



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **APR 10 2014** OFFICE: CALIFORNIA SERVICE CENTER

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:

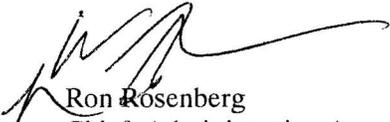
SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center (the "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.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a "Computer Systems and Software Analysis and Consulting Services" business established in 2011, with 4 employees. In order to employ the beneficiary in what it designates as a "Computer Systems Analyst" position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the grounds that the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's notice of decision; and (5) the petitioner's Form I-290B, Notice of Appeal or Motion, and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's grounds for denying this petition.¹ Accordingly, the appeal will be dismissed and the petition will remain denied.

I. STANDARD OF REVIEW

In the exercise of its administrative review in this matter, as in all matters that come within its purview, the AAO follows the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010), unless the law specifically provides that a different standard applies. In pertinent part, that decision states the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.

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

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. See *INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Id. at 375-76.

Again, the AAO conducts its review of service center decisions on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d at 145. In doing so, the AAO applies the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon its review of the present matter pursuant to that standard, however, the AAO finds that the evidence in the record of proceeding does not support the petitioner's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, the AAO finds that the director's determination in this matter was correct. Upon its review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, the AAO finds that the petitioner has not established that its claims are "more likely than not" or "probably" true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads the AAO to believe that the petitioner's claims are "more likely than not" or "probably" true.

II. PROCEDURAL AND FACTUAL BACKGROUND

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position that it designates as a computer systems analyst, to work on a full-time basis at a salary of \$60,000 per year. In addition, the petitioner indicated that the beneficiary would be employed at [REDACTED]. The petitioner stated that the dates of intended employment are from October 1, 2013 to October 1, 2016.

The petitioner appended the requisite Labor Condition Application (LCA) to the petition, which indicates that the occupational classification for the position is "Computer Systems Analysts" SOC (ONET/OES) Code 15-1121, at a Level I (entry level) wage. The LCA was certified for a validity period beginning September 19, 2013 to September 19, 2016.

In a letter of support, dated April 1, 2013 the petitioner identified itself as "a global software development company" and stated that it provides the "full spectrum of software development services in both dedicated offshore centers and at customer sites." As a computer systems analyst, the petitioner indicated that the beneficiary's duties will be as follows:

[A]nalyze, design and implement Web-based applications. He will be responsible for extracting and defining user requirements. Furthermore, [the beneficiary] will identify where modifications to existing processes are required. He will also design new processes as necessary. In each situation, [the beneficiary] will perform comprehensive testing of any improved or newly developed applications prior to their implementation. His technical environment will include Java, MySQL, Java Script, HTML, and SQL Server/Management Studio, among others.

In support of the petition, the petitioner provided an undated document titled "International Travel Agency Business Plan" which identified a specific project "[REDACTED]". In the "Executive Summary" portion of the business plan, the petitioner stated: "avia4us.com project will be a sole proprietorship owned and operated by [the petitioner]" and one of its goals over the next three years is to "[a]chieve 100% of sales from the Internet." As described in the "Mission" portion of the business plan, avia4us.com is a travel agency providing consulting and custom travel arrangements and packages.

The development team, as explained in section 6.1 Organizational Structure of the business plan, is to be comprised of "experienced travel industry professionals along with web-site developers and designers." The petitioner indicated further that the organizational structure will start with a General Manager/Accountant, Marketing and Advertising Director/President and Technical Director, and two full-time experienced "developers" from abroad.

The director issued an RFE on June 17, 2013. The petitioner was asked to submit evidence to establish, among other things, (1) that the proffered position qualifies as a specialty occupation, (2) that, for the duration of the requested H-1B validity period, a valid employer-employee relationship will exist between the petitioner and the beneficiary, and that the petitioner has the right to control the beneficiary's work, and (3) that if the beneficiary will work on a project at the petitioner's location there is sufficient specialty occupation work for the beneficiary to perform for the duration of the requested H-1B validity period. The director provided a list of the types of evidence that could be submitted.

In response to the director's RFE, the petitioner submitted a letter dated July 1, 2013. The petitioner described the project the beneficiary will be assigned to as development of avia4us.com. The petitioner stated: "the full development of our CRS (Computerized Reservation System) and the required transitions between booking engines will require full-time computer systems specialists dedicated to bringing the site into competition with other major web-sites."

The petitioner explained: "[c]urrently some of the draft design mockup exists and is to be finalized soon as well as the architecture of the project, which is going to be part of the tasks for [the

beneficiary] as a Computer Systems Analyst." The petitioner stated further that the beneficiary "will be working on system development, including primarily our [REDACTED] CRS system, to work to integrate this system with web applications, and their related databases." Specifically, the beneficiary will be responsible for the following tasks:

- Analyze, design and implement Web-based applications: develop CRS and web applications as identified by supervisor and management through packaged customized applications and design, implement, maintain and enhance existing Web applications and all internal systems; 35%
- Extracting and defining user requirements: perform complete testing of Web applications unit and system, and conduct all user acceptance testing and report results; 15%
- Identify where modifications to existing processes are required: design and implement user-driven templates, databases and interfaces for ease of use, develop database-driven Web interfaces for rapid, real-time information sharing, and develop external Web portals allowing users to input and retrieve accurate information; 33%
- Interaction with project team and customers: working closely with QA test cases and unit testing and interference with Business and IT resources of clients for requirements and follow-up; 12%
- Training Project Team Members: introducing newest technologies and sharing best practices; 5%

The petitioner provided an unsigned document consisting of three additional pages relating to the beneficiary's job description. The first document listed one and a half pages of specific tasks related to a project and the hours to be spent performing each task. The tasks included items such as: researching requirements to the project, proposal design and architecture development, preparing QA Test plan, discussion about initial design of web pages, creating mock-ups, designing workflow and diagrams, setup for the travel recreation systems, and breaking the project into smaller parts and assigning them to specific developers.

Following the one and a half pages of specific tasks, the petitioner provided a narrative explanation of the project management and skills required to perform the duties as follows:

I will manage the project as a Project Manager and [REDACTED] and other Developers will work as a team of Senior Developers, requiring [s]pecialized knowledge in web development...SQL relational database management and development...ability to research and debug software and learn and setup new software when needed, for example how to setup and use, communicate with the travel reservation system.

The petitioner goes on to state that the list of knowledge is "mostly everything essential that any developer would need for this project avia4us.com"

The petitioner then listed the following duties with percentage of time to be spent performing the duties:

- Delivery Management for Analytics and Data warehousing solutions; [no percentage given]
- Interface with Business and IT resources of clients for requirements and follow up; 8%
- Develop new Software and Web applications as identified by supervisor and management through packaged and customized applications; 10%
- Design, Implement, Maintain, and enhance existing Software and Web applications and all internal systems are integrated; 21%
- Perform complete testing of Software and Web applications with Unit testing using nUnit tools and system, engaging users as necessary; 8%
- Conduct all user acceptances testing, and report results; 5%
- Design and implement user-driven templates, databases and interfaces for ease of use; 8%
- Develop database-driven Web interfaces for rapid, real-time information sharing; 10%
- Develop external Web portals allowing users to input and retrieve accurate information; 15%
- Participate in team daily and weekly meetings; 8%
- Working closely with QA team on test cases and unit testing; 5%
- Training Project Team Members (Introducing newest technologies and sharing best practices, Training about Business); 2%

The petitioner further submitted an employment offer letter to the beneficiary dated March 1, 2013. The beneficiary was offered a salary of \$60,000 for the position of Computer Systems Analyst on "the petitioner's] Web Development Team." The employment letter set out the agreement of the parties indicating, in part:

Employer shall employ Employee as a Computer Systems Analyst to (i) perform software development and maintenance; (ii) develop strategies and methods to assist the Employer in providing products and services to its clients and; (iii) such other matters as the Employer may reasonably request, not inconsistent with the services specified herein.

An acceptance letter also dated March 1, 2013 was attached to the employment offer and signed by both parties.

The petitioner stated that the proffered "position requires advanced education in a technical field such as computer science, engineering, or a related field as well as knowledge and experience related to computer systems and technologies."

The petitioner also submitted an organizational chart showing the Owner & President location in the

US and Ukraine as well as a Chief Financial Officer at both locations. Reporting to the Owner & President is the "Future US Team." The Chief Technology Officer is shown to be located in Ukraine with a Lead Developer, three Computer System Analysts/Developers, and a QA Tester reporting to him. There is no employee with the name "[REDACTED]" listed on the chart.

The petitioner provided additional supporting evidence in response to the RFE, including, among other items, the following:

- Draft mock-ups of the avia4us.com project.
- An educational evaluation for an individual to whom the petitioner offered the same position as evidence that it is standard in the petitioner's industry for Computer Systems Analysts handling the level of complexity described to have at least a Bachelor's degree in Computer Science or a related technical field and to show that the petitioner hired individuals with bachelor's degrees for the position.

Upon review, the director denied the petition determining that the petitioner had not established that the proffered position is a specialty occupation within the meaning of the applicable statute and regulations.

On appeal, the petitioner submits two briefs. The first brief, dated September 19, 2013, does not identify any erroneous conclusion of law or fact with the decision but submits additional evidence to show the position qualifies as a specialty occupation.

In connection with the first brief, the petitioner provided the same list of job tasks and duties with percentage of time breakdown as provided in response to the RFE. The petitioner, however, provided a different description of the specialized knowledge requirements related to the position than that provided in response to the RFE. Specifically, the petitioner stated the following:

I, [the President], will manage the project as Project Manager and [the beneficiary] and other Computer Systems Analysts will work as a team of Senior IT professionals, requiring [s]pecialized knowledge in software applications and web development... SQL relational database management and development...ability to research and debug software and learn and setup new software when needed, for example how to setup and use, communicate with the travel reservation system, customize certain solutions.

The petitioner provided a revised organizational chart, showing two employees hired for the position of Computer Systems Analyst and three employees selected but not yet hired for the position. The employee referenced as "[REDACTED]" in the petitioner's first description of the beneficiary's duties in response to the RFE, was listed as [REDACTED] currently reporting to the President as a "Computer Systems Analyst."

The petitioner also submits the following documentation::

- Paychecks and IRS Forms W-2 for current employees;
- The employment offer and acceptance of employment previously submitted
- Copies of I-129 cover letters and supporting documents for two current employees listed as computer systems analysts and four potential employees in the same position of computer systems analyst - no approval notices were included;
- A printout from the Department of Labor's *Occupational Outlook Handbook's (Handbook)* report on Computer Systems Analysts;
- Copies of 11 advertisements for Computer Systems Analysts from other companies the petitioner described as "similar;" and
- Timesheets and IRS Form 941: Employer's Quarterly Wage reports.

The second brief, dated February 2, 2014, states that the record established that the position of computer systems analyst is a specialty occupation and that the petitioner will have sufficient specialty occupation work for the beneficiary. The petitioner attaches the following documents to the second brief:

- A copy of U. S. Citizenship and Immigration Services' (USCIS) Fiscal Year 2012 Annual Report to Congress on the Characteristics of H1B Specialty Occupation Workers;
- The same printout from the Department of Labor's *Occupational Outlook Handbook's (Handbook)* report on Computer Systems Analysts, as previously provided;
- A printout from a U.S. News article on best technology jobs which profiled the occupation of a computer systems analyst;
- A January 22, 2014 letter on the letterhead of [REDACTED] providing a list of duties for its position of computer systems analyst and claiming that [REDACTED]; requires a minimum of a bachelor's degree in computer science or a related field or equivalent experience for its computer systems analysts;
- A January 22, 2014 letter, with no letterhead signed by [REDACTED] who indicates he was previously employed with [REDACTED] provides an identical list of duties for the position of computer systems analyst as set out in the [REDACTED] letter and provides the [REDACTED] conclusion that "we require a minimum of a bachelor's degree in computer science or a related field or equivalent experience" for its computer systems analysts;
- An additional seven advertisements for Computer Systems Analysts from other companies;

The petitioner also provided a February 2, 2014 letter signed by its president which included a revised description of the proffered position. The petitioner states that while working on the avia4us.com project, the position requires:

Advanced knowledge of architecture, design, software implementation, web applications, web services, SQL Database design, development, optimization and profiling;

Debugging, tracking and logging skills to find and resolve issues on our production servers, QA and UAT environments;

Before starting the actual development of the [REDACTED] project, design the workflow of all processes in the travel reservation system and generate diagrams and case scenarios;

Performance of unit testing – developing automatic unit testing solutions to ensure a stable and error-free product;

Someone who can secure https connection setups and ensure proper site authorization and authentication, ensuring privacy for avia4us users; and

Proficiency in Web Farm setup, wherein multiple web servers are used to service large web applications with huge amount of users worldwide.

The petitioner also notes that a bachelor's degree in computer science provides the specific education needed to implement all Search Optimization Engine (SEO) marketing and accounting related features of the site. The petitioner, while indicating that the [REDACTED] project will require 11,000 hours to reach its full operating capacity, also states that it has other ongoing service agreements that will provide ample work for its "analysts." The documents attached to the second brief also include copies of several service agreements and work orders with third parties. The work orders did not include the beneficiary's name.

The sole issue on appeal is whether the petitioner has established that the duties of the proffered position comprise a specialty occupation.

III. Law

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 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), 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.

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

IV. ANALYSIS

A. Second Submitted Brief

As a preliminary matter, the second brief submitted on February 2, 2014, does not appear to address the director's denial dated August 29, 2013. The brief discusses errors of law or fact made by the director in his decision; however, the brief provides quotations and reasoning not found in the director's decision dated August 29, 2013. For example, the second brief states the "Service appears to concede in the Denial that the proffered position satisfies the third criterion, stating that 'although you claim to have hired only individuals with a bachelor's degree or higher in computer science or computer engineering, the position, nevertheless, does not meet the statutory definition of specialty occupation'." This language is not included in the director's August 29, 2013 decision. Likewise, the language "[a]lthough you assert that you normally require a baccalaureate degree...your reasoning is problematic when viewed in light of the statutory definition of specialty occupation," does not appear anywhere in the director's decision. Additionally, the second brief indicates that the director determined "that, 'the position of computer systems analysts [sic] is an occupation that does not require a baccalaureate level of education in a specific specialty as a *normal*, minimum for entry into the occupation'." Again, the director did not use this language in the denial decision. Moreover, the second brief refers to the denial improperly disregarding evidence of job postings when the director determined that "the listings provided appear to be for

positions that are dissimilar to the proffered position" and that "there is not enough information from the listing to determine whether of [sic] the employers advertising for the position is similar to the petitioner's organization'." However, the petitioner did not submit job announcements or listings for the director's review, the job listings were submitted on appeal to the AAO. Accordingly, not only does the decision not include the language quoted by the petitioner, the underlying documentation referred to was not provided for the record for the director. Finally, the second brief alleges that the director misunderstood the nature of the petitioner's business and that the director concluded that the petitioner is "not the entity that will be providing [specialty occupation] duties to the beneficiary." The director's denial decision of August 29, 2013 includes no such conclusion.

As the second brief obviously refers to a different denial decision and the reasoning for the denial of a different case, the second brief is not probative in this matter. The petitioner's assertions in the second brief are not relevant to the matter at hand. Although the AAO will review and analyze the additional exhibits attached to the second brief, the AAO accords no probative weight to the assertions in the second brief.

B. Material Inconsistencies which Preclude Approval of the Petition

One consideration that is necessarily preliminary to, and logically even more foundational and fundamental than the issue of whether a proffered position qualifies as a specialty occupation, is whether the petitioner has provided substantive information and supportive documentation sufficient to establish that, in fact, the beneficiary would be performing services for the type of position for which the petition was filed (here, a computer systems analyst). Upon review of the record of proceeding, the AAO notes that there are numerous inconsistencies and discrepancies in the petition and supporting documents, which undermine the petitioner's credibility with regard to the services the beneficiary will perform, as well as the actual nature and requirements of the proffered position. When a petition includes numerous discrepancies, those inconsistencies raise serious concerns about the veracity of the petitioner's assertions.

More specifically, the petitioner submitted an LCA in support of the instant petition that designated the proffered position under the occupational category of "Computer Systems Analysts" - SOC (ONET/OES) code 15-1121. The petitioner stated in the LCA that the wage level for the proffered position was a Level I (entry-level) position, with a prevailing wage of \$60,000 per year. The LCA was certified on March 26, 2013 and signed by the petitioner on April 1, 2013.

Despite the petitioner's categorization of the proffered position as a computer systems analyst, the petition contains numerous references to a position related to development, or, web development. First, the petitioner provided a business plan in the initial documents submitted with the petition. The development team, as explained in section 6.1 Organizational Structure of the business plan, is to be comprised of "experienced travel industry professionals along with web-site developers and designers." The business plan also indicated that the organizational structure will start with a General Manager/Accountant, a Marketing and Advertising Director/ President and Technical Director, and two full-time experienced "developers" from abroad.

Additionally, in response to the RFE, the petitioner provided a more detailed description of the beneficiary's duties. The tasks described also appear to relate primarily to web design and development. After the list of specific tasks, the petitioner describes the duties to relate to the position of "Developer" and states that the duties require knowledge in "web development" as follows:

I will manage the project as a Project Manager and [redacted] and other Developers will work as a team of Senior Developers, requiring Specialized knowledge in web development...SQL relational database management and development...ability to research and debug software and learn and setup new software when needed, for example how to setup and use, communicate with the travel reservation system.

The petitioner goes on to state that the list of knowledge is "mostly everything essential that any developer would need for this project [redacted]". This description of the duties in relation to the "Developer" position and "web development" also contradicts the petitioner's categorization of the position as that of a computer systems analyst. Moreover, the petitioner fails to provide any explanation as to the referenced employee [redacted]. This individual is not listed on the organizational chart submitted with the initial petition.

On appeal, however, the petitioner takes the exact same list of duties, but changes the description of the duties as stated above to now relate to the position of computer systems analyst as follows:

I, [the President], will manage the project as Project Manager and [the beneficiary] and other Computer Systems Analysts will work as a team of Senior IT professionals, requiring [s]pecialized knowledge in software applications and web development... SQL relational database management and development...ability to research and debug software and learn and setup new software when needed, for example how to setup and use, communicate with the travel reservation system, customize certain solutions.

The petitioner's revised organizational chart, shows two employees hired for the position of Computer Systems Analyst and three employees selected but not yet hired for the position. The employee referenced as [redacted] in the petitioner's description of the beneficiary's duties in response to the RFE, was listed as "[redacted]," currently reporting to the President as a "Computer Systems Analyst."

The petitioner's description of duties in its February 2, 2014 letter provides yet a different version of the proposed duties for the proffered position. As the record does not include a consistent detailed description of the actual duties of the proffered position, the record does not include probative evidence that the proffered position is a specialty occupation.

In the work orders submitted for the record, the work orders show that the petitioner's president, who is also identified in the business plan initially submitted as also holding the positions of marketing and advertising director and technical director, is also working for third party companies

as a "mobile web developer" and a "senior.NET developer." Another work order shows that [REDACTED] is working as a "Mobile Application Developer" for a third party company. Two of the three work orders were ongoing when the petition was filed. Accordingly, it appears that part of the petitioner's business is providing web development services for third party companies.

Upon review of the nature of the petitioner's business and its initial descriptions of the proffered position as a web developer, the record before the director suggests that the proffered position is more likely than not that of a web developer.² The petitioner does not offer explanations regarding the revised characterization of the proffered position.³ 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).

Moreover, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities on appeal. The petitioner and counsel must establish that the position offered to the beneficiary when the petition was filed merits classification as a specialty occupation position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

² The petitioner uses the same broad range of duties for the "specific tasks" of its claimed web developer position and its claimed computer systems analyst position. However, these are two separate occupations. While the occupations may include some overlap in duties, it is the petitioner's burden to sufficiently detail the specific tasks of a position and to identify which tasks and the percentage of time allocated to those specific tasks, so that USCIS may analyze the actual duties of the proffered position in context with the nature of the petitioner's business and the projects to which a specific beneficiary may be assigned. In only this way, may USCIS conduct a proper analysis of the duties of the position and determine whether the proffered position corresponds to a specialty occupation position and the occupation designated on the requisite LCA.

³ If the petitioner seeks to employ a beneficiary in two distinct occupations, the petitioner should file two separate petitions, requesting concurrent, part-time employment for each occupation. While it is not the case here, if a petitioner does not file two separate petitions and if only one aspect of a combined position qualifies as a specialty occupation, USCIS would be required to deny the entire petition as the pertinent regulations do not permit the partial approval of only a portion of a proffered position and/or the limiting of the approval of a petition to perform only certain duties. *See generally* 8 C.F.R. § 214.2(h). Furthermore and as is the case here, the petitioner would need to ensure that it separately meets all requirements relevant to each occupation and the payment of wages commensurate with the higher paying occupation. *See generally* 8 C.F.R. § 214.2(h); 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. Thus, filing separate petitions would help ensure that the petitioner submits the requisite evidence pertinent to each occupation and would help eliminate confusion with regard to the proper classification of the position being offered.

In this matter, the petitioner has provided a broad range of duties for the proffered position. The lack of clarity regarding the beneficiary's actual tasks and job responsibilities coupled with the inconsistent characterizations of the occupation, fail to support the petitioner's claim that the proffered position is a specialty occupation. In addition, upon review of the nature of the petitioner's business and the specific project to which it claims the beneficiary would be assigned, the petitioner has failed to submit evidence that it employed other technical team members to support the beneficiary in the actual launch and development of the petitioner's new web-based travel systems. 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. at 190). The petitioner did not address, nor did it establish, how the beneficiary will be relieved from primarily performing non-qualifying duties. The record is insufficient to establish that the beneficiary will perform tasks which comprise primarily specialty occupation duties. The record is simply deficient in this regard.

The AAO finds that the above noted differences with regard to the characterization of the proffered position as contained in the petitioner's "International Travel Agency Business Plan," the petitioner's narratives accompanying the position's specific tasks, and the information submitted on appeal are materially inconsistent and constitute attestations about the nature of the proffered position that are unreliable because of their materially conflicting information. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591-92.

The AAO further finds that the materially inconsistent and conflicting titles, characterizations, and information which the petitioner provided, and attested as true, regarding the proffered position and its constituent duties so undermine the credibility of the petition as to preclude its approval. Accordingly, the AAO here finds that for that reason alone, this petition may not be approved.

C. Specialty Occupation

The petitioner stated on the Form I-129 that the beneficiary would be employed in a computer systems analyst position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, the specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the 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.

Based upon a complete review of the record of proceeding, the AAO finds that the petitioner has failed to establish (1) the substantive nature and scope of the beneficiary's employment; (2) the

actual work that the beneficiary would perform; (3) the complexity, uniqueness and/or specialization of the tasks; and/or (4) the correlation between that work and a need for a particular educational level of highly specialized knowledge in a specific specialty. Consequently, this precludes a determination that the petitioner's proffered position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions.

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

In this regard, the discrepancies in the record and the lack of evidence substantiating the duties and responsibilities of the position undermine the petitioner's claim that the beneficiary would perform in the proffered position of computer systems analyst. The petitioner fails to provide a sufficient factual basis to convey the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire three-year period requested. The record does not persuasively support a claim that the work the petitioner generates will require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific performance specialty directly related to the demands of the proffered position.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), 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.

The material deficiencies in the evidentiary record are decisive in this matter and they conclusively require that the appeal be dismissed. However, we will continue our analysis in order to apprise the petitioner of additional deficiencies in the record that would also require dismissal of this appeal. Assuming for the sake of argument that the proffered duties as generally described by the petitioner in its initial letter and in response to the RFE would in fact be the duties of a computer systems analyst, the AAO will analyze this occupation and the evidence of record to determine whether the position of a computer systems analyst as generally described would qualify as a specialty occupation.

The AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in

parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty.

Factors considered by the AAO when determining these criteria include: whether the U.S. Department of Labor's *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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 AAO will now look at the *Handbook*, an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁴ In the chapter on computer systems analysts, the *Handbook* provides the following overview of the occupation:

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

The *Handbook* lists the typical duties of a computer systems analyst as:

- 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 information systems and computing infrastructure upgrades are financially worthwhile
- Devise ways to add new functionality to existing computer systems
- Design and develop new systems by choosing and configuring hardware and software
- Oversee the installation and configuration of new systems to customize them for the organization
- Conduct testing to ensure that the systems work as expected
- Train the system's end users and write instruction manuals⁵

⁴ All of the AAO's references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

⁵ The petitioner's general description of duties does not include the majority of the "typical" duties ascribed to the occupation of a computer systems analyst. However, as the petitioner attested on the LCA and the Form I-129 that the proffered position is a computer systems analyst, the AAO will continue its analysis of a computer systems analyst position.

Many computer systems analysts are general-purpose analysts who develop new systems or fine-tune existing ones; however, there are some specialized systems analysts. The following are examples of types of computer systems analysts:

Systems designers or **systems architects** specialize in helping organizations choose a specific type of hardware and software system. They translate the long-term business goals of an organization into technical solutions. Analysts develop a plan for the computer systems that will be able to reach those goals. They work with management to ensure that systems and the IT infrastructure are set up to best serve the organization's mission.

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

Programmer analysts design and update their system's software and create applications tailored to their organization's needs. They do more coding and debugging than other types of analysts, although they still work extensively with management and business analysts to determine what business needs the applications are meant to address.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-2015 ed., "Computer Systems Analysts," <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-2> (last visited April 9, 2014).

The duties described by the petitioner in this matter depict a broad range of duties. Although the record suggests that the proffered position more closely aligns with that of a web developer, if the proffered position is in fact a computer systems analyst, it appears it would be a general purpose computer systems analyst or a programmer analyst position. As determined above, the record is deficient in establishing the actual nature of the proffered position. There is simply not enough information regarding the actual duties of the proffered position to accurately assess and analyze the proffered position.

However, regarding the education and training of a computer systems analyst, the *Handbook* reports:

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 have skills in information technology or computer programming.

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

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

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-2015 ed., "Computer Systems Analysts," <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited April 9, 2014).

Here, although the *Handbook* indicates that most systems analysts have a bachelor's degree in a computer or information science field it also indicates that some employers hire workers with business or liberal arts degrees. The *Handbook* reports that "[m]any analysts have liberal arts degrees and have gained programming or technical expertise elsewhere. Accordingly, a bachelor's degree in a specific discipline is not the minimum requirement necessary to enter into the occupation. In addition, although most systems analysts get a degree in a computer or information science subject "most" is not indicative that a computer systems analysts position normally requires at least a bachelor's degree, or its equivalent, in a specific specialty (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I)). The first definition of "most" in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of computer systems analysts positions require at least a bachelor's degree in computer or information science, it could be said that "most" computer systems analysts positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the generally described and limited position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "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." Section 214(i)(1) of the Act.

The *Handbook's* report does not establish that a computer systems analyst position requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act.⁶

⁶ Of note, the *Handbook's* chapter on web developers reports generally: "[t]he typical education needed to become a web developer is an associate's degree in web design or related field. Web developers need

The AAO observes that on appeal, the petitioner claims that USCIS has previously approved H-1B cases for the proffered position of computer systems analyst. In response to the RFE, the petitioner submitted a copy of an H-1B supporting letter and degree evaluation as evidence that USCIS has previously approved an H-1B case submitted by the petitioner for the proffered position. However, the petitioner did not submit copies of the H-1B approval notices and remaining supporting documents. As this record of proceeding does not contain copies of the petitions, there are minimal underlying facts to be analyzed and, therefore, no determinations can be made regarding what facts, if any, are analogous to the facts in this proceeding.

Nevertheless, if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 597. It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petition, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S.Ct. 51 (2001).

Additionally, on appeal, the petitioner points to Occupational Information Network (O*NET) Summary Report for 15-1051.00 – Computer Systems Analysts, referenced in the FLC Data Center's Online Wage Library (OWL). This summary is insufficient to establish that the position qualifies as a specialty occupation normally requiring at least a bachelor's degree or its equivalent in accounting or a related field. A designation of Job Zone 4 -- Education and Training Code: 5 indicates that a position requires considerable preparation. It does not, however, establish that a bachelor's degree in any specific specialty is required, and does not, therefore, demonstrate that a position so designated is in a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). More specifically, the OWL statement is a condensed version of what the O*NET actually states about its Job Zone 4 designation. *See* O*NET OnLine Help Center, at <http://www.onetonline.org/help/online/zones>, for a discussion of Job Zone 4, which explains that

knowledge of both programming and graphic design." U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-2015 ed., "Web Developers," <http://www.bls.gov/ooh/computer-and-information-technology/web-developers.htm#tab-4> (last visited April 9, 2014). Accordingly, a web developer is not categorically a specialty occupation.

this Zone signifies only that most but not all of the occupations within it require a bachelor's degree. Further, the Help Center's discussion confirms that Job Zone 4 does not indicate any requirements for particular majors or academic concentrations. Therefore, despite the petitioner's assertions to the contrary, the OWL and O*NET information is not probative of a computer systems analyst position qualifying as a specialty occupation.

The petitioner's reliance on a copy of USCIS' Fiscal Year 2012 Annual Report to Congress on the Characteristics of H1B Specialty Occupation Workers is misguided. The report, referring to 8 C.F.R. § 214.2(h)(4)(ii), states that specialty occupations "may" include computer systems analysts and programmers, among other occupations. However, a review of the regulation does not include a specific reference to computer systems analysts and programmers. Moreover, the report discusses the characteristics of broad categories of occupations. When making a determination in regard to a specific case, the AAO and USCIS address the actual duties of the specific employment supplied by the petitioner in order to analyze and ascertain whether the 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. As discussed above, the petitioner has not provided in sufficient detail this necessary information.

The petitioner's submission of an article on the best technology jobs which includes information on the occupation of a computer systems analyst, likewise, does not establish specific standard educational requirements for the position. Rather, this article tracks the *Handbook's* report that a variety of paths may qualify an individual for a position as a computer systems analyst.

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

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

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1165 (quoting

Hird/Blaker Corp. v. Sava, 712 F. Supp. 1102).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports an industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference its previous discussion on the matter.

On appeal, the petitioner submits copies of job advertisements in support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations. However, upon review of the documents, the AAO finds that the petitioner's reliance on the job announcements is misplaced.

In the Form I-129 petition, the petitioner describes itself as a global software development company established in 2011, with 4 employees. The petitioner claims that it has a gross annual income of \$533,800. Although requested in the Form I-129 petition, the petitioner did not state its net annual income.

For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the advertising organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

The AAO reviewed the job advertisements submitted by the petitioner. The petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised.⁷ Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

Upon review of the documentation, the petitioner fails to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in

⁷ USCIS "must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. at 376. As just discussed, the petitioner has failed to establish the relevance of the job advertisements submitted to the position proffered in this case. Even if their relevance had been established, the petitioner still fails to demonstrate what inferences, if any, can be drawn from these few job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the same industry. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995).

positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

Specifically, the advertisements include positions with [REDACTED]

[REDACTED]
building company). Without further information, the advertisements appear to be for organizations that are not similar to the petitioner, and the petitioner has not provided any probative evidence to suggest otherwise.

Further, the petitioner provided advertisements for positions with the "[REDACTED]" two unidentified IT solutions firms; [REDACTED]

[REDACTED] The advertisements do not contain information regarding the employers' industry or business operations. Consequently, the record lacks sufficient information regarding the advertising employer to conduct a legitimate comparison of the organization to the petitioner. The petitioner has not provided information regarding which aspects or traits (if any) it shares with the advertising organizations.

Additionally, the petitioner has not established that the advertisements are for parallel positions. It is not possible to determine important aspects of the job, such as the day-to-day responsibilities, complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received from the advertisements submitted. Accordingly, it is unclear whether the duties and responsibilities of these positions are the same or parallel to the proffered position.

Moreover, the AAO notes that it appears that some of the advertised positions may be for more senior positions. For example, the petitioner provided a job posting for [REDACTED], which requires a bachelor's degree and up to five years of experience in [REDACTED]. Additionally, the positions for [REDACTED]

[REDACTED] required a four year degree and between four and seven years of experience. The petitioner, however, designated the proffered position in the LCA as a Level I (entry-level) position. Thus, the petitioner effectively attests that the proffered position is not a senior position. After reviewing the job postings, the AAO notes that without further clarification, the petitioner has not sufficiently established that the duties and responsibilities of the advertised positions are parallel to the proffered position.

Furthermore, contrary to the purpose for which the advertisements were submitted, the postings do not establish that at least a bachelor's degree in a specific specialty, or its equivalent, is required for the positions. For instance, the petitioner submitted postings in which a general degree is

acceptable and/or a degree in a wide variety of disciplines is acceptable including the postings for [REDACTED]. Although a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.⁸ Moreover, since there must be a close correlation between the required "body of highly specialized knowledge" and the position, a minimum entry requirement of a degree in disparate fields would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).⁹ Thus, upon review, the advertisements do not indicate that a bachelor's degree in a *specific specialty* that is directly related to the duties of the position is required.

⁸ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

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

Id.

⁹ 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 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.

The two letters submitted, both dated January 22, 2014, from the Human Resources generalist at [REDACTED] include identical lists of duties and provide a verbatim conclusion of educational requirements for their claimed computer systems analysts. The letters similarity in language and identical conclusions raises questions regarding the actual authorship of the letters. Moreover, the petitioner has not provided evidence regarding [REDACTED] industry or business operations. Thus, the record lacks sufficient information to conduct a legitimate comparison of either organization to the petitioner.

The AAO reviewed all of the advertisements and the industry letters submitted in support of the petition. However, as discussed, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry for parallel positions in organizations similar to the petitioner.

On appeal, the petitioner also claims to have submitted evidence of prior H-1B approvals for the President and a current computer systems analyst previously hired by other companies for computer systems analyst positions as evidence that "all candidates hired by other similar IT companies" are required to have at least a Bachelor's Degree in computer science or a related field. No such petitions or approvals were submitted as stated.

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

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

The AAO reviewed the record in its entirety and finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. That is, the petitioner has not developed or established complexity or uniqueness as attributes of the proffered position (through the job duties, the petitioner's (or client's) business operations or by any other means) that would require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent.

More 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. The description of the duties does not specifically identify any tasks that are so complex or unique

that only a specifically degreed individual could perform them. The record lacks sufficient probative evidence to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

The lack of complexity or uniqueness is further evidenced by the LCA submitted by the petitioner in support of the instant petition. As referenced above, the petitioner designated the proffered position as a Level I (entry-level) position on the LCA. This designation is indicative of a comparatively low, entry-level position relative to others within the occupation.¹⁰ That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results. Based upon the wage rate, the beneficiary is only required to have a basic understanding of the occupation.

Additionally, given the *Handbook's* indication that computer systems analysts positions do not normally require at least a bachelor's degree in a specific specialty, or the equivalent, for entry, it is not credible that a position involving limited, if any, exercise of independent judgment, close supervision and monitoring, receipt of specific instructions on required tasks and expected results, and close review *would* contain such a requirement.¹¹

¹⁰ 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.

U.S. Dept 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.

¹¹ It is noted that the petitioner would have been required to offer a significantly higher wage to the beneficiary in order to employ him at a Level II (qualified), a Level III (experienced), or a Level IV (fully competent) level. U.S. Dept of Labor, Foreign Labor Certification Data Center, Online Wage Library, FLC Quick Search, "Computer Systems Analysts," <http://flcdatacenter.com/OesQuickResults.aspx?code=15-1121&area=16974&year=13&source=1> (last accessed April 9, 2014).

The AAO observes that the petitioner has indicated that the beneficiary's educational background will assist him in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not sufficiently explain or clarify at any time in the record which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. Upon review of the record of proceeding, the petitioner has failed to establish the proffered position as satisfying this prong of the criterion at 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) requires that an employer demonstrate that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. USCIS usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position when analyzing this criterion.

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

While a petitioner (or client) may believe or otherwise assert that a proffered position requires a specific degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

In response to the RFE, the petitioner submitted a diploma evaluation for a "potential employee" for the same position as evidence that "all candidates are required to have at least Bachelor's degree in Computer Science to do this job." However, the petitioner does not provide documentation to demonstrate that the candidate was employed by the petitioner, such as copies of pay records or Form W-2, Wage and Tax Statements. Further, the petitioner failed to provide the job duties and day-to-day responsibilities of the position that it claims is the same as the proffered position. The

petitioner did not provide any information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, it is unclear whether the duties and responsibilities of the candidate would be the same or similar to the proffered position.

On appeal, the petitioner claims that it has two "Approved petitions I-129" for current employees who are also computer systems analysts. The petitioner provided paystubs and payroll documents as evidence that these two individuals were employed by the company. The petitioner did not, however, submit copies of the prior H-1B petitions and the respective supporting documents with the exception of a degree evaluation for one of the employees. As the record of proceeding does not contain sufficient evidence of the prior petitions to determine whether they are the same position, including job description, there are no underlying facts to be analyzed and, therefore, no substantive reasons to explain why deference to the approval of the prior H-1B petitions is warranted.

On appeal, the petitioner submits additional evidence of three new "potential" employees for the position of computer systems analyst. The petitioner also submits H-1B supporting letter and diploma evaluations for these candidates. Again, the petitioner fails to provide documentation to demonstrate that the candidate was employed by the petitioner at the time the petition was filed, such as copies of pay records or Form W-2, Wage and Tax Statements. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Furthermore, the position descriptions provided for the potential candidates are vague, and do not provide enough information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, it is unclear whether the duties and responsibilities of any of the three candidates would be the same or similar to the proffered position. Finally, without the inclusion of the LCA the petitioner cannot substantiate that the position were for similar wage levels and salaries as the proffered position.

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

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

The petitioner asserts that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. However, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. While the petitioner submitted job descriptions of the proffered position, it

must be noted that the petitioner failed to adequately describe the substantive nature of the work that the beneficiary will perform within the client's business operations on a day-to-day basis. Moreover, as discussed above there is conflicting evidence substantiating the petitioner's assertions.

Moreover, the AAO incorporates its earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupational category of "Computer Systems Analysts." The petitioner designated the position as a Level I position (the lowest of four assignable wage-levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation."¹² Again, without further evidence, it is not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a substantially higher prevailing wage. As previously discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

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

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

V. CONCLUSION

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 must be denied for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to

¹² For additional information regarding wage levels as defined by DOL, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

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establish eligibility for the immigration benefit sought. Section 291 of the Act; *see e.g., Matter of Otiende*, 26 I&N Dec. at 128. Here, that burden has not been met.

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