



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: JUN 21 2013 OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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:

SELF-REPRESENTED

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. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on April 16, 2012. In the Form I-129 visa petition, the petitioner describes itself as a provider of quality assurance solutions, testing services, and IT development established in 2002. In order to employ the beneficiary in what it designates as a software quality assurance analyst and tester position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on June 13, 2012, finding that the petitioner failed to establish that the beneficiary is qualified to perform the duties of the proffered position in accordance with the applicable statutory and regulatory provisions. On appeal, the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that it satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the 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 notice of decision; and (5) the Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

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

Later in this decision, the AAO will also address an additional, independent ground, not identified by the director's decision, that the AAO finds also precludes approval of this petition. Specifically, beyond the decision of the director, the AAO finds that the proffered position is not a specialty occupation in accordance with the applicable statutory and regulatory provisions. For this additional reason, the petition may not be approved. It is considered an independent and alternative ground for denial.<sup>1</sup>

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a software quality assurance analyst and tester to work on a full-time basis. With the Form I-129 petition, the petitioner submitted a letter dated March 30, 2012, which included the following description of the proffered position:

The specific job duties of [the proffered] position are as follows.

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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).

- Analyzing the communications, informational and programming requirements of clients Planning, developing and designing business programs and computer systems;
- Develop Test plans and test cases for 5010 applications.
- Conduct Functional/Regression testing.

The average involvement time frame and various stages of project implementation is given below:

IT Requirements:	10%
Designs:	10%
<b>Testing:</b>	<b>80%</b>

(Errors in the original.) In the letter of support, the petitioner stated the minimum educational requirements for the proffered position as "at least a bachelor's degree in computer sciences or Engineering." The petitioner indicated that the beneficiary is qualified for the proffered position by virtue of his academic background and professional experience. The petitioner stated that the beneficiary holds a "Masters in Business Administration- Marketing" and has "work experience in the computer industry." With the initial petition, the petitioner submitted documentation regarding the beneficiary's credentials.

The petitioner also submitted an itinerary for the beneficiary, indicating that he will be assigned to [REDACTED] in Los Angeles, California through [REDACTED] on an existing Statement of Work until May 2013. The itinerary states that the beneficiary will be assigned to the Claims Processing Adjudication System project at the petitioner's test labs in Westborough, Massachusetts. The itinerary states that the duties of the beneficiary in the Claims Processing Adjudication System project are as follows:

Responsibilities:

- Develop Test Components.
- Develop EDI interfaces
- Develop Web services and test SOAP
- Develops test plan, project plan, timeliness and tasks
- Facilitates resolution of issues and defects
- Monitors and communicates status of test case development and execution
- Ensures performance testing is engaged with project facilities communication

The petitioner also submitted a letter from [REDACTED] which states that the beneficiary has provided services to [REDACTED] in El Monte, California since October of 2011 and is scheduled to continue in that position until May 4, 2013. The letter states that [REDACTED] is unable to provide a copy of the agreement between itself and [REDACTED] due to the confidentiality and non-disclosure portion of the agreement. The petitioner also provided pages 1 through 7 of a 17 page subcontracting agreement, dated January 25, 2006, between itself and [REDACTED] to provide services

to end-client [REDACTED] In addition, the petitioner provided a letter of employment addressed to the beneficiary.

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 "Computer Occupations, All Other" – SOC (ONET/OES Code) 15-1799, at a Level I wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 27, 2012. The petitioner was asked to submit probative evidence to establish that the beneficiary is qualified to perform services in the specialty occupation. The director outlined the specific evidence to be submitted. Notably, the director provided detailed information regarding the evidence needed to establish that the beneficiary has obtained the equivalent of a U.S. bachelor's degree in a specific specialty.<sup>2</sup>

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<sup>2</sup> The AAO notes that the RFE stated, in part, the following information regarding evaluations of beneficiary credentials written by university professors:

**NOTE:** College or university professors writing evaluations as consultants on behalf of private educational credentials evaluations firms will not satisfy this requirement as regulations limit the scope of their evaluation to only foreign education.

The evaluation by an official, preferably the Registrar, of a college or university must be on behalf (on letterhead) of the college or university where they are employed and have the authority to grant college credit for training and/or work experience. A private educational credentials evaluation service may not evaluate an alien's work experience or training[,] because regulations limit the scope of educational evaluators to evaluating only foreign education.

Professors writing as consultants, may, in the alternative, be considered as recognized authorities if they can clearly establish their qualifications as experts[,] provide specific instances where past opinions have been accepted as authoritative and by whom[,] clearly show how conclusions were reached[,] and show the basis for the conclusions with copies or citations of any research material used.

The evaluation should describe the material evaluated and establish that the areas of experience are related to the specialty. Resumes or Curriculum Vitae alone are usually insufficient to satisfy this requirement.

Also, provide a letter from the **Registrar** of the institution (on the institution's letterhead) to establish that the particular evaluating official is authorized to grant college-level credit on behalf of their institution, and that the evaluator holds a bachelor's degree in the field of study he or she is evaluating. Further, provide written verification or other documentation that the evaluator is actually employed by the claimed college or university. Additionally, include evidence that the institution is accredited.

Provide copies of pertinent pages from the college or university catalog to show that it has a program for granting college-level credit based on training and/or experience. Merely stating

On May 31, 2012, the petitioner responded to the RFE by submitting a letter and additional evidence. Specifically, the petitioner submitted (1) an evaluation of the beneficiary's credentials from [REDACTED] (2) additional copies of the beneficiary's diplomas; (3) a letter from [REDACTED] and (4) a letter from [REDACTED] India.

The director denied the petition on June 13, 2012, finding that the petitioner had failed to establish that the beneficiary was qualified to perform duties in the specialty occupation position, in accordance with the applicable statutory and regulatory provisions. The petitioner submitted an appeal of the denial of the H-1B petition. In support of the Form I-290B, the petitioner submitted additional evidence.

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

USCIS is required to follow long-standing legal standards and determine first, whether the proffered position is a specialty occupation, and second, whether an alien beneficiary is qualified for the position at the time the nonimmigrant visa petition is filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

When determining whether a position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv)

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in a letter that the school has such a program is insufficient. The program must be clearly substantiated. Further, CLEP and PONSI equivalency exams or special credit programs do not satisfy this requirement because the regulation requires that the beneficiary produce the results of such exams or programs in order for them to qualify. Also, training or experience derived from internship programs may not satisfy this requirement unless the petitioner can establish that the experience or training program claimed was gained through enrollment in the particular college or university's internship program.

Moreover, provide evidence to show the total amount of college credit the Registrar or other evaluator may grant for training or experience as part of the program. The evaluator may provide copies of the evaluation made by a school official, preferably the Registrar, which clearly shows how the alien met the college or university's program requirements and how much possible credit the alien may be granted for his or her training and experience.

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."

For H-1B approval, the petitioner must demonstrate a legitimate need for an employee exists and to substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. It is incumbent upon the petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent, to perform duties at a level that requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition. That is, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through attainment of at least a baccalaureate degree in a specific discipline. The AAO finds that the petitioner has not done so.

Further, the AAO observes that the duties of the position stated by the petitioner its letter dated March 30, 2012, and the itinerary are stated in general terms and lack sufficient detail for the AAO to ascertain exactly what services the beneficiary will be providing. Such a brief and generic description fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations and, thus, cannot be relied upon when discussing the duties attached to specific employment. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner's business operations, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

Such generalized information does not in itself establish a correlation between any dimension of the proffered position and a need for a particular level of education, or educational equivalency, in a body of highly specialized knowledge in a specific specialty. The AAO also observes, therefore, that it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they are described, the AAO finds, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire period requested, so as to persuasively support the claim that the position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the duties and responsibilities of the proffered position.

The petitioner has failed to provide sufficient details regarding the nature and scope of the beneficiary's employment or any substantive evidence regarding the actual work that the beneficiary would perform. Without a meaningful job description, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. The tasks as described fail to communicate (1) the actual work that the beneficiary would perform, (2) the complexity, uniqueness and/or

specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty.

Furthermore, the petitioner has failed to establish that it has specialty occupation work available for the beneficiary for the entire H-1B visa period requested. The petitioner stated in the itinerary that the beneficiary will be assigned to [REDACTED] in Los Angeles, California through [REDACTED] on an existing statement of work ("SOW") until May 2013. The petitioner did not submit a copy of the SOW. No explanation was provided. Instead, the petitioner submitted a letter from Pinnacle that states that the beneficiary is assigned to [REDACTED]; however, due to a confidentiality clause in the agreement [REDACTED] is unable to provide a copy of the agreement. The petitioner also provided pages 1 through 7 of a 17 page subcontracting agreement, dated January 25, 2006, between itself and [REDACTED] to provide services to end-client [REDACTED]. The petitioner has not represented that the beneficiary will be assigned to [REDACTED]. No explanation for the evidence was provided. In the itinerary, the petitioner states that the beneficiary will also be assigned to a Claims Processing Adjudication System project at the petitioner's test labs in Westborough, Massachusetts. However, the petitioner failed to provide any evidence to substantiate the existence of this project.

The petitioner stated in the Form I-129 that it was established in 2002 and employs 70 individuals. However, upon review of the record of proceeding, the AAO notes that there is a lack of information and supporting evidence with regard to the petitioner's business operations and the services the beneficiary will perform, as well as the actual nature and requirements of the proffered position. The lack of substantive documentation raises serious concerns about the veracity of the petition.

Upon review of the record, the AAO finds that the petitioner has provided insufficient probative documentation to substantiate its claims regarding its business activities and the actual work that the beneficiary will perform to establish eligibility for this benefit. That is, there is a lack of substantive, documentary evidence that the petitioner is a viable entity (e.g., an enterprise engaged in regular, systematic and continuous operations which provides the services as claimed in the petition and supporting documents) that it is able to substantiate its claim that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. The petitioner has not sufficiently established that it would employ the beneficiary in the capacity specified in the petition and it has not established that the statement of facts contained in the petition is accurate. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). In this case, the discrepancies in the record lead the AAO to question the credibility of the petitioner's statements.

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.<sup>3</sup> Going on record without

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<sup>3</sup> For example, 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:

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'r 1998). USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(1).

Although the petitioner requested the beneficiary be granted H-1B classification for a three-year period, the evidence does not establish that the petitioner would be able to sustain an employee performing the duties of a software quality assurance analyst and tester at the level required for the H-1B petition to be granted for the entire period requested, and there is insufficient information regarding how the beneficiary's duties will be allocated during this three-year period. The petitioner failed to establish that the petition was filed on the basis of employment for the beneficiary as a software quality assurance analyst and tester that, at the time of the petition's filing, was definite and nonspeculative for the entire period of employment specified in the Form I-129. The petitioner has not established that the beneficiary's overall day-to-day duties, for the entire period requested, would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation.

A position may be awarded H-1B classification only on the basis of evidence of record establishing that, at the time of the filing, definite, non-speculative work would exist for the beneficiary for the period of employment specified in the Form I-129. The record of proceeding does not contain such evidence. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Beyond the decision of the director, the AAO finds that the evidence fails to establish that the position as described by the petitioner constitutes a specialty occupation. 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 in this regard, the

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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.

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

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

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

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989);

*Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

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

The AAO notes that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. Notably, the petitioner did not submit documentation from the end-client establishing the duties, responsibilities, and requirements (if any) for the proffered position.

In the instant case, the petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Nevertheless, assuming, *arguendo*, that the proffered duties as described by the petitioner would in fact be the duties to be performed by the beneficiary, the AAO will nevertheless analyze them and the evidence of record to determine whether the proffered position as described would qualify as a specialty occupation. To that end and to make its determination as to whether the employment described above qualifies as a specialty occupation, the AAO turns first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

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> In the instant case, the petitioner provided an LCA in support of the petition that indicates the occupational classification for the proffered position is "Computer Occupations, All Others." However, the *Handbook* simply describes this category as "[a]ll computer occupations not listed separately."

The AAO notes there are occupational categories which are not covered in detail by the *Handbook*, as well as occupations for which the *Handbook* does not provide any information. The *Handbook* states the following about these occupations:

**Data for Occupations Not Covered in Detail**

Employment for the hundreds of occupations covered in detail in the *Handbook* accounts for more than 121 million, or 85 percent of all, jobs in the economy. [The *Handbook*] presents summary data on 162 additional occupations for which employment projections are prepared but detailed occupational information is not developed. These occupations account for about 11 percent of all jobs. For each occupation, the Occupational Information Network (O\*NET) code, the occupational

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<sup>4</sup> All of the AAO's references are to the 2012-2013 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

definition, 2010 employment, the May 2010 median annual wage, the projected employment change and growth rate from 2010 to 2020, and education and training categories are presented. For guidelines on interpreting the descriptions of projected employment change, refer to the section titled "Occupational Information Included in the OOH."

Approximately 5 percent of all employment is not covered either in the detailed occupational profiles or in the summary data given here. The 5 percent includes categories such as "all other managers," for which little meaningful information could be developed.

Thus, the narrative of the *Handbook* indicates that there are over 160 occupations for which only brief summaries are presented. (That is, detailed occupational profiles for these 160+ occupations are not developed.) The *Handbook* continues by stating that approximately five percent of all employment is not covered either in the detailed occupational profiles or in the summary data. The *Handbook* suggests that for at least some of the occupations, little meaningful information could be developed.

Upon review of the record, the AAO notes that the *Handbook* does not provide a detailed narrative account nor does it provide summary data for the occupational category "Computer Occupations, All Others." Accordingly, the *Handbook* lacks sufficient information regarding the occupational category (e.g., duties, academic requirements) to be deemed probative evidence in this matter.

Accordingly, in certain instances, the *Handbook* is not determinative. When the *Handbook* does not support the proposition that a proffered position is one that meets the statutory and regulatory provisions of a specialty occupation, it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise qualifies as a specialty occupation under this 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 indicates whether the position in question qualifies as a specialty occupation. Whenever more than one authoritative source exists, an adjudicator will consider all of the evidence presented to determine whether a beneficiary qualifies to perform in a specialty occupation. The petitioner has failed to do so in the instant case. That is, the petitioner has failed to submit probative evidence that normally the minimum requirement for positions falling under the occupational category "Computer Occupations, All Others" is at least a bachelor's degree in a specific specialty, or its equivalent.

The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Moreover, when reviewing the *Handbook*, the AAO notes that the petitioner designated the proffered position as a Level I (entry level) position on the LCA. Wage levels should be

determined only after selecting the most relevant 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.<sup>5</sup> DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

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

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).

Thus, in designating the proffered position at a Level I wage, the petitioner has indicated that the proffered position is a comparatively low, entry-level position relative to others within the

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

occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results.

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

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

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 previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter. The record of proceeding does not contain any evidence from an industry professional association to indicate that a degree is a minimum entry requirement. Further, the petitioner did not provide letters or affidavits from firms or individuals in the industry to establish the proffered position as qualifying as a specialty occupation under this criterion of the regulations.

In support of the petitioner's assertion that the proffered position is a specialty occupation position, the record of proceeding contains two job announcements, submitted by the petitioner on appeal. However, upon review of the evidence, the AAO finds that the petitioner's reliance on the job announcements is misplaced.

In the Form I-129, the petitioner stated that it is a provider of quality assurance solutions, testing services, and IT development established in 2002. The petitioner further stated that it has 70 employees. The petitioner stated its gross annual income as approximately \$22 million and its net

annual income as approximately \$500,000. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 541511 – "Custom Computer Programming Services."<sup>6</sup> The U.S. Department of Commerce, Census Bureau website describes this NAICS code as follows:

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

U.S. Dep't of Commerce, U.S Census Bureau, 2007 NAICS Definition, 541511 – Custom Computer Programming Services, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited June 17, 2013).

The AAO notes that under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the petitioner must establish that "the degree requirement is common to *the industry in parallel positions among similar organizations.*" (Emphasis added.) That is, this prong requires the petitioner to establish that a requirement of a bachelor's 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.

The petitioner submitted a job posting for a "Sr. QA Analyst" at [REDACTED]. The posting states that [REDACTED] is "the world's largest restaurant company with more than 37,000 restaurants in over 117 countries and territories and more than 1 million associates worldwide." The second job posting is from [REDACTED] for a "QA Analyst." For the petitioner to establish that organizations are similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such information, evidence submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and an organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion. As previously mentioned, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). In the instant case, the petitioner has not submitted any evidence to establish that the advertising organizations are similar to the petitioner. Furthermore, the petitioner has not stated which aspects of its business operations (if any) that it believes it shares with the advertising organizations in order to establish that they are similar. Thus, from the onset the petitioner has not established that the evidence is probative under this criterion of the regulations.

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<sup>6</sup> NAICS is used to classify business establishments according to type of economic activity, and each establishment is classified to an industry according to the primary business activity taking place there. See U.S. Dep't of Commerce, U.S. Census Bureau, NAICS, on the Internet at <http://www.census.gov/eos/www/naics/> (last visited June 17, 2013).

Moreover, the posting for [REDACTED] states that the organization requires a "bachelor's degree" for the advertised position, but does not indicate that a bachelor's degree in a specific specialty is required. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).<sup>7</sup>

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, not every deficit of every job posting has been addressed. Further, it must be noted that even if all of the job postings indicated that a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.<sup>8</sup>

Thus, based upon a complete review of the record, the petitioner fails to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

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 the particular position proffered in this petition is "so

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<sup>7</sup> Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

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

*Id.*

<sup>8</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 job postings. *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").

complex or unique" that it can be performed only by an individual with at least a bachelor's degree in a specialty occupation, or its equivalent.

In the instant case, the petitioner does not claim that the proffered position involves complex and/or unique duties. AAO finds that the documentation fails to provide any particular insights into the petitioner's business activities, and the evidence does not establish that the proffered 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.

Moreover, the AAO finds that the petitioner has not provided any documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. The LCA indicates a wage level at a Level I (entry level) wage. This wage-level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results. Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."<sup>9</sup>

The petitioner failed to establish how the beneficiary's responsibilities and day-to-day duties are so complex or unique that the position can be performed only by an individual with a bachelor's degree in a specific specialty, or its equivalent. Thus, based upon the record of proceeding, including the LCA, it does not appear that the proffered position is so complex or unique that it can only be performed by an individual who has completed a baccalaureate program in a specific discipline that directly relates to the proffered position.

It is further noted that although the petitioner asserts that a bachelor's degree is required to perform the duties of the proffered position, the petitioner failed to sufficiently demonstrate how the duties require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. That is, the record of proceeding does not establish that the requisite knowledge for the proffered position can only be obtained through a baccalaureate or higher degree program in a specific specialty, or its equivalent. For example, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the position. While a few related courses may be beneficial, or

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<sup>9</sup> For additional information regarding wage levels as defined by DOL, 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).

even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position.

The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent. The petitioner has not credibly demonstrated that this position, which the petitioner characterized in the LCA as an entry-level position, is so complex or unique that it can be performed only by an individual with at least a baccalaureate degree in a specific specialty, or its equivalent.

The AAO observes that the petitioner has indicated that the beneficiary's academic credentials and prior work experience in the computer industry will assist him in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not explain or clarify at any time in the record which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Upon review of the record of proceeding, the petitioner has failed to establish the proffered position as satisfying the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

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

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

equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

The petitioner stated in the Form I-129 petition that it has 70 employees and that it was established in 2002 (approximately 10 years prior to the H-1B submission). The petitioner did not provide the total number of people it has employed to serve in the proffered position. The petitioner also did not submit any documentation regarding employees who currently or in the past have held the position. On appeal, the petitioner submitted a job posting from its website for a quality assurance analyst and tester. The printout is dated July 11, 2012. The posting states a requirement for a "[b]achelor's with 2 + years of experience." The petitioner does not state that a specific specialty or discipline is required.

The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a *specific specialty* that is directly related to the duties and responsibilities of the position. *See* 214(i)(1)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). Again, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147. A claim by the petitioner that the duties of the position can be performed by an individual with only a general-purpose bachelor's degree is tantamount to an admission that the proffered position is not in fact a specialty occupation.

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

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

The AAO acknowledges that the petitioner may believe that the proffered position qualifies as a specialty occupation under this criterion of the regulations. However, upon review of the record of proceeding, the AAO finds that the petitioner did not submit sufficient information about its business operations or the proffered position to establish that the nature of the specific duties of the proffered position is so specialized and complex that the knowledge required to perform them is usually associated with a bachelor's degree or higher in a specific specialty, or its equivalent. That is, relative specialization and complexity have not been developed by the petitioner as an aspect of the proffered position.

In the instant case, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent. As reflected in this decision's earlier comments and findings with regard to the generalized level at which the proposed duties are described by the petitioner, the petitioner failed to establish relative specialization and complexity as distinguishing characteristics of those duties. The AAO is therefore unable to assess whether performance of such duties would require knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty, or its equivalent.

Moreover, the AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupation. The petitioner designated the position as a Level I position (the lowest of four assignable wage levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV position, requiring a significantly higher prevailing wage. A Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

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

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

The AAO will now address the director's basis for denial of the petition, namely that the petitioner failed to establish that the beneficiary is qualified to perform services in a specialty occupation. Upon review of the record, the AAO finds that the petitioner has failed to establish that the beneficiary possesses the requisite degree to perform the duties of the proffered position.

The petitioner must establish eligibility under the applicable statutory and regulatory provisions. Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or

- (C) (i) experience in the specialty equivalent to the completion of such degree, and
- (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The degree referenced by section 214(i)(1)(B) of the Act, 8 U.S.C. § 1184(i)(1)(B), means one in a specific specialty that is characterized by a body of highly specialized knowledge that must be theoretically and practically applied in performing the duties of the proffered position.

In implementing section 214(i)(2) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

For purposes of 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the provisions at 8 C.F.R. § 214.2(h)(4)(iii)(D) require one or more of the following to determine whether a beneficiary has achieved a level of knowledge, competence, and practice in the specialty occupation that is equal to that of an individual who has a baccalaureate or higher degree in the specialty:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;<sup>10</sup>
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. . . .

The petitioner submitted the following documentation regarding the beneficiary's credentials: (1) a diploma from the [REDACTED] in the beneficiary's name that states that he has earned a Master of Business Administration; (2) a transcript from the [REDACTED]; (3) a diploma from [REDACTED] indicating that the beneficiary holds a Master of Arts (External) in history; (4) a diploma from [REDACTED] indicating that the beneficiary holds a Bachelor of Arts (Special) with special subject of history; (5) a transcript in the beneficiary's name from [REDACTED]; (6) a certificate from [REDACTED] in the beneficiary's name; (7) a certificate from [REDACTED] in the beneficiary's name; (8) an employment verification letter from [REDACTED] and (9) an employment verification letter from [REDACTED].

The petitioner did not submit evidence to satisfy the criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(D)(2)-(4) to establish that the beneficiary possesses a baccalaureate or higher degree in the specific specialty directly related to the duties of the proffered position (or its equivalent). In the present matter, the petitioner relies upon an evaluation of the beneficiary's academic credentials and work experience conducted by [REDACTED] or [REDACTED]. However, upon review of the record, the petitioner has failed to establish that the beneficiary is qualified to serve in a specialty occupation position.

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<sup>10</sup> The petitioner should note that, in accordance with this provision, the AAO will accept a credentials evaluation service's evaluation of *education only*, not experience.

<sup>11</sup> The AAO notes that the petitioner submitted two versions of [REDACTED] evaluation. One was submitted in response to the RFE and bears what appears to be the [REDACTED] logo. In this version, dated May 23, 2012, the evaluation reads:

**Affirmation by the Dean:** I hereby state that I am the Dean, School of Graduate Studies and Computer Information Systems, [REDACTED] USA – a nationally accredited University (Accrediting Council for Independent Colleges and Schools –ACICS). I have the education, qualification and power to grant college level credit based on work experience and real-life experience and also to grant college level credit in an academic

In his evaluation, entitled "Expert Opinion/Work-Credential Position Evaluation Report," [REDACTED] states the following regarding the beneficiary's qualifications:

It is the expert opinion of this evaluator that [the beneficiary] has the minimum educational qualification of a 4-year baccalaureate degree related to the field of the specialty occupation via a combination of education and specialized training. Upon careful review of the degrees, diplomas and specialized training leading to certification obtained by [the beneficiary] are equivalent to the at least the **Master of Business Administration (MBA) with concentration in Computer Information Systems** thereby satisfying the minimum level education (4-year baccalaureate degree) and competence in the field.

(Errors in the original.) In reaching this determination, [REDACTED] relies on the beneficiary's three year undergraduate degree obtained in India, a master's degree in Business Administration-Marketing obtained from the [REDACTED]<sup>12</sup> and computer courses completed in India at [REDACTED]. The AAO notes that [REDACTED] relies on the computer courses completed at [REDACTED] in reaching determination that the beneficiary has obtained the equivalent of a concentration in computer information systems. The record contains a certificate of completion from each organization. The certificate from [REDACTED] states that the beneficiary completed the "PGDCA" course. The certificate from [REDACTED] states that it was awarded to the beneficiary "for attending the 'C,' 'C++,' & 'Java' course at the [REDACTED] on the 21<sup>st</sup> day of the month 03 in the year 2006." The certificate was issue on March 24, 2006. The AAO observes that [REDACTED] evaluation contains specifics regarding the [REDACTED]

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curriculum/classroom setup at the University level.

The second version, which is on [REDACTED] letterhead and was submitted on appeal, is also dated May 23, 2012, and states:

The evaluator is a Professor at [REDACTED] accredited by (SACS) and a Professor/Academic administrator at [REDACTED]. He has the credentials and ability to grant college and University level academic credit to in-class and online education in the United States and also the ability and experience to evaluate and grant academic credit to specialized training and professional work experience in the field of Computer Information Systems.

The content of the two versions of the evaluation appears otherwise virtually identical.

<sup>12</sup> The AAO notes that the [REDACTED] is not accredited by an institutional accreditation organization recognized by the U.S. Department of Education. The Database of Accredited Postsecondary Institutions and Programs reports that the Accrediting Council for Independent Colleges and Schools terminated the [REDACTED] accreditation on August 6, 2008. See U.S. Dept. of Ed., *Database of Accredited Postsecondary Institutions and Programs*, available on the Internet at <http://www.ope.ed.gov/accreditation/Search.aspx> (last visited on June 17, 2013). The beneficiary's transcript indicates that he attended the [REDACTED] between 2009 and 2011, after the school's accreditation was terminated.

Infotech program that do not appear elsewhere in the record. Specifically, [REDACTED] indicates that the beneficiary participated in 700 contact hours of education at [REDACTED] and that he received a grade of "A" for each course. The AAO notes that no transcript from [REDACTED] was provided, and the "certificate" indicates that the beneficiary was "placed in the grade of B+." No explanation for the discrepancy was provided.

The AAO further notes that [REDACTED] concluded that the course that the beneficiary completed is the equivalent of 10 credit hours in the United States, and that the beneficiary attained the grade of "A." [REDACTED] does not indicate the documentation he reviewed to arrive at this conclusion. Notably, the certificate of participation from [REDACTED] contained in the record appears to indicate that the beneficiary attended a one-day course on March 21, 2006, for which he was awarded a certificate of participation on March 24, 2006. There is no "grade" on the certificate.

Based upon the information provided, the AAO is unable to ascertain how [REDACTED] determined that the courses that the beneficiary undertook at Sun Infotech and Aptech resulted in a "1.0 year post graduate Masters level Diploma in Computer Applications at [REDACTED] (recognized and registered by the Government of India," or that "the course structure of the Diploma and learning outcomes equated to the curricular outcome in a BS degree in Computer Information Systems in the US." The evaluator's brief description of the courses completed by the beneficiary does not present an adequate factual foundation for the opinion that he offers and it is not supported by evidence sufficient to corroborate his conclusion.

[REDACTED] claims that in his position at either [REDACTED] he has the "ability and experience to evaluate and grant academic credit to specialized training and professional work experience in the field of Computer Information Systems." However, the petitioner has not provided sufficient probative evidence that indicates that [REDACTED] indeed has authority at either institution to grant such academic credit. The AAO notes that in the RFE, the director provided extensive instructions to the petitioner regarding documentation to establish that an individual meets the criteria delineated in the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). See note 2, supra (noting the director's instructions). The petitioner has not provided sufficient evidence to establish that [REDACTED] has "authority to grant college-level credit for training and/or experience in the specialty" or that either [REDACTED] have "a program for granting such credit based on an individual's training and/or work experience." As previously mentioned, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). The AAO finds that the petitioner has not established that [REDACTED] is qualified to assess the beneficiary's credentials under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) and therefore accords no weight to his evaluation.

Aside from the decisive fact that the evidence of record does not establish the aforementioned evaluator as competent under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) to evaluate the beneficiary's specialized training or work experience, the AAO finds that the content of the evaluation regarding the beneficiary's experience would merit no weight even if the evaluator were qualified under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). As noted above, the evaluation is not supported by probative evidence to support the evaluator's claims regarding the beneficiary's training.

The petitioner has failed to satisfy any of the criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(D)(1)-(4), and the AAO will next perform a Service evaluation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). It is always worth noting that, by its very terms, 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) is a matter strictly for USCIS application and determination, and that, also by the clear terms of the regulation, experience will merit a positive determination only to the extent that the record of proceeding establishes all of the qualifying elements at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) – including, but not limited to, a type of professional recognition.

In accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D)(5):

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; 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 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>13</sup>;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (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.

The AAO has reviewed the documentation submitted by the petitioner regarding the beneficiary's qualifications. The AAO again notes that the petitioner did not provide transcripts of the beneficiary's specialized computer training. Furthermore, the AAO observes that both employment

<sup>13</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).

verification letters regarding the beneficiary's prior employment provide insufficient information regarding the beneficiary's work history and duties (i.e., complexity of the job duties, level of judgment and understanding required to perform the job, amount and nature of supervision received, and supervisory responsibilities). The letter from [REDACTED] dated May 31, 2004, states that the beneficiary held the position of "Assistant Manager for Quality Control" from August 1, 2002 until May 31, 2004. However, the letter also states that "during [the beneficiary's] tenure, he worked as Quality Control Engineer, Sales Associate, Computer Operator, Quality Control Lead for Applications and Assistant Manager for Quality Control." No other dates of employment for the other positions were provided. The letter lists the beneficiary's duties as "[q]uality assurance and quality control of software programs, conducting marketing research and sales, testing the output and reports, quality control of machinery and managing the quality control staff."

The letter from [REDACTED] dated December 16, 2007, states that the beneficiary was employed at that company full-time between July 2004 and December 2007. The letter states that he "joined as a Junior Tester and also performed role of Mid-Level QA Analyst." The following duties were provided:

- Participate along with team in analyzing software requirements
- Write test cases for client-server and web applications.
- Conduct system, regression, smoke, functional and uat testing.

(Errors in the original).

The AAO observes that the letters are devoid of information regarding the requirements (if any) for the past positions held by the beneficiary. Furthermore, the record lacks probative evidence regarding the academic credentials of the beneficiary's peers, supervisors and/or subordinates in his prior employment.

Upon review of the record, the petitioner has not provided sufficient corroborating evidence as outlined in 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). Thus, the AAO cannot conclude that the beneficiary's past work experience included the theoretical and practical application of a body of highly specialized knowledge in a field related to the proffered position and that the beneficiary's experience was gained while working with peers, supervisors, or subordinates who have a bachelor's degree (or higher) or its equivalent in the specialty occupation. Moreover, the petitioner failed to submit probative evidence establishing that the beneficiary has recognition of expertise in the field. Upon review of the record of proceeding, the AAO finds that the petitioner has failed to establish that the beneficiary has at least a bachelor's degree in a specific specialty, or its equivalent. Accordingly, the appeal will be dismissed and the petition denied for this reason.

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.<sup>14</sup> 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>14</sup> The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 145. However, as the appeal is dismissed, and the petition is denied for the reasons discussed above, the AAO will not further discuss the additional issues and deficiencies that it observes in the record of proceedings.