quality of training and/or experience and also the professional recognition that are required for USCIS to recognize years of training and/or experience as equivalent to academic achievement for beneficiary-qualification purposes.

This regulation allows for USCIS recognition of educational equivalency attained by training and/or experience *only* when USCIS finds that the following multi-tiered requirements have been satisfied:

[I]t must be clearly demonstrated [1] that the alien’s training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; [2] that the alien’s experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and [3] that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation<sup>11</sup>;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;

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[REDACTED] (last visited June 5, 2013).

<sup>11</sup> *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority’s opinion must state: (1) the writer’s qualifications as an expert; (2) the writer’s experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Also, beyond the decision of the director, the petitioner has submitted insufficient evidence to establish that, at the time it filed the H-1B visa petition, the petitioner had secured work for the beneficiary for the entire requested H-1B validity period.

It is noted that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa 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 (Reg. Comm'r 1978). As such, eligibility for the benefit sought must be assessed and weighed based on the facts as they existed at the time the instant petition was filed and not based on what were merely speculative facts not then in existence.

The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While the petitioner is certainly permitted to petition for H-1B classification on the basis of facts not in existence at the time the instant petition was filed, it must nonetheless file a new petition to have these facts considered in any eligibility determination requested, as the agency may not consider them in this proceeding pursuant to the law and legal precedent cited, *supra*.

On Form I-129, the petitioner listed the intended dates of employment of the beneficiary as being

from October 1, 2012 to September 30, 2015. It is noted that the [REDACTED] Letter stated that the beneficiary "was engaged to work on the project at [REDACTED] and that the "project is currently scheduled for one year and can continue for another two years." In addition, the [REDACTED] Letter, dated April 27, 2012, stated that "[the beneficiary] is working on [the] [REDACTED] project since June 27<sup>th</sup>, 2011<sup>12</sup> and we anticipate the need for her services for at least 24 months with a possibility of extension." Thus, the evidence in the record of proceeding appears to indicate that, at the time the petition was filed, the petitioner had not secured non-speculative employment for the beneficiary for the entire requested H-1B validity period. Accordingly, the petition must be denied.

Finally, beyond the decision of the director, it appears that there is insufficient documentary evidence (including all of the pertinent contractual documents) to establish that the petitioner, rather than the other firms involved with the beneficiary's assignment to work at [REDACTED], would actually assert the level of control over the beneficiary's actual day-to-day work that would be required to satisfy the common-law standards for an "employer-employee relationship." Thus, for this reason also, the petition must be denied.

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 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 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.

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<sup>12</sup> The AAO notes that the beneficiary was performing her Curricular Practical Training (CPT) at [REDACTED]