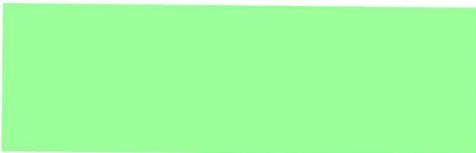


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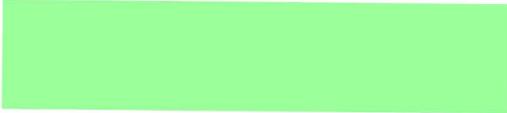
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

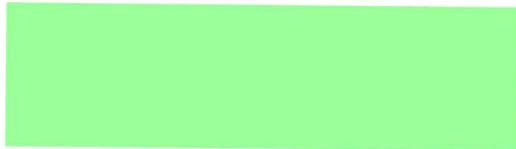


DATE: **MAY 31 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner:
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

for 
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 a Nonimmigrant Worker (Form I-129) to the California Service Center on August 12, 2011. On the Form I-129 visa petition, the petitioner describes itself as an information technology services business established in 2000, with 44 employees. In order to employ the beneficiary in a position to which it assigned the job title "Cloud Apps Deployment Engineer," 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).

Upon review of the Form I-129 and the documentation filed with it, the director issued a request for additional evidence (hereinafter referred to as the RFE), which, in part, requested that the petitioner submit evidence to establish that it had secured specialty-occupation work for the beneficiary from the time of the beneficiary's entry into the United States through the requested H-1B validity period. Towards this end, the RFE included a list of some of the types of evidence that could be submitted.

After review of the documents submitted in response to the RFE, the director denied the petition, finding that the petitioner failed (1) to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions; and (2) to demonstrate that it had secured work for the entire requested period of employment when it filed the petition.

On appeal, counsel for the petitioner states that the director's basis for denial of the petition on the specialty occupation issue was erroneous. In support of this position, counsel for the petitioner submitted a brief and additional documentation.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the aforementioned RFE; (3) the petitioner's response to the RFE; (4) the director's notice denying the petition; and (5) the petitioner's Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

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

The AAO will first address the director's main ground for denial of the petition: the determination that the petitioner had not established the proffered position as a specialty occupation.

To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

occupation that requires:

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

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. §

214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), 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.

The Labor Condition Application (LCA) submitted in support of this petition was certified for a position that would bear the job title Cloud Apps Deployment Engineer and would belong to the occupational classification Software Developers, Applications – SOC (ONET/OES Code) 15-1132.00, at a Level I wage.

In the Form I-129, the petitioner described the proposed duties as follows:

Apply computer science principles to complex cloud based deployment projects.
Please see attached petitioner support letter.

In its support letter, dated August 4, 2011, the petitioner provided the following description of the proffered position:

In layman's terms, the Cloud Apps Deployment Engineer performs a service that allows users to sync their desktop computers, laptops, netbooks, tablets, data phones, and all other mobile devices together simultaneously, all through the web. In order to perform this service, the Cloud Apps Deployment Engineer must understand networking/email fundamentals, directory service fundamentals, technical architecture of the cloud service provider, security, configurations, and troubleshooting basics, amongst other things.

In the letter of support, the petitioner states that the job duties "require a level of skill typically

attained while completing a bachelor's degree in a computer[-]related discipline." The petitioner claims that the beneficiary is qualified for the position and states that the beneficiary has a bachelor's degree in computer engineering from the [REDACTED] in Brazil.

The petitioner submitted a credential evaluation by Evaluation World LLC that states that the beneficiary's foreign degree is equivalent to a bachelor of science degree in computer engineering from a regionally accredited college or university in the United States.

The petitioner's response to the RFE included, among other documents: (1) a copy of an employment offer letter from the petitioner to the beneficiary, dated November 14, 2011 (hereinafter referred to as the EOL); (2) an unsigned and undated copy of the "Google Apps Deployment Services Statement of Work" (hereinafter referred to as the SOW), which appears to have been presented by the petitioner to an undisclosed client on November 14, 2011; and (3) a letter from the petitioner addressed "To Whom It May Concern," dated November 22, 2011, which lists some of the petitioner's clients that have been migrated to Google Apps.

In the aforementioned EOL, the petitioner provided the following description of the title, duties and responsibilities, position location, and employment period of the proffered position:

Title: Google Apps Deployment Engineer and will be reporting to . . . [the] President & CEO and to no other intermediary supervisor at [the petitioner] or outside of [the petitioner].

Duties and responsibilities: As a Google Apps Deployment Engineer, you will apply computer science principles to complex cloud based deployment and implement projects. Specifically, you will use open source technologies, APIs, SDKs, and scripts to customize implementations for organizations of various types and sizes; develop new tools and technologies for cloud deployment and migrations both individually and in a team environment; develop and work with databases of various types including MySQL and MS SQL; conduct tests and ensure software meets quality assurance standards; consult with clients throughout the implementation process; work with project managers and clients to understand requirements and clarify conceptual needs for projects; develop detailed project specifications and document applications and all associated procedures. In addition, you have no role in hiring or paying workers, nor do you have any supervisory or managerial responsibilities. Your role is solely to perform the duties as a Google Apps Deployment Engineer.

Position location: All duties are to be performed at [the petitioner's] Corporate office

Employment Period: Date of entry in the United States to September 2014.

The AAO finds that the petitioner's descriptions of the proposed duties as provided above and

elsewhere in the record, which include undefined terms of art and acronyms, do indicate that, if actually performed, those duties would involve the application of technical computer and information technology knowledge, to whatever extent might be involved in the beneficiary's work, which, in the EOL's language, would be "solely to perform the duties as a Google Apps Deployment Engineer." However, the AAO further finds that the minimum level of training, experience, and/or formal education that would be required to attain such knowledge is not self-evident in the duty descriptions, even considered in the aggregate and in the context of the evidence that the record of proceeding asserts about the general types of organizations in which they would be applied.

As the relatively abstract descriptions of general functions that they are, this record's duty descriptions do not establish a level of complexity, uniqueness, or specialization that distinguishes them, or the position that they comprise, from positions whose performance does not require a bachelor's degree, or the equivalent, in a specific specialty.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

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

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Software Developers."

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet at <http://www.bls.gov/ooh/>. The AAO's references to the *Handbook* are to the 2012-2013 edition available online.

The AAO reviewed the information in the *Handbook* regarding the occupational category “Software Developers.” However, the AAO is not persuaded that the proffered position falls under the aforementioned occupational category.² The AAO has determined that the proffered position’s duties most closely relate to the *Handbook*’s description regarding the occupational category “Network and Computer Systems Administrators.”

The subchapter of the *Handbook* entitled “What Network and Computer Systems Administrators Do” states the following about this occupational category:

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

Duties

Network and computer systems administrators typically do the following:

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

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

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

² The AAO’s view in this respect is based on the job descriptions provided in the record of proceeding, on the petitioner’s self-description, on the SOW, on printouts from the petitioner’s website, and on the petitioner’s letter, dated November 22, 2011, submitted in response to the RFE, stating that the petitioner does not create software.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Network and Computer Systems Administrators, available on the Internet at <http://www.bls.gov/ooh/Computer-and-Information-Technology/Network-and-computer-systems-administrators.htm#tab-2> (last visited April 10, 2013).

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

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

Education

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

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

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

Certification

Certification is a way to show a level of competence and may provide a jobseeker with a competitive advantage. Certification programs are generally offered by product vendors or software firms. Companies may require their network and computer systems administrators to be certified in the product they use. Some of the most common certifications are offered from Microsoft, Red Hat, and Cisco.

Important Qualities

Analytical skills. Administrators need analytical skills to evaluate network and system performance and determine how changes in the environment will affect it.

Communication skills. Administrators work with many other types of workers and have to be able to describe problems and their solutions to them.

Computer skills. Administrators oversee the connections of many different types of computer equipment and must ensure that they all work together properly.

Multi-tasking skills. Administrators may have to work on many problems and tasks at the same time.

Problem-solving skills. Administrators must be able to quickly resolve problems with computer networks when they occur.

Id., available on the Internet at <http://www.bls.gov/ooh/Computer-and-Information-Technology/Network-and-computer-systems-administrators.htm#tab-4> (last visited April 10, 2013).

When reviewing the *Handbook*, the AAO must note again that the petitioner designated the prevailing wage for the proffered position as wage for a Level I (entry level) position on the LCA.³ This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.⁴ That is, in accordance with the relevant DOL explanatory information on wage

³ Wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

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

⁴ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is describes as follows:

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

Id.

levels, this Level I wage rate is only appropriate for a position in which the beneficiary is only required to have a basic understanding of the occupation and would be expected to perform routine tasks that require limited, if any, exercise of judgment. This wage rate also indicates that the beneficiary would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results.

The *Handbook* does not report that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the Network and Computer Systems Administrators occupational classification. The “How to Become a Network and Computer Systems Administrator” section of the *Handbook*, excerpted above, reports that “[n]etwork and computer systems administrators must often have a bachelor’s degree, although some positions require an associate’s degree or professional certification along with related work experience.” In addition, the *Handbook* states that “[c]ertification programs are generally offered by product vendors or software firms. Companies may require their network and computer systems administrators to be certified in the product they use.” Such information is not indicative of an occupation for which there is a normal requirement for at least a baccalaureate or higher degree in a specific specialty, or its equivalent.

Accordingly, as the *Handbook* indicates that entry into the pertinent occupational group does not normally require at least a bachelor’s degree in a specific specialty or its equivalent, the *Handbook’s* information does not satisfy this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

The AAO notes that the petitioner failed to provide any documentation regarding the Google Apps Certification Program and the minimum educational requirements for Google Apps certification as a Google Apps Deployment Specialist, although, the AAO finds, this appears to be the type of position for which the petition was filed.

In this regard, the AAO notes that the information about the Google Apps Certification Program, available on the Internet at <http://certification.googleapps.com/Home/faqs> (last visited April 10, 2013), does not indicate that at least a bachelor’s degree in a specific specialty, or its equivalent, is required to apply for the Google Apps Certification Program. In the section entitled, “Test Taking Tips,” subsection, “How should I prepare for the exams?,” it states that “[t]he best way to prepare

for the exam is from hands-on experience deploying or selling Google Apps for Business to several customers. For the Deployment Specialist exam, we recommend having a minimum of 3-6 years of IT experience, and completing at least 3 customer deployments involving data migration with some technical complexity.” The AAO notes that in this case, given that the petitioner claims to be an authorized Google Apps reseller and to “lead[] as one of the ten certified Google Apps Enterprise/Resale partner[s],” it is fair to assume that the petitioner is aware of the information that is contained in the Google Apps Certification Program’s website with regard to Google Apps Deployment Specialist’s qualifications. Even if not so aware, the AAO finds a significant and material evidentiary deficiency in the petitioner’s failure to submit into the record of proceeding what educational credentials Google itself requires for persons to operate for its resellers as a Google Apps Deployment Specialist.

Upon review of the totality of the evidence in the entire record of proceeding, the AAO concludes that the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that a requirement for at least a bachelor’s degree in a specific specialty, or its equivalent, is normally required for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the particular position that is the subject of this petition is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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

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

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

In order for the petitioner to establish that another organization is similar for the purpose of establishing the other organization’s relevance to this particular criterion, the evidence of record must demonstrate that the petitioner and the other organization are substantially alike in the substantive nature and scope of their operations. Here, the petitioner does not succeed in that endeavor. It fails to provide sufficient evidence to show that the advertising companies and the petitioner are so similar in size, operational scope, and performance requirements that the

performance, recruiting, and hiring requirements of the organizations may be recognized as also similar.⁵ When determining whether the petitioner and another organization share the same general characteristics, information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements) may be considered. It is not sufficient for the petitioner to claim that the organizations are similar and in the same industry without providing a persuasive factual foundation for such an assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Aside from the failure to establish the requisite similarity between the petitioner and organizations whose advertisements were submitted into the record of proceeding, the AAO also finds that the petitioner has failed to satisfy another material element of proof under this particular criterion, namely, that the documentary evidence presented under this criterion actually relates to positions that are “parallel” to the position proffered in the petition.

The Agosto advertisement is for a “Google Apps Implementation Project Manager,” a position that is not shown to be substantially similar to the one proffered here. In the absence of the petitioner’s failure to establish that the advertised position and the position that is the subject of this petition are, in fact, parallel, the petitioner has failed to establish that advertisement’s relevance to this or any other criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). This same, fundamental defect of failing to establish that the advertised position and the one here proffered are parallel applies to the Gravity advertisement for an “Architect, Cloud Computing” position paying \$100,000 per year; to the Appirio advertisement for a “Google Apps Consultant” – which only states a preference for (not a requirement for) a degree in a specific specialty; to the FrontRange Solutions advertisement for a “Senior Cloud Application Architect - Saas”; to the Genetech advertisement for a “Cloud Support Analyst”; to the advertisement by Kineticom for a “Senior Software Engineer – Cloud,” which is advertised for the “Category: Software Development”; to the Salesforce advertisement for an “Associate Performance Engineer, Cloud Computing”; and to the Salesforce advertisement for a “Service Cloud Architect.”

Aside from and in addition to the other evidentiary defects noted above with regard to the job-vacancy advertisements, the AAO also notes, first, that the advertisements fail to reflect consistent hiring requirements, in that some only state degree preferences, not requirements; and, second, that a number of the advertisements fail to establish objectively comparable recruiting and hiring standards, in that they express degree-equivalency as acceptable but without identifying any standard by which such equivalency would be determined.

For all of the reasons discussed above, the petitioner’s reliance on the job-vacancy advertisements is misplaced. As a result, the petitioner has not established that similar companies in the same

⁵ For instance, the two advertisements by Salesforce.com indicate that this company is not a similar organization to the petitioner in terms of size (over 5,000 employees), revenue (over \$2.0 billion in annual revenue run rate), and number of customers (over 97,700 customers worldwide).

industry routinely require at least a bachelor's degree in a specific specialty in their recruiting and hiring for positions parallel to the one proffered in this petition.⁶

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

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

In the instant case, the AAO finds that the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position.

The record of proceeding does not contain evidence establishing relative complexity or uniqueness as aspects of the proffered position, let alone that the position is so complex or unique as to require the theoretical and practical application of a body of highly specialized knowledge such that a person with a bachelor's or higher degree in a specific specialty or its equivalent is required to perform that position. Rather, the AAO finds that the petitioner has not distinguished either the proposed duties, or the position that they comprise, from the range of Network and Computer Systems Administrators positions that the *Handbook's* information indicates are held by persons without at least a bachelor's degree, or the equivalent, in a specific specialty.

⁶ Further, even if the evidentiary value of the advertisements was not so undermined by the issues noted above, they would still not be persuasive in that, aside from the unknown size of the relevant population of advertisements from which those submitted into the record were drawn, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the relatively small number of job advertisements with regard to determining the common educational requirements for entry into parallel positions in similar companies. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position of cloud apps deployment engineer at an information technology services business required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not normally require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

The AAO further finds that, even outside the context of the *Handbook*, the petitioner has simply not established relative complexity or uniqueness as attributes of the proffered position, let alone as being so elevated as to require the services of a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

Consequently, as it has not been shown that the particular position for which this petition was filed is so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. Again, the AAO incorporates by reference and reiterates its earlier discussion that the LCA indicates a wage level based upon the occupational classification "Software Developers" at a Level I (entry level) wage. This wage level designation is appropriate for positions for which the petitioner expects the beneficiary to have a basic understanding of the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that 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.

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

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

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

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the position.

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").

While the petitioner submitted several of its own job vacancy announcements for positions asserted to be similar to the proffered position, these job vacancy announcements are not sufficient to establish the requisite history of the recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty. In this regard, the AAO notes, first, that the petitioner fails to establish the degree or degree equivalency of persons – if any – who were hired pursuant to the advertisements. Second, the AAO finds that the petitioner has failed to establish how representative those advertisements are of even the petitioner's relevant job-vacancy advertising practices over any definite period of time sufficiently long as to be indicative of an established history of even consistent recruiting practices over a substantial period of time.

Thus, as the record of proceeding does not establish the requisite history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

The AAO finds that the petitioner has not provided probative evidence to satisfy this criterion of the regulations.

That is, the proposed duties have not been described with sufficient specificity to establish their nature as more specialized and complex than the nature of the duties of other positions in the pertinent occupational category whose performance does not require the application of knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty, or its equivalent.

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

As the evidence in the record of proceeding has not established that the nature of the duties of the position is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

Additionally, the AAO finds that the petition is not supported by sufficient evidence that it was filed on the basis of cloud apps deployment engineer work that, at the petitioner's filing, was assured for the beneficiary for the period of employment specified in the petition. As noted above, the EOL is dated November 14, 2011, a date after the RFE was issued, and therefore this document was not available at the time the petition was filed on August 12, 2011. The EOL indicates that the beneficiary will work on projects for "organizations of various types and sizes" and will "consult with clients throughout the implementation process; [and] work with project managers and clients to understand requirements and clarify conceptual needs for projects. . . ."

As noted above, in response to the RFE, the petitioner also provided a copy of an unsigned and undated SOW for an undisclosed client, that states "Presented On 11/14/2011." However, since this SOW is unsigned and undated, there is no evidence that it has been accepted by any end-client and is a valid statement of work. Moreover, there is no evidence that this would be the end-client for whom the beneficiary would work. Thus, the record lacks a copy of any evidence between the petitioner and the end-client regarding the nature and scope of the beneficiary's work. In addition, the record is devoid of any documentary evidence related to the items listed as prerequisites for the project, which include, but are not limited to, a signed Master Services Agreement. Also, the SOW does not describe the beneficiary's duties in meaningful detail or identify the necessary minimum qualifications necessary to perform them. The SOW contains a "Project Team" list, specifying the names, roles, and responsibilities of the team members, but it does not mention the beneficiary. Moreover, the SOW is unclear as to what the duration of the work will be.

In its letter in response to the RFE, dated November 23, 2011, counsel stated that the name of the client company was deleted in the SOW because of the petitioner's policy to keep clients' information confidential. However, the AAO notes that in contradiction with this alleged policy of the petitioner, the petitioner also submitted a letter in response to the RFE, dated November 22, 2011, and addressed to "To Whom It May Concern," wherein it disclosed information about six clients that it had migrated to Google Apps, such as the names of such clients, the number of end-users for each client, and the approximate cost of each service.

While a petitioner should always disclose when a submission contains confidential commercial information, the claim does not provide a blanket excuse for the petitioner's failure to provide such a document if that document is material to the requested benefit.⁷ Although a petitioner may always

⁷ Both the Freedom of Information Act and the Trade Secrets Act provide for the protection of a petitioner's

refuse to submit confidential commercial information if it is deemed too sensitive, the petitioner must also satisfy the burden of proof and runs the risk of a denial. *Cf. Matter of Marques*, 16 I&N Dec. 314 (BIA 1977). Despite the director's specific request, the petitioner failed to submit the requested material evidence. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). For this reason also, the petition must be denied.

The AAO agrees with the director's finding that the petitioner failed to establish that, by the time of the petition's filing, it had secured work for the entire period of requested employment, that is, October 1, 2011 to September 30, 2014.

The AAO notes that although this petition was filed on August 12, 2011, and the period of requested employment in the petition extended from October 1, 2011 through September 30, 2014, the SOW contains language that states that it was "Presented On 11/14/2011" to an undisclosed client, more than three months after the petition was filed and more than a month after the commencement of the requested H-1B validity period. Also, the SOW does not specify a date for when the beneficiary's services will begin and when the services will end. The SOW therefore does not cover the entire period of requested employment. However, even if this SOW did constitute credible evidence regarding work that the petitioner may have secured for the beneficiary to perform during the requested period of employment, this document is not in itself evidence that, by the time of the petition's filing, the petitioner had secured definite, non-speculative employment with the beneficiary. 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)(12). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Thus, the AAO agrees with the director that the petitioner failed to establish that, by the time of the petition's filing, it had secured work for the entire period of requested employment. Accordingly, the appeal will be dismissed and the petition will be denied on this basis also.

Moreover, although counsel, in its letter in response to the RFE, dated November 23, 2011, stated that the SOW is a copy of "a contract entered into by the petitioner and one of its clients," the language on the face of the SOW appears to indicate, through the usage of words such as "Presented To" and "Presented On," that this document is actually a presentation or proposal, rather than a contract. Also, in a section titled, "Expiration," it states that "[t]his **proposal expires within 30 days**. Please indicate your acceptance by signing in the space below, and faxing this proposal in its entirety. . . ." (Emphasis in italic added.) Also, in the brief on appeal, counsel for the petitioner, in stark contradiction to her statements in the letter in response to the RFE (noted above), stated that the petitioner submitted "a **sample** of [an] actual contract with 'ultimate end-client companies' but deleted/blocked out confidential information such as the name of the client company, names of

confidential business information when it is submitted to USCIS. *See* 5 U.S.C. § 552(b)(4), 18 U.S.C. § 1905. Additionally, the petitioner may request pre-disclosure notification pursuant to Executive Order No. 12,600, "Predisclosure Notification Procedures for Confidential Commercial Information." Exec. Order No. 12,600, 1987 WL 181359 (June 23, 1987).

authorized officials of the client, and signatures.” (Emphasis in original.) Again, this language does not indicate that the SOW has any contractual significance with respect to the beneficiary’s employment, and does not indicate that the petitioner secured work for the beneficiary for the entire period of requested employment.

Moreover, there are some inconsistent statements made on petitioner’s behalf with respect to the SOW. Previously, in response to the RFE, counsel for the petitioner stated that the SOW was a copy of a contract between the petitioner and one of its clients, while now on appeal, counsel states that the SOW is a sample of a contract with end-client companies. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Most importantly, counsel for the petitioner’s statement that the SOW is a sample of an actual contract is not sufficient evidence that a contract actually exists between the petitioner and an end-client for the beneficiary’s work. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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

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

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

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