



U.S. Citizenship
and Immigration
Services

(b)(6)



Date: JUN 28 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: 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 revoked approval of the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision revoking approval of the petition will be withdrawn. The petition will be remanded to the director for the initiation of a new revocation-on-notice proceeding in accordance with the content of this decision, below.

On the Form I-129 visa petition the petitioner stated that it is a software development and consulting services firm. To employ the beneficiary in what it designated as a computer programmer position on the visa petition, the petitioner endeavors to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director initially approved the instant visa petition on June 2, 2008. On December 9, 2009 the director issued a Notice of Intent to Revoke (NOIR), based on information provided in a memorandum from an officer at the [REDACTED] after an interview with the beneficiary, stating two bases for revocation, namely, (1) that the project upon which the petitioner stated that the beneficiary would work had been "plagiarized" from various sources identified by the consular officer and (2) that the petitioner's tax returns had not included "cost of goods sold." On June 10, 2010, having received no response to the NOIR, the director revoked approval of the visa petition, based on the evidence from the consular officer.

On appeal, the petitioner's CEO asserted that the job offer made to the beneficiary is *bona fide* and that the evidence presented supports approval of the visa petition in all other respects. The petitioner submitted a brief and additional evidence.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's NOIR; (3) the director's revocation notice; and (4) the Form I-290B and the petitioner's brief and attached exhibits in support of the appeal.

The regulation at 8 C.F.R. § 214.2(h)(11)(iii), which governs revocations that must be preceded by notice, states:

(A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
- (2) The statement of facts contained in the petition or on the application for a temporary labor certification was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or

- (3) The petitioner violated terms and conditions of the approved petition; or
- (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
- (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

(B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

In the NOIR, the director stated:

During an interview with the beneficiary at a consular office, it was revealed that the beneficiary's proposed project, [REDACTED] was largely plagiarized from other software firms and from other articles and books. Further, a review of [the petitioner's] 2005, 2006, and 2007 tax returns reveals a zero Cost of Goods Sold.

Approval of the visa petition was subsequently revoked on those same bases.

The abstract assertion that the proposed project was plagiarized does not provide the AAO with the ability to make an independent judgment on appeal. The director did not identify any particular passages of text that had been copied from another, identified source, and pursuant to its own Google search, the AAO found none. While the burden to establish eligibility remains with the petitioner in revocation proceedings, the AAO is unable to find based on the evidence or record as currently constituted that any material submitted by the petitioner has been plagiarized.

In general, while it appears that the director takes issue with the petitioner's initial claims that it is developing a software product to be sold, the petitioner's explanations and corroborating evidence submitted on appeal is sufficient to overcome the stated grounds for revocation. Accordingly, this finding of the director is withdrawn. The AAO leaves open, however, the possibility that the director may issue the same finding again, if it is accompanied by a more particular statement about what portions of the petitioner's project, or its description of it, were plagiarized, and from what sources such that doubt may be cast on the credibility of the claims and evidence presented by the petitioner in this record of proceeding.

Further, although the tax returns provided confirm that the petitioner claimed no Cost of Goods Sold during 2005, 2006, and 2007, that observation was accompanied by no explanation of why this demonstrates that no bona fide job offer exists in this case, and no explanation of any reason that the absence of Cost of Goods Sold on two tax returns is incompatible with the petitioner's description of its business model. Absent an explanation of how the absence of Cost of Goods Sold on the petitioner's tax returns demonstrates that approval of the visa petition must be revoked, the petitioner's explanation and evidence submitted on appeal is sufficient to show that the product to be sold was still in development during those years. The AAO therefore withdraws that portion of the director's decision as well.

The point raised by the director in the NOIR, however, is a valid one and one that is pertinent to whether the beneficiary was performing the duties he was initially approved to perform and, thereby, whether the beneficiary was being employed in accordance with the terms and conditions of the approved petition. In issuing a new notice of intent to revoke and in more clearly articulating this ground for revocation of the petition, the director should therefore request new and additional evidence that the petitioner has since completed its development of this software product and begun to sell it to customers. Absent such evidence, the credibility of the assertions and evidence presented on appeal will be drawn into question, especially given the number of years the petitioner has had to date to develop said product.

Accordingly, the AAO directs that the director initiate a new revocation-upon-notice action, in accordance with the procedures outlined at 8 C.F.R. § 214.2(h)(11)(iii) (quoted at the outset of this decision). The NOIR should include the issues identified above as well as the additional issues identified by the AAO below as bases for the intention to revoke approval of the petition on notice.

- 1. Grounds for revocation residing in the conflict between, on the one hand, assertions in the petition that the beneficiary would be working as a Computer Programmer Analyst with, on the other hand, the Form I-129's and Labor Condition Application's (LCA's) identification of the proffered position as a Computer Programmer – a distinctly different occupational category with a lower prevailing wage.**

The LCA job-title and related prevailing wage information (for a computer programmer position) do not correspond to the claims in the petition – including in the statements of the petitioner's human resources director in her March 31, 2008 letter and the petitioner's statements on appeal – that the petition was filed for a computer programmer analyst position, a position which requires a higher prevailing wage and, hence, a higher required wage, than that stated in the LCA specified in in the Form I-129.¹

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(I) stipulates the following:

¹ It is noted that additional explanation is provided in the specialty occupation analysis section, *infra*, for finding that the proffered position is best classified as a computer systems analyst, and not as a computer programmer position.

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

While the U.S. Department of Labor (DOL) is the agency that certifies LCAs before they are submitted to U.S. Citizenship and Immigration Services (USCIS), the DOL regulations note that it is within the discretion of the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) to determine whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

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

[Italics added]

USCIS recognizes the DOL's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.² The AAO observes that the duties of computer programmers are described in the chapter entitled "Computer Software Engineers and Computer Programmers." In a separate chapter, entitled "Computer Systems Analysts," the *Handbook* describes the duties of those positions and states in pertinent part the following with regard to programmer analysts:

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.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Computer Systems Analysts," <http://www.bls.gov/ooh/Computer-and-Information-Technology/Computer-systems-analysts.htm#tab-2> (last visited June 27, 2013).

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

Thus, by describing these positions in separate chapters, the *Handbook* indicates that programmer analyst positions are different from computer programmer positions. It further indicates that programmer analysts perform the duties of a computer systems analyst in addition to the duties of a computer programmer. "Computer programmer" is not, therefore, synonymous with "computer programmer analyst." The LCA submitted to support the instant visa petition, therefore, does not appear to correspond with the visa petition, as other evidence in the record shows that the proffered position is a programmer analyst position.

Further, the AAO recognizes the Foreign Labor Certification Data Center's Online Wage Library (OWL) as an authoritative source of statistically-based information on the prevailing wages of the wide variety of occupations that it addresses. The AAO notes that the petitioner asserted, on the Form I-129, that it would employ the beneficiary at its Iselin, New Jersey office. Iselin, New Jersey is in Middlesex County, which is in the Edison-New Brunswick, New Jersey Metropolitan Division Metropolitan Statistical Area (MSA). In that MSA, on April 1, 2008, when the visa petition in this case was filed, according to OWL, the prevailing wage for Level I Computer Programmers (OES/SOC code 15-1021) was \$25.38 per hour, or \$52,790 per year. On the LCA the petitioner stated that the prevailing wage for the proffered position is \$52,790 per year, and that it obtained that information from OWL, thus indicating that the LCA filed to support the petition was certified for the Computer Programmer occupational classification, rather than for a position in the Computer Systems Analyst occupational classification (OES/SOC code 15-1051).³

In addition to the different occupational codes assigned to each occupation, the prevailing wage determinations in OWL are markedly different between computer programmers and computer systems analysts, which includes programmer analysts. OWL states that, at that same time and in the same location related to this petition, the prevailing wage for Level I programmer analysts was \$28.05, or \$58,344 per year. This underscores that programmer positions are not the same as programmer analyst positions.

Further, on the visa petition, the petitioner has offered to pay the beneficiary \$53,000 annually. Although this is greater than the prevailing wage for programmer positions in the Middlesex County MSA when the visa petition was filed, it is less than the prevailing wage for *programmer analysts* at the same time in the same location. As the petitioner has not demonstrated that the proffered position is a programmer position, rather than a programmer analyst position, it has not demonstrated that it paid or intended to pay the required wage to the beneficiary for the position in which it would employ him. This is another issue that the director should address in the NOIR.⁴

³ It is noted that the OES/SOC occupational codes have since changed for both computer programmers and computer systems analysts. The OES/SOC code for computer programmers is currently 15-1131, and the OES/SOC code for computer systems analysts is no 15-1121.

⁴ It is noted that the LCA serves as the critical mechanism for enforcing section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). See 65 Fed. Reg. 80110, 80110-80111 (indicating that the wage protections in the Act seek "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers" and that this "process of protecting U.S. workers begins with [the filing of an LCA] with [DOL]."). According to section 212(n)(1) of the Act, an employer must attest that it will pay a holder of an

The NOIR should explicitly notify the petitioner that, as related above, the conflicting information about the nature and type of the position as related in the record of proceeding constitutes incorrect statements of fact, which are a ground for revocation-on-notice under 8 C.F.R. § 214.2(h)(10)(iii)(A)(2), that is, "The statement of facts contained in the petition . . . was not true and correct, inaccurate, fraudulent, or misrepresented a material fact."

The NOIR should also explicitly notify the petitioner that the approval of the petition, despite the materially conflicting information in the record of proceeding about the occupational classification to which the proffered position belonged, is a basis for revocation of the approval of the petition under 8 C.F.R. § 214.2(h)(11)(iii)(A)(5), because, given that the visa petition was not supported by a corresponding LCA, approval of the visa petition "involved gross error."

2. Failure of the evidence in the record of proceeding to establish the proffered position as a specialty occupation.

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:

H-1B visa the higher of the prevailing wage in the "area of employment" or the amount paid to other employees with similar experience and qualifications who are performing the same services. *See Patel v. Boghra*, 369 Fed.Appx. 722, 723 (7th Cir. 2010).

- (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.

With the visa petition, the petitioner provided a letter, dated March 31, 2008, from its human resources director. That letter states, "The minimum [educational requirement] for the [proffered position is] a Bachelor's degree in Math, or Computer Science, or Engineering, or Business, or any related field."

It should be noted that, without more, the array of degrees in mathematics, computer science, engineering, business, "or any related field" as an acceptable educational qualification for the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" 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 (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. See section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Here, it is not readily apparent that the acceptable fields of study listed above are closely related or that the field of business is directly related to the duties and responsibilities of the particular position proffered in this matter. For this reason, the visa petition does not indicate that the proffered position requires a minimum of a bachelor's degree in a specific specialty or its equivalent.

Further, the petitioner's indication that a general bachelor's degree in business would be a sufficient educational qualification for the proffered position is also insufficient to establish that the proffered position requires a minimum of a bachelor's degree in a specific specialty or its equivalent. An otherwise undifferentiated degree in business is not a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business or business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, 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, such as a degree in business or business administration, may be a legitimate qualification 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.

Again, the petitioner claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation. As such, it was gross error to have approved this petition when there was such an admission from the petitioner that the duties of the proffered position could be performed by an individual without a bachelor's degree in a specific specialty or its equivalent.

As will now be discussed, further reasons necessitating the issuance of another NOIR in this matter reside in the evidentiary deficiencies in this record of proceeding with regard to the specialty occupation issue.

The AAO observes that on the Form I-129, the petitioner identified the proffered position as a computer programmer position. Likewise, the LCA filed in support of the petition was certified for a computer programmer, not for a computer programmer analyst. In her March 31, 2008 letter, however, the petitioner's human resources director stated that the petitioner wishes to hire the beneficiary as a computer programmer analyst, and the duty descriptions provided by that representative of the petitioner also comport with that of a computer programmer analyst, rather than with the lesser paying position of a computer programmer.

The 2012-2013 edition of the *Handbook* describes computer programmer analyst positions in the chapter entitled "Computer Systems Analysts," and it describes computer programmer positions in

the "Computer Programmers" chapter. Thus, as with OWL, the *Handbook* draws a clear distinction between the two occupational classifications.

The 2012-2013 edition of the *Handbook* describes the general nature of computer programmer positions as follows:

Computer programmers write code to create software programs. They turn the program designs created by software developers and engineers into instructions that a computer can follow. Programmers must debug the programs—that is, test them to ensure that they produce the expected results. If a program does not work correctly, they check the code for mistakes and fix them.

Duties

Computer programmers typically do the following:

- Write programs in a variety of computer languages, such as C++ and Java
- Update and expand existing programs
- Update and expand existing programs
- Debug programs by testing for and fixing errors
- Build and use computer-assisted software engineering (CASE) tools to automate the writing of some code
- Use code libraries, which are collections of independent lines of code, to simplify the writing

Programmers work closely with software developers and, in some businesses, their work overlaps. When this happens, programmers can do the work typical of developers, such as designing the program. This entails initially planning the software, creating models and flowcharts detailing how the code is to be written, and designing an application or system interface. For more information, see the profile on software developers.

Some programs are relatively simple and usually take a few days to write, such as mobile applications for cell phones. Other programs, like computer operating systems, are more complex and can take a year or more to complete.

Software-as-a-service (SaaS), which consists of applications provided through the Internet, is a growing field. Although programmers typically need to rewrite their

programs to work on different systems platforms such as Windows or OS X, applications created using SaaS work on all platforms. That is why programmers writing for software-as-a-service applications may not have to update as much code as other programmers and can instead spend more time writing new programs.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Computer Programmers," <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-2> (visited June 27, 2013).

The 2012-2013 *Handbook* addresses programmer analysts as an example position within the computer systems analysts occupational classification and, accordingly, addresses them in the chapter entitled "Computer Systems Analysts." That chapter relates the general duties of computer systems analysts in pertinent part as follows:

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[s] analysts.

* * *

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.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Computer Systems Analysts," <http://www.bls.gov/ooh/Computer-and-Information-Technology/Computer-systems-analysts.htm#tab-2> (visited June 27, 2013).

Programmer analyst positions, then, as the name implies, are computer systems analysts that include more programming duties than other computer systems analyst positions. In her March 31, 2008 letter, the petitioner's human resources director described the duties of the proffered position in the following manner, which appears to indicate – particularly by the references to systems-level work – that the beneficiary would be performing the duties of a *computer programmer analyst*:

Beneficiary will assist in designing, evaluating, programming and implementing the application. He will maintain computer systems, write program specifications and undertake technical documentation. He will design, write and develop custom-made software applications as per specific requirements.

Beneficiary will identify problems, study existing systems to evaluate effectiveness and develop new systems to improve production or workflow. He will write a detailed description of user needs, program functions, and steps required to develop or modify computer program. Beneficiary will also review computer system capabilities, workflow and scheduling limitation to determine whether the program can be changed within existing system.

Beneficiary will assist in developing application software based on specific needs. He will provide technical evaluation of new products, assess time estimation and provide technical support within the organization.

Beneficiary will be responsible for trouble shooting, installation and design and development of software applications. He will maintain thorough and accurate documentation on all application systems and adhere to established programming and documentation standards.

Beneficiary will prepare flow charts and diagrams to illustrate the sequence of steps that programs follow and to describe logical operations involved by making use of his knowledge of computer science. Beneficiary will also prepare manuals to describe installation and operating procedures.

That description makes clear that the beneficiary would not only be programming, but would study existing computer systems and design program applications to be coded. Thus, it appears that the position described is a programmer analyst position, and further analysis of the specialty occupation issue will be based on that finding.⁵

Having determined the best occupational classification of the proffered position, next to be discussed is the application of the additional, supplemental requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

We will first address the supplemental, alternative requirement of 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied if the petitioner demonstrates that the normal minimum entry requirement for the proffered position is a bachelor's or higher degree in a specific specialty or its equivalent.

⁵ It is noted that a few of the duties described appear to include those of a software developer. On the whole, however, the duties of the proffered position as presented by the petitioner are most similar to that of a computer systems analyst.

The *Handbook* describes the educational requirements of computer systems analyst positions, including programmer analyst positions, as follows:

How to Become a Computer Systems Analyst

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.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Computer Systems Analysts," <http://www.bls.gov/ooh/Computer-and-Information-Technology/Computer-systems-analysts.htm#tab-4> (visited June 27, 2013).

While the *Handbook* indicates that a bachelor's degree in a computer or information science field is common, it states that such a degree is not a requirement. It also indicates that those with general degrees in business or liberal arts may enter the occupation. As previously discussed, although a general-purpose bachelor's degree, such as a degree in business or liberal arts, 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. In addition to a general degree, the *Handbook* further states that those with associate's degrees and experience in a related occupation may also enter the occupation, but there is no indication that such a combination of education and experience must be equivalent to a bachelor's or higher degree in a directly related specific specialty.

Therefore, the *Handbook* does not support the proposition that programmer analyst positions, as a category, require a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into the occupation. Rather, it indicates that, to the contrary, some programmer analyst positions, at least, do not require a specific degree. As such, it does not support the particular position proffered here as normally requiring a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into this position.

The record contains no other evidence pertinent to the categorical requirements of programmer analyst positions. Thus, the petitioner has not demonstrated that a bachelor's degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position and has not, therefore, satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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

In determining whether there is 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 already discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or any other authoritative, objective, and reliable resource, reports a standard industry-wide entry requirement of at least a bachelor's degree in a specific specialty or its equivalent.

Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

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

A review of the record indicates that the petitioner has failed to credibly demonstrate that the duties the beneficiary will be responsible for or perform on a day-to-day basis entail such complexity or uniqueness as to constitute a position so complex or unique that it can be performed only by a person with at least a bachelor's degree in a specific specialty.

Specifically, the petitioner failed to demonstrate how the duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While a few related courses may be beneficial, or even required, in performing certain duties of the proffered position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here.

Therefore, the evidence of record does not establish that this position is significantly different from other positions in the occupation such that it refutes the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for such positions, including degrees not in a specific specialty. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent. As the petitioner fails to demonstrate how the proffered position is so complex or unique relative to other computer programmer analyst positions with software development and consulting services firms that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next to be considered is the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which is satisfied if the petitioner demonstrates that it normally requires a bachelor's degree in a specific specialty or its equivalent for its computer programmer analyst positions.⁶

⁶ While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS

The only evidence pertinent to the petitioner's previous history of recruiting and hiring consists of statements by the petitioner's human resources director, in her March 31, 2008 letter. In that letter, she asserted that the petitioner "[has] always employed professionals with the minimum of a Bachelor's degree."

That statement, even if corroborated, would be insufficient to demonstrate that the petitioner normally requires minimum of a bachelor's degree *in a specific specialty* or its equivalent for its computer programmer analyst positions. In this regard, as reflected in this decision's earlier discussion of the degrees that the petitioner found acceptable for the proffered position, it should be noted that the petitioner appears to have misinterpreted the statutory and regulatory definition of an H-1B specialty occupation as premised upon a petitioner's requiring any bachelor's or higher degree, or the equivalent, rather than upon the *particular position* itself requiring at least a bachelor's degree, or the equivalent, *in a specific specialty*.

Further still, as was noted, the petitioner's human resources director indicated that the proffered position may be filled by a person with a degree in any of a number of diverse subjects, including an undifferentiated bachelor's degree in business, which, as is explained in detail above, makes clear that the petitioner does not normally require a minimum of a bachelor's degree or the equivalent *in a specific specialty* for the proffered position. In short, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO will address the alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner establishes that the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent.

Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. The duties of the proffered position, such as assisting in designing, evaluating, programming and implementing computer applications; maintaining computer systems, writing program specifications, designing, writing, and developing custom-made software applications; etc., contain no indication of a nature so specialized and complex that knowledge required to perform them is usually associated with attainment of a minimum of a bachelor's degree in a specific specialty or its equivalent. In other words, the proposed duties have not been described

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 employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in a specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

with sufficient specificity to show that they are more specialized and complex than the duties of programmer analyst positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent. The petitioner has not, therefore, satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).⁷

For the reasons discussed above, the approval of the proffered position as a specialty occupation violated the H-1B specialty occupation requirements, in particular, because the petitioner failed to satisfy at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Thus, the NOIR should also specify the petitioner's failure to establish the proffered position as a specialty occupation as a basis for revocation under 8 C.F.R. § 214.2(h)(11)(iii)(A)(5), that is, "The approval of the petition violated paragraph (h) of this section or involved gross error."

This decision does not preclude the director from including in the NOIR any other bases for revocation on notice of the approval of the instant petition, provided that they comport with, and are stated with the specificity required by, the revocation-on-notice regulation at 8 C.F.R. § 214.2(h)(11)(iii).

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 been met in part. Accordingly, the director's decision will be withdrawn, and the matter will be remanded for entry of a new decision.

ORDER: The decision of the director is withdrawn. The matter is remanded to the director for further action consistent with the above and entry of a new decision.

⁷ Further, it is noted again the petitioner has designated the proffered position as a Level I position on the submitted LCA, indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf. Therefore, it would not be credible that the position is one with specialized and complex duties, as such a higher-level position would likely be classified as a Level IV position, requiring a significantly higher prevailing wage.