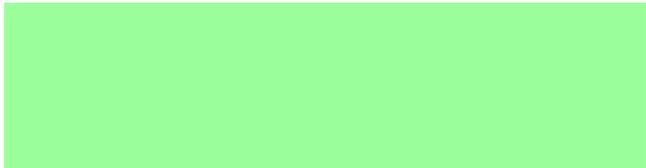


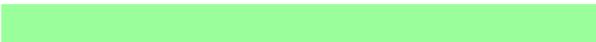


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **AUG 06 2014** 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:

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 service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a 165-employee "Systems Integration & Information Technology Related Services" company established in 2002.¹ In order to employ the beneficiary in a full-time position to which it assigned the job title "Programmer Analyst" at a salary of \$60,000 per year, 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). In support of this petition, the petitioner submitted a Labor Condition Application (LCA) certified for use with a job offer falling within the "Computer Programmers" occupational category, at a Level I (entry-level) prevailing wage rate.

The director denied the petition on October 28, 2013, concluding that the evidence of record did not establish that the proffered position is a specialty occupation.

The record of proceeding contains the following: (1) the Form I-129 and supporting documentation; (2) the director's Notice of Intent to Deny (NOID); (3) the petitioner's response to the NOID; (4) the director's decision denying the petition; and (5) the Form I-290B and duplicate copies of documentation previously submitted.

As will be discussed below, we find that, upon review of the entire record of proceeding, the evidence of record does not overcome the director's grounds for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. THE PETITIONER AND THE PROFFERED POSITION

As noted above, the petitioner stated on the Form I-129 that it has been doing business as a systems integration and information technology related services company since 2002, that it currently employs 165 individuals, and that it has a gross annual income of \$30,000,000 and a net annual income of \$800,000.

The petitioner's April 2, 2013 letter of support, which was filed with the Form I-129, described the petitioner as follows:

Petitioner Information

[The petitioner] offer[s] Information Technology and Software related services such as, Custom Applications Design, Development, Integration, Re-engineering,

¹ The petitioner provided a North American Industry Classification System (NAICS) Code of 541511, "Custom Computer Programming Services." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "541511 Custom Computer Programming Services," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited Aug. 5, 2014).

Implementation and Migration services using cutting edge technologies and also using our own products offering. We provide Software Development and Integration Services for Fortune 1000 clients all over the world.

The letter further described the proffered position, its duties, and its requirements as follows:

A. Position Description

[We are] currently looking for Programmer Analysts for our software development Group. This position is based at our corporate headquarters [REDACTED]. The position description is to design, configure, develop, implement and test computer software applications. Work from specifications drawn up by software developers or other individuals. Assisting software developers by analyzing user needs and configuring software solutions, may develop and write computer programs to store, locate and retrieve specific documents, data and information.

B. Position Duties

- Gather user requirements and convert them to technical specifications[.]
- Write, update and maintain computer programs or software packages to handle specific jobs[.]
- Conduct trial runs of programs and software applications to be sure they will produce the desired results[.]
- Perform or direct revision, repair, or expansion of existing programs to increase operating efficiency or adapt new requirements[.]
- Consult with managerial, engineering, and technical personnel to clarify program intent, identify problems, and suggest changes.
- Perform systems analysis and programming tasks to maintain and control the use of computer systems software[.]
- Compile and write documentation of program development and subsequent revisions, inserting comments in the coded instructions so others can understand the program[.]
- Prepare detailed workflow charts and diagrams that describe input, output and logical operation, and convert them into a series of instructions coded in a computer language[.]

C. Position Requirements

- Minimum bachelor's degree or equivalent field of study such as Computer Sciences, Engineering, Information Systems, Business Management or Mathematics.
- Minimum two years of software development experience using Clear Case, Subversion, PVCS, Tortoise SVN client, Araxis Merge, Beyond Compare, IBM Websphere, ANT, Bash, C++, Java, JSP, Servlet, HTML, DHTML, Oracle, SQL Server, Web & Application Server on Windows and UNIX environments.
- Excellent communications, interpersonal and problem solving skills.
- Ability to communicate effectively with technical staff and end-users.
- Should be able to work independently and in a team environment with minimal supervision.

In response to the NOID, the petitioner refined the description of the position and its constituent duties into the following list of job duties and associated percentages of time involved in their performance:

- Gather user requirements and convert them to technical specifications 10%
- Write, update and maintain computer programs or software packages to handle specific jobs 15%
- Conduct trial runs of programs and software applications to be sure they will produce the desired results 5%
- Perform or direct revision, repair, or expansion of existing programs to increase operating efficiency or adapt new requirements 5%
- Consult with managerial, engineering, and technical personal to clarify program intent, identify problems and suggest changes 8%
- Developing the server side components using Java/J2EE, Servlets as controllers and Eclipse as IDE 15%
- Writing JDBC programs to create connections and fetch the data from the Database 5%

- Perform system analysis, and programming tasks to maintain and control the use of computer systems software 5%
- Responsible for integrating software components after the development 12%
- Compile and write documentation of program development and subsequent revisions, inserting comments in the coded instructions so other[s] can understand the program 8%
- Prepare detailed workflow charts and diagrams that describe input, output and logical operation, and convert them into a series of instructions coded in a computer language 6%
- Train the users who uses [sic] the product and document enhancements suggested by the users 6%

II. SPECIALTY OCCUPATION

We will now address the director's determination that the proffered position is not a specialty occupation. Based upon a complete review of the record of proceeding, we find that the evidence of record fails to establish that the position as described constitutes a specialty occupation.

A. LAW

To meet the petitioner's burden of proof with regard to the proffered position's classification as an H-1B specialty occupation, 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 result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college

professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

B. PRELIMINARY FINDINGS REGARDING THE PROFFERED POSITION'S DUTIES AND THE RELATIVE COMPLEXITY OF THE POSITION

We first note that the petitioner has not explained the basis for its assertion that the beneficiary must have a minimum of two years of software development experience using all of the programming languages and programming tools that it specified in its April 2, 2013 letter quoted above. Aside from that concern, however, we find that the record of proceeding provides no objective and reliable standard by which we can determine that the performance of the duties as described, even if they involve the asserted programming tools and languages, require at least a bachelor's degree in a specific specialty or its equivalent.

In this regard we observe that the "Computer Programmers" chapter of the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)* states that "most programmers learn only a few computer languages while in school," and that a computer science degree provides "the skills needed to learn new computer languages easily." However, the *Handbook* neither states nor indicates that a degree – associate *or* bachelor's – in computer science or in any related specialty is required to learn or employ programming languages or any tool used by computer programmers.²

Further, there is no basis for us to take administrative notice that the proposed duties as described in the record of proceeding comprise a computer programming position that would require at least a bachelor's degree in computer sciences, engineering, information systems, business management or mathematics or, for that matter, in any specific specialty.

² See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Computer Programmers," <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4> (last visited Aug. 5, 2014).

Moreover, based on the evidence that is provided, we also do not find that it establishes relative complexity, specialization and/or uniqueness as distinguishing aspects of either the proposed duties or the position that they are said to comprise. While the petitioner may claim that the nature of the proposed duties and the position that they are said to comprise elevate them above the range of usual Computer Programmer positions and duties by virtue of their level of specialization, complexity, and/or uniqueness, the evidence of record does not support these claims. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

As evident in the job description quoted above, the record of proceeding presents the duties comprising the proffered position in terms of relatively abstract and generalized functions. More specifically, they lack sufficient detail and concrete explanation to establish the substantive nature of the work and associated applications of specialized knowledge that their actual performance would require within the context of the petitioner's particular business operations. Take for example the following duty description:

Gather user requirements and convert them to technical specifications

The evidence of record contains neither substantive explanation nor documentation showing the range and volume of such user requirements that the beneficiary would have to gather and convert. Likewise, the record does not clarify the substantive work and associated applications of specialized knowledge that would be involved in the referenced duty. Likewise, we see that the petitioner does not provide substantive information with regard to the particular work, methodologies, and applications of knowledge that would be required for the percentage-assigned duties, such as "Write, update and maintain computer programs or software packages to handle specific jobs-15%." Thus, we conclude that, as generally described as all of the elements of the constituent duties are, they do not - even in the aggregate - establish the nature of the position or the nature of the position's duties as more complex, specialized, and/or unique than those of computer programmer positions that do not require the services of a person with at least a bachelor's degree in a specific specialty, or the equivalent.

In support of the assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted a September 30, 2013 letter from Professor [REDACTED] Department of Statistics and Computer Information Systems, [REDACTED] School of Business, [REDACTED] Professor [REDACTED] made the following assertions:

I am providing this Evaluation to discuss the specialty requirements for the position of Programmer Analyst to be held by [the beneficiary] with [the petitioning company], a provider of information technology and solutions.

* * *

I am providing this opinion letter based on my background in academia and in professional industry. I have gained substantial professional experience related to research and analysis of technology operations, by virtue of my background in both academic and commercial industry. I have served as a professional academic through my postings as an adjunct instructor with the Department of Statistics and Computer Information Systems of [REDACTED] (where I have served since 1997), and as an instructor with the School of Business of the [REDACTED] (since 1986) and [REDACTED] (since 1997).

With regard to my own credentials: I obtained a Bachelor of Arts Degree in the Sciences, and a Master of Business Administration Degree, with a dual major in Computer Applications and Information Sciences and Accounting [REDACTED]. Based upon these qualifications—as well as the ongoing, cross-disciplinary emphasis in information technology and business that I have pursued via my work as an instructor for IT-related courses in a business school environment—I am particularly well-suited to issue opinions regarding technology positions that involve a commercial application, such as the instant petition, which straddle the lines of technology and business.

* * *

I have reviewed [the petitioner's] support letter, describing in detail [the beneficiary's] duties as a Programmer Analyst. The duties describe a professional, specialty-level IT occupation, with significant duties in both the identification and analysis of client business processes and requirement (e.g., via consulting with end-users as well as client and internal management in order to ascertain system requirements); and use of this analysis in order to develop, design, and then support custom, proprietary software systems. Having reviewed the employer's detailed position letter, and considered the position within the context of normal standards and practices for the software development field, I agree that the position is sufficiently complex to require at least a Bachelor's Degree in a relevant technical field.

We reviewed the letter in its entirety. However, as discussed below, the letter from Professor [REDACTED] is not persuasive in establishing that the proffered position qualifies as a specialty occupation position.

Specifically, the content of the professor's letter does not demonstrate that his opinion is based upon sufficient information about the particular position at issue and the petitioner's business operations. Professor [REDACTED] states that he "reviewed [the petitioner's] support letter," but he does not indicate that he inquired deeper into the petitioner's business operations or the extent and complexity of the particular matters that the beneficiary would address. Professor [REDACTED] does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise.

Moreover, upon review of the letter, Professor [REDACTED] does not indicate that he visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. Furthermore, there is no indication that the petitioner advised Professor [REDACTED] that the petitioner characterized the proffered position as low and entry-level, for an employee who has only a basic understanding of the occupation (as indicated by the Level I wage-level on the LCA).

As we shall discuss in detail below, that prevailing wage-rate is appropriate for a position in which the beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; will be closely supervised and his work closely monitored and reviewed for accuracy; and will receive specific instructions on required tasks and expected results. We find this to be a relevant aspect of the position, as it reflects an assessment that the proffered position is of relatively low complexity in relation to other jobs within the position's occupational group. In this respect too, we find that Professor [REDACTED] opinion is not based upon a sufficient factual foundation. Without this information, the petitioner has not demonstrated that Professor [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine the educational requirements based upon the job duties and responsibilities. Professor [REDACTED] has not provided sufficient facts that would support the contention that the proffered position requires at least a bachelor's degree in a specific specialty.

In summary, and for each and all of the reasons discussed above, we conclude that the opinion letter rendered by Professor [REDACTED] is not probative evidence to establish the proffered position as a specialty occupation. The conclusion reached by Professor [REDACTED] lacks the requisite specificity and detail and is not supported by independent, objective evidence demonstrating the manner in which he reached such conclusion. The professor does not present an adequate factual foundation to support the opinion and we find that the opinion is not in accord with other information in the record. Therefore, we find that Professor Appel's submission is not probative evidence towards satisfying any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

For efficiency's sake, we hereby incorporate the above discussion and analysis regarding the opinion letter into each of the bases in this decision for dismissing the appeal.

Finally, we will enter this additional finding before analyzing the evidence of record under the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A): the range of acceptable degree majors or academic concentrations specified by the petitioner weighs against its argument that performance of the proffered position requires at least a bachelor's degree in a specific specialty.

The petitioner stated that the position requires a "bachelor's degree or equivalent field of study such as Computer Sciences, Engineering, Information Systems, Business Management or Mathematics." In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," we do 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.

Again, in the letter of support, the petitioner stated that its minimum educational requirement for the proffered position is a bachelor's degree or equivalent in Computer Sciences, Engineering, Information Systems, Business Management or Mathematics. However, the field of engineering is a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering. Therefore, it is not readily apparent that a general degree in engineering is closely related to computers or that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the particular position proffered in this matter.

Here and as indicated above, the petitioner, who bears the burden of proof in this proceeding, simply fails to establish either (1) that all of the disciplines (including any and all engineering fields) are closely related fields, or (2) that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the proffered position. Absent this evidence, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, under the petitioner's own standards. Accordingly, as the evidence of record fails to establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty*, or its equivalent, for entry into the particular position, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion.

Therefore, absent evidence of a direct relationship between the claimed degrees required and the duties and responsibilities of the position, it cannot be found that the proffered position requires anything more than a general bachelor's degree. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is

directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree (such as a degree in business) 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 id.*

C. ANALYSIS

Having made the above preliminary findings, we turn now to the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

We will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied by establishing 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.

We recognize the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.³ The *Handbook's* discussion of the duties of computer programmers states, in pertinent part, the following:

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

Computer programmers typically do the following:

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

Programmers work closely with software developers, and in some businesses, their duties overlap. When this happens, programmers can do work that is typical

³ The *Handbook*, which is available in printed form, may also be accessed online at <http://www.bls.gov/ooh>. The references to the *Handbook* are from the 2014-15 edition available online.

of developers, such as designing the program. This entails initially planning the software, creating models and flowcharts detailing how the code is to be written, writing and debugging code, and designing an application or systems interface.

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

Software-as-a-service (SaaS), which consists of applications provided through the Internet, is a growing field. Although programmers typically need to rewrite their programs to work on different systems platforms such as Windows or OS X, applications created using SaaS work on all platforms. That is why programmers writing for software-as-a-service applications may not have to update as much code as other programmers and can instead spend more time writing new programs.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Computer Programmers," <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-2> (last visited Aug. 5, 2014).

The *Handbook* states the following with regard to the educational requirements necessary for entrance into this field:

Most computer programmers have a bachelor's degree; however, some employers hire workers who have an associate's degree. Most programmers get a degree in computer science or a related subject. Programmers who work in specific fields, such as healthcare or accounting, may take classes in that field to supplement their degree in computer programming. In addition, employers value experience, which many students gain through internships.

Most programmers learn only a few computer languages while in school. However, a computer science degree gives students the skills needed to learn new computer languages easily. During their classes, students receive hands-on experience writing code, debugging programs, and doing many other tasks that they will perform on the job.

To keep up with changing technology, computer programmers may take continuing education and professional development seminars to learn new programming languages or about upgrades to programming languages they already know.

Id. at <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4> (last visited Aug. 5, 2014).

These statements from the *Handbook* do not indicate that at least a bachelor's degree in a specific specialty or its equivalent is normally required for entry into the Computer Programmers

occupational category. First, the *Handbook* specifically states that "some employers hire [computer programmers] who have an associate's degree." The *Handbook's* recognition that a bachelor's or higher degree is not exclusively "required" by employers, strongly suggests that a bachelor's or higher degree in a specific specialty, or the equivalent, is not a standard, minimum entry requirement for this occupation. Rather, the Computer Programmer occupational category accommodates a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty or its equivalent. The *Handbook* continues by stating that employers value computer programmers who possess experience, which can be obtained through internships. Thus, the *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupation.

Further, with regard to the *Handbook's* statements that "most" computer programmers possess a bachelor's degree and that "most" "get a degree" in a computer-related field, this is not the same as stating that most require a bachelor's degree in a computer-related field to enter the occupation. Rather, it may simply mean that of those in the occupation with associate or bachelor's degrees, "most" major in a computer-related field.

Even if the *Handbook* stated that most computer programmers require a bachelor's or higher degree in computer science, 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 programmer positions require at least a bachelor's degree in a specific specialty, it could be said that "most" computer programmer 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 particular 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." § 214(i)(1) of the Act.

Accordingly, as the *Handbook* indicates that entry into the Computer Programmer occupational category does not normally require at least a bachelor's degree in a specific specialty or its equivalent, it does not support the proffered position as satisfying this first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). That is, in light of the *Handbook's* information on the range of acceptable educational credentials for entry into the Computer Programmer occupational category, a particular position's inclusion within this classification is not in itself sufficient to establish that position as one for which a baccalaureate or higher degree in a specific specialty or its equivalent is normally a minimum requirement for entry.

When, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies the criterion, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a

favorable finding with regard to this criterion. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

We here refer the petitioner back to our earlier comments and findings with regard to Professor [REDACTED]'s letter. As noted above, we find that the letter from Professor [REDACTED] does not establish that the proffered position is a specialty occupation.

In addition, we note that the Occupational Information Network (O*NET) Summary Reports, submitted by the petitioner in response to the director's NOID, are insufficient to establish that the proffered position qualifies as a specialty occupation normally requiring at least a bachelor's degree in a specific specialty or its equivalent. On August 5, 2014, we accessed the pertinent section of the O*NET OnLine Internet site relevant to 15-1131.00 – Computer Programmers. O*NET OnLine does not state a requirement for a bachelor's degree. Rather, it assigns this occupation a Job Zone "Four" rating, which groups it among occupations of which "most," but not all, "require a four-year bachelor's degree." Further, O*NET OnLine does not indicate that four-year bachelor's degrees required by Job Zone Four occupations must be *in a specific specialty* directly related to the occupation. Therefore, O*NET OnLine information is not probative of the proffered position being a specialty occupation.

As the evidence in the record of proceeding does not establish that at least a baccalaureate degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

In this 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 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 this particular 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, we find that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively 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 (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) 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 at 1165

(D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. Also, the record contains no letters or affidavits from firms or persons in the industry attesting to such a requirement. Further, there is no evidence of a professional association having made a bachelor's degree in a specific specialty, or the equivalent, a minimum requirement for entry.

Therefore, the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) located in organizations that are similar to the petitioner.

Next, we find that the evidence of record does not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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."

The petitioner's statements with regard to the claimed complex and unique nature of the proffered position are acknowledged. However, as reflected in our earlier comments and findings regarding the record's description of the duties comprising the proffered position, the petitioner has not provided sufficient evidence to establish why it is more likely than not that the proffered position can only be performed by a person with at least a bachelor's degree in a specific specialty or its equivalent.

Also, we find that assertions of the requisite complexity or uniqueness are undermined by the fact that the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within the same occupation. The fact that the petitioner would be paying a wage-rate that is only appropriate for a low-level, entry position relative to others within the occupation is inconsistent with the level of relative complexity and uniqueness required to satisfy this second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Based upon the wage rate selected by the petitioner, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate indicates that the beneficiary will perform routine tasks requiring limited, if any, exercise of independent judgment; that the beneficiary's work will be closely supervised and monitored; that he will receive specific instructions on required tasks and expected results; and that his work will be reviewed for accuracy. 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.

Again, the *Handbook* indicates that there are positions located within the "Computer Programmers" occupational categories which are performed by persons without at least a bachelor's degree in a specific specialty or the equivalent. Accordingly, 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 be so complex or unique relative to other computer programmers that it could only be performed by a person with at least a bachelor's degree in a specific specialty or the equivalent. Even more fundamentally, as discussed in detail above, the evidence of record does not establish that the proffered position possesses the relative complexity or uniqueness required to satisfy this program.

The petitioner therefore failed to establish how the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with at least a bachelor's degree in a specific specialty or its equivalent.

As the evidence of record therefore fails to establish how the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by an individual with at least a bachelor's degree in a specific specialty or its equivalent, the petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

We turn next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's or higher degree in a specific specialty or its equivalent for the position.

Our review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and employees who previously held the position in question.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree in a specific specialty, or its equivalent, in its prior recruiting and hiring for the position. Additionally, the record must establish that the 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 proffered position.⁴

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 employer 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 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

The director's September 5, 2013 NOID specifically requested the petitioner to document its past recruiting and hiring history with regard to the proffered position. In response to the NOID, the

⁴ Any such assertion would be undermined in this particular case by the fact that the petitioner submitted an LCA that had been certified for a Level I wage-level, which is appropriate for use with a comparatively low, entry level position relative to others within the same occupation.

petitioner stated as follows: "Petitioner always entertains candidates with minimum baccalaureate degree or higher to perform the duties of the offered position. The petitioner currently employs 113 individuals on H-1B capacity. These include Programmer Analysts, Systems Analysts, Software Engineers, Network Systems Administrators, Database Administrators, EDMS Developers, Sharepoint Developers, J2EE Developers and QA Analysts." As evidence of this, the petitioner has included a report indicating employee name, the highest level of education attained and the field of study. No identification was provided to establish that the documentation submitted pertains to the proffered position, namely, Programmer Analyst. Furthermore, the petitioner has failed to establish that the beneficiary's duties and responsibilities in the proffered position would be the same as any of the individuals referenced in the petitioner's report.

Additionally, in support of this criterion, the petitioner submitted "present and past job announcements that the petitioner has placed in various mediums. Petitioner also submits Notice of Filings for the position in question along with its requirements." First, none of the announcements bear the title "Programmer Analyst." While it is the nature of the duties comprising the advertised positions that would determine whether those positions are in fact parallel to the proffered position, we see that the duty descriptions are not substantially similar to the proffered position's duties as stated in the petitioner's letters submitted with the H-1B petition and in the petitioner's NOID response. We also see that the extensive IT experience that some of the job advertisements specify as hiring requirements suggests that they involve the application of greater occupational knowledge than the proffered position, a Level I position. So, the job-vacancy advertisements do not even merit consideration under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty or its equivalent for the position.

Additionally, many of the submitted advertisements do not all specify a requirement for a bachelor's or higher degree in a specific specialty or its equivalent.

As the submitted vacancy-announcements are not probative evidence towards satisfying this criterion, further analysis of their content is not necessary. As the record of proceeding does not demonstrate that the petitioner normally requires at least a bachelor's degree in a specific specialty or its equivalent for the proffered position, it does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next, we find that the evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered position's 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 the specific specialty or its equivalent.

In reviewing the record of proceeding under this criterion, we reiterate our earlier discussion regarding the *Handbook's* statements with regard to the entry requirements for positions falling within the "Computer Programmers" occupational category. Again, the *Handbook* does not indicate that a bachelor's or higher degree in a specific specialty, or the equivalent, is a standard, minimum requirement to perform the duties of such position; and the record indicates no factors that would elevate the duties proposed for the beneficiary above those of other entry-level positions generally

discussed in the *Handbook*. As reflected in this decision's earlier discussion of the duty descriptions in the petitioner's letter of support, the proposed duties as described in the record of proceeding contain no indication of specialization and complexity such that the knowledge they would require is usually associated with any particular level of education in a specific specialty. As generically and generally as they were described, the duties of the proposed position are not presented with sufficient detail and explanation to establish the substantive nature of the duties as they would be performed in the specific context of the petitioner's particular business operations. Also as a result of the generalized and relatively abstract level at which the duties are described, the record of proceeding does not establish their nature as so specialized and complex as to require knowledge usually associated with at least a bachelor's degree in a specific specialty, or the equivalent.

Additionally, we reiterate our findings that both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, by the submission of an LCA certified for a Level I wage, the petitioner effectively attests that the proposed duties are of relatively low complexity as compared to others within the same occupational category. This fact is materially inconsistent with the level of complexity required by this criterion.

The *Prevailing Wage Determination Policy Guidance* issued by DOL states the following with regard to Level I wage rates:

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 [emphasis in original].

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.

The pertinent guidance from DOL, at page 7 of its *Prevailing Wage Determination Policy Guidance* describes the next higher wage-level as follows:

Level II (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

Id.

The above descriptive summary indicates that even this higher-than-designated wage level is appropriate for only "moderately complex tasks that require limited judgment." The fact that the Level II wage-rate itself is associated with performance of only "moderately complex tasks that require limited judgment," is indicative of the relatively low level of complexity imputed to the proffered position by virtue of the petitioner's Level I wage-rate designation. Further, we note the relatively low level of complexity that even this Level II wage-level reflects when compared with the two still-higher LCA wage levels, neither of which was designated on the LCA submitted to support this petition.

The aforementioned *Prevailing Wage Determination Policy Guidance* describes the Level III wage designation as follows:

Level III (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. . . .

Id.

The *Prevailing Wage Determination Policy Guidance* describes the Level IV wage designation as follows:

Level IV (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

Id.

Here, we again incorporate our earlier discussion and analysis regarding the implications of the petitioner's submission of an LCA certified for the lowest assignable wage-level. As already noted, by virtue of this submission, the petitioner effectively attested to DOL that the proffered position is a low-level, entry position relative to others within the same occupation, and that, as clear by

comparison with DOL's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II).

For all of these reasons, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

III. CONCLUSION AND ORDER

For the reasons discussed above, we conclude that the evidence of record does not establish that the proffered position qualifies as a specialty occupation.

An application or petition that fails to comply with the technical requirements of the law may be denied by this office 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 we conduct appellate review on a *de novo* basis).

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of our 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, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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