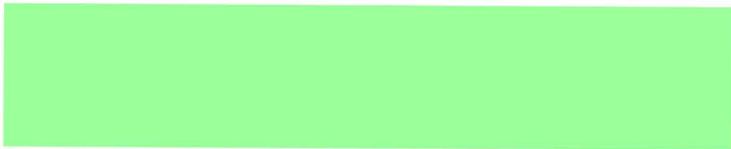
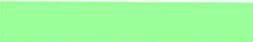


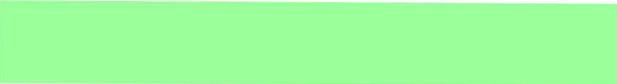


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **AUG 13 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary:

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

ON BEHALF OF PETITIONER:

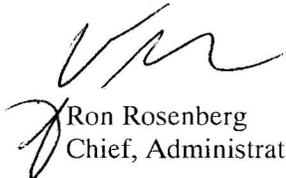
SELF-REPRESENTED

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

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center. In the Form I-129 visa petition, the petitioner describes itself as a business engaged in software design and development, and IT consulting that was established in 1997. In order to employ the beneficiary in what it designates as a programmer analyst position, the petitioner seeks to classify the beneficiary 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, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements. Counsel submitted a brief in support of this assertion.

The record of proceeding before us 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 denial letter; and (5) the Form I-290B, Notice of Appeal or Motion, and supporting documentation. We reviewed the record in its entirety before issuing its decision.¹

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

I. FACTUAL AND PROCEDURAL BACKGROUND

In this matter, the petitioner states in the Form I-129 petition that it seeks the beneficiary's services as a programmer analyst to work on a full-time basis at an annual salary of \$75,000. In a support letter dated March 27, 2013, the petitioner stated the following duties and requirements associated with the proffered position:

- Analyze and document business requirements. Perform technical and functional reviews along with business and other technology partners to understand dependencies and new requirements.
- Execute solution design activity such as data mapping, object modeling, page layout design and rule logic definition in context of [REDACTED] application.
- Design prototype, document, build, test and deploy enhancements to [REDACTED] custom and standard objects, UI's, workflows, triggers, alerts and reports within Salesforce.

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

- Provide the solution approach and design the Technical architecture based on [REDACTED] expertise and limitation of the technology.
- Provide primary support (Tier 2) for sustaining modules as well as new applications and perform day to day [REDACTED] activities.
- Involved in [REDACTED] Administration, System Configuration Management, and Change Management and Release Management activities.
- Involved in [REDACTED] Administration, System Configuration Management, and Change Management and Release Management activities.
- Involved in Integrations with [REDACTED] and Oracle using [REDACTED] tool.
- Assist and support client used acceptance testing (UAT) efforts and execute go-live development.

* * *

[O]ur minimum prerequisite for employment as a Programmer Analyst is a Bachelor's Degree in Computer Science, Mathematics, Electrical, Engineering or a related field.²

The petitioner indicated that the beneficiary is qualified to perform services in the proffered position by virtue of her education. In support of this assertion, the petitioner provided copies of a diploma and transcript that indicate that the beneficiary was granted a Master of Science in electrical engineering by [REDACTED] California in August 2011. The petitioner also submitted a foreign certificate, diploma, and transcript in the name of the beneficiary; however, an evaluation of the beneficiary's foreign credentials was not provided.

The petitioner provided a Labor Condition Application (LCA) in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational classification "Computer Systems Analysts" - SOC (ONET/OES) code 15-1121, at a Level I (entry level) wage.

In support of the Form I-129, the petitioner submitted letters from mid-vendor [REDACTED] and end-client [REDACTED]. The petitioner also provided a purchase order issued by [REDACTED] to the petitioner for the beneficiary's services; a "Consulting and Confidentiality Agreement" between the two organizations; and the petitioner's 2012 federal tax return.

² We note that in its March 27, 2013 letter, the petitioner indicated that the beneficiary would be placed with client [REDACTED] which would then place the beneficiary with [REDACTED]. The petitioner provided letters from both companies that list the duties and requirements of the proffered position. Notably, end-client [REDACTED] indicates that the requirements for the proffered position are a "Master's degree in computer science, engineering or its equivalent and a Certified [REDACTED] Professional with Administration & Development skills along with a good exposure and knowledge on Retail Sales business domain." No explanation for the discrepancy was provided.

The letter from the end-client [REDACTED] lists the following duties for the proffered position:

- Analyze and document business requirements. Perform technical and functional reviews along with business and other technology partners to understand dependencies and new requirements.
- Provide the solution approach and design the Technical architecture based on [REDACTED] expertise and limitation of the technology.
- Provide primary support (Tier 2) for sustaining modules as well as new applications and perform day to day [REDACTED] activities.
- Involve in [REDACTED] Administration, System Configuration Management, and Change Management and Release Management activities.
- Involve in Integrations with [REDACTED] and Oracle using [REDACTED] tool.
- Perform the gap & risk analysis in order to provide us the appropriate design solutions
- Develop the requirements based on the time constraints through functional spec, testing and deployment of applications using the [REDACTED] platform with Apex, Visualforce, triggers, App Exchange products, SOSL, SOQL, Informatica on Demand, [REDACTED] IDE, ANT Migration tool and setting the security of the application and data both at system and application level.
- Involving in system testing, Integration testing and also design the training manuals for UAT.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE. The director requested that the petitioner submit probative evidence to establish eligibility for the benefit sought, and outlined the evidence to be submitted.

The petitioner and counsel responded to the director's RFE with a letter from the petitioner, dated July 17, 2013, and additional evidence including:

- Several job postings;
- Three opinion letters;
- Documentation regarding several of the petitioner's employees;
- Documents related to the beneficiary's maintenance of immigration status; and
- An evaluation of the beneficiary's foreign education prepared by [REDACTED] [REDACTED] which indicates that the beneficiary has attained the equivalent of a United States Bachelor of Science in electronic engineering.

The director reviewed the information provided in the initial H-1B petition and in response to the RFE. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish eligibility for the benefit sought and denied the petition. The petitioner submitted an appeal of the denial of the H-1B petition. In support of the appeal, the petitioner submitted a brief.

II. STANDARD OF PROOF

In light of counsel's references to the requirement that U.S. Citizenship and Immigration Services (USCIS) apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). 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" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

* * *

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.

As footnoted above, we conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support counsel'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*, we find that the director's determinations in this matter were correct. Upon our 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, we find 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 us to believe that the petitioner's claims are "more likely than not" or "probably" true.

III. MATERIAL FINDINGS

The issue here is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, we will make some preliminary findings that are material to the determination of the merits of this appeal.

To ascertain the intent of a petitioner, USCIS must look 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."

Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act. The petitioner has not done so here.

In the instant case, the duties of the proffered position, as described by the petitioner in support of the Form I-129 petition and in response to the director's RFE, have been stated in generic terms that fail to convey the actual tasks the beneficiary will perform on a day-to-day basis.

Although in the RFE the director requested that the petitioner provide a more detailed description of the proffered position, the petitioner elected to provide the same list of generally stated duties with a breakdown of the percentage of the beneficiary's time to be spent on each duty.

We observe that the description of duties provided in the end-client letter differs significantly from the petitioner's description of the proffered position. Notably, although the petitioner stated that the beneficiary will spend 25% of her time "[executing] solution design activity such as data mapping, object modeling, page layout design and rule logic definition in context of [REDACTED] application," this duty does not appear on the list provided by the end-client. Similarly, the petitioner claims that the beneficiary will spend 10% of her time "[designing] prototype, document, build, text and deploy enhancements to [REDACTED] custom and standard objects, UI's, workflows, triggers, alerts and reports within [REDACTED]. However, this duty does not appear in the end-client's letter. In addition, the end-client has specified duties of the proffered position that do not appear in the

petitioner's list. For example, the end-client states that the beneficiary will "[d]evelop the requirements based on the time constraints through functional spec, testing and deployment of applications using the [REDACTED] platform with Apex, Visualforce, triggers, App Exchange products, SOSL, SOQL, Informatica on Demand, [REDACTED] IDE, ANT Migration tool and setting the security of the application and data both at system and application level." The petitioner does not mention this duty. The discrepancies between the various job descriptions in the record call into question the accuracy of the petitioner's representations regarding the duties of the proffered position.

Further, the duties that are described by the petitioner are described in vague terms that fail to convey the specific tasks that the beneficiary will perform. For example, in response to the RFE, the petitioner represented that the beneficiary will spend 20% of her time "[i]nvolved in [REDACTED] Administration, System Configuration Management, and Change Management and Release Management activities." However, the petitioner does not specify what this "involvement" will entail. Similarly the petitioner asserted that the beneficiary will be "[i]nvolved in Integrations with [REDACTED] and Oracle using [REDACTED] tool." This statement does not provide sufficient insight into the actual work the beneficiary is expected to perform. As the petitioner has not adequately described the specific duties of the proffered position, the petitioner's assertions regarding the education required to perform the duties are not substantiated.

Thus, upon review, it is not evident that the proposed duties as described, and the position that they comprise, merit recognition of the proffered position as qualifying as a specialty occupation. That is, to the extent that they are described, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the performance of the proffered position for the entire period requested. The job descriptions do not persuasively support the claim that the position's day-to-day job responsibilities and duties would require the theoretical and practical application of a particular educational level of highly specialized knowledge in a specific specialty directly related to those duties and responsibilities. The overall responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's operations. Thus, the petitioner has failed to demonstrate how the performance of the duties of the proffered position, as described by the petitioner, would require the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent.

IV. SPECIALTY OCCUPATION

The issue here is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, and for the specific reasons described below, we agree with the director and find that the evidence fails to establish that the position as described constitutes a specialty occupation.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this

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

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

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

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

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

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

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

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

§ 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d at 387. 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 at 147 (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.

We now turn to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). As explained earlier in this decision, the petitioner has not established the nature of the proffered position and in what capacity the beneficiary will actually be employed within the petitioner's business operations. The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Nevertheless, assuming, *arguendo*, that the petitioner had adequately and consistently described the duties of the proffered position, we will now discuss the proffered position in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

As previously mentioned, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Computer Systems Analysts."

We recognize the U.S Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.³ We reviewed the chapter of the *Handbook* entitled "Computer Systems Analysts" including the sections regarding the typical duties and requirements for this occupational category.⁴ However, the *Handbook* does not indicate that "Computer Systems Analysts" comprise an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry.

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

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.

Education

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's degree in 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.

³ All of our references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

⁴ For additional information regarding the occupational category "Computer Systems Analysts," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 ed.*, Computer Systems Analysts, on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-1> (last visited August 8, 2014).

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.

Many systems analysts continue to take classes throughout their careers so that they can learn about new and innovative technologies and keep their skills competitive. Technological advances come so rapidly in the computer field that continual study is necessary to remain competitive.

Systems analysts must understand the business field they are working in. For example, a hospital may want an analyst with a background or coursework in health management, and an analyst working for a bank may need to understand finance.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 ed.*, Computer Systems Analysts, available on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited August 8, 2014).

When reviewing the *Handbook*, it also must be noted that the petitioner designated the proffered position as a Level I (entry level) position on the LCA.⁵ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance."⁶ A Level I wage rate is described as follows:

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

⁵ Wage levels should be determined only after selecting the most relevant O*NET code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

⁶ Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

See 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, in designating the proffered position at a Level I wage, the petitioner has indicated that the proffered position is a comparatively low, entry-level position relative to others within the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that she would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results. Based upon the petitioner's designation of the proffered position as a Level I (entry) position, it does not appear that the beneficiary will be expected to serve in a senior or leadership role. As noted above, according to DOL guidance, a statement that the job offer is for a research fellow, worker in training or an internship is indicative that a Level I wage should be considered.

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 these positions. The *Handbook* indicates that there is a spectrum of degrees acceptable for positions in this occupation, including general purpose degrees such as business and liberal arts.

The *Handbook* does not state that the experience gained by a candidate must be equivalent to at least a bachelor's degree in a specific specialty. While the *Handbook* indicates that a bachelor's degree in a computer or information science field is common, the *Handbook* does not report that such a degree is normally a minimum requirement for entry. The *Handbook* continues by stating that some firms hire analysts with business or liberal arts degrees who know how to write computer programs. According to the *Handbook*, many systems analysts have liberal arts degrees and have gained programming or technical expertise elsewhere. The *Handbook* reports that many analysts have technical degrees but does not specify a degree level (e.g., associate's degree, baccalaureate) for these technical degrees. Moreover, the *Handbook* specifically states that such a degree is not always a requirement. Thus, the *Handbook* does not support the claim that the proffered position falls under an occupational group for which normally the minimum requirement for entry is a baccalaureate degree (or higher) in a specific specialty, or its equivalent.

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

Next, we 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 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement.

In the Form I-129, the petitioner stated that it is a software design and development company engaged in IT consulting established in 1997, and has 100 employees. The petitioner stated its gross annual income as approximately \$5.8 million and its net annual income as \$1.6 million. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 541511. According to the U.S. Census Bureau, NAICS is used to classify business establishments according to type of economic activity and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited August 8, 2014). The NAICS code specified by the petitioner is designated for "Custom Computer Programming Services," and is defined by the U.S. Department of Commerce, Census Bureau as follows:

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

U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 541511 – Custom Computer Programming Services, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited August 8, 2014).

In response to the RFE, the petitioner provided printouts of five online job announcements. However, this documentation does not establish that the proffered position qualifies as specialty occupation. As a preliminary matter, we note that 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. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

For the petitioner to establish that an organization is similar, it must demonstrate that it shares the same general characteristics with the advertising organization. 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.

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 (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.

None of the advertisements provide sufficient information regarding the advertising organizations to establish that the advertising organizations are similar to the petitioner. Further, all of the advertisements provided state the duties of the advertised positions in such abbreviated terms that we are unable to ascertain if the duties are parallel to the proffered position. While we are unable to determine the duties of the advertised positions, they all appear to be more senior than the proffered position. Each of the five advertisements lists between two and five years of required experience in addition to a degree. As previously noted, the petitioner has characterized the proffered position as a Level I (entry-level) position on the LCA. DOL guidance states that Level I positions are appropriate for a worker-in-training or an individual performing an internship.⁷

Additionally, 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 example, the advertisement from [REDACTED] requests a "Bachelor degree." The postings from both [REDACTED] indicate that a bachelor's degree in science is acceptable academic preparation for the advertised positions. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose degree (such as a degree in "science") may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).⁸

⁷ For additional information regarding wage levels, see DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf. A complete discussion of this topic is provided in a subsequent section of this decision.

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

Thus, advertisements that request a general-purpose degree are not probative to the issue of whether the petitioner's proffered position requires a degree in a *specific specialty*.

The job advertisements do not establish that similar organizations to the petitioner routinely employ individuals with degrees in a specific specialty, in parallel positions in the petitioner's industry. Further, it must be noted that even if all of the job postings indicated that a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations.⁹

In support of the assertion that the proffered position qualifies as a specialty occupation, the petitioner and counsel also submitted letters from [REDACTED] and [REDACTED] and an affidavit from [REDACTED]

[REDACTED] states that she is qualified to render an opinion on the requirements of the proffered position because she has "been in a comparable business to the petitioner for many years." However, Ms. [REDACTED] does not describe in what way the business she has been in is similar to the petitioner. She states the minimum requirement for the position of programmer analyst "in her industry" as "a bachelor's degree or its equivalent in a related field." Ms. [REDACTED] does not specify what fields are considered "related."

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 The petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these few job postings with regard to the common educational requirements for entry into parallel positions in similar organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

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

The letter from [REDACTED] states that her employer is an IT Consultancy Software Development and Engineering Services firm, and that it employs 45 individuals "in the position of Programmer Analyst or closely related/similar occupation." Ms. [REDACTED] does not state any familiarity with the proffered position, thus it is not apparent that the positions she identifies as programmer analysts positions are parallel to the proffered position.

Similarly, the affidavit from [REDACTED] states an education requirement for "the position of Programmer Analyst or closely related/similar occupations," but does not provide information to establish that the 40 individuals employed in these positions at his company are parallel positions to the proffered position.

We observe that the letter-writers for these three companies did not provide any documentary evidence to corroborate that their company currently or in the past employed individuals in parallel positions to the proffered position, nor did they provide any documentation to substantiate the companies' claimed academic requirements (e.g., copies of diplomas/transcripts, employment records, job vacancy announcements).

Further, as noted, while the letter-writers for these three employers provide general statements that their company has employed individuals to serve in positions like the proffered position, they fail to provide the actual job duties and day-to-day responsibilities of the positions that they claim are the same or parallel to the proffered position. In addition, the petitioner has not supplemented the record with information regarding the companies to establish that they are similar to the petitioner.

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

Thus, based upon a complete review of the record of proceeding, the petitioner has not established 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. 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).

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

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents, including evidence regarding its business operations. For example, the petitioner submitted a consulting agreement, a purchase order, and a copy of its 2012 federal tax return.

However, a review of the record of proceeding indicates that the petitioner has failed to credibly demonstrate the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent. Furthermore, the petitioner has not established why a few related courses or industry experience alone is insufficient preparation for the proffered position. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it may believe are so complex and unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.¹⁰

The petitioner has indicated that the beneficiary's educational background will assist her 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 qualifies as a specialty occupation. In the instant case, the petitioner does not establish 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. The petitioner fails to demonstrate 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. Consequently, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

¹⁰ This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. More specifically, the LCA indicates a wage level at a Level I (entry level) wage. As previously mentioned, the wage-level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that she will be expected to perform routine tasks that require limited, if any, exercise of judgment; that she will be closely supervised and her work closely monitored and reviewed for accuracy; and that she will receive specific instructions on required tasks and expected results.

Upon review of DOL's instructive comments, we observe that the petitioner did not designate the proffered position as involving even "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II) when compared to other positions within the same occupation. See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

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

To merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of 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. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

In support of the petitioner's assertion that the proffered position qualifies as a specialty occupation under this criterion of the regulation, the petitioner provided documentation regarding the education of several of its employees. In its letter dated July 17, 2013, the petitioner indicated that seven of these individuals hold positions with the petitioner with the same title as the proffered position: "Programmer Analyst." We observe that the petitioner is in the business of placing individuals with other companies for the purpose of providing IT consulting services. Thus, it is apparent that the title that the petitioner gives to a particular position does not reflect that the duties of these positions will be the same, as the individuals are assigned to different companies. Notably, the pay statements for individuals that the petitioner identifies as holding the same position as the proffered position have addresses in New Jersey and Virginia. The beneficiary is assigned to an end client in California. The job duties for the positions that these individuals hold, as described by the end-clients where they are employed, were not provided. Thus, upon review of the record, the petitioner has not submitted sufficient probative evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Therefore, 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 does not assert on appeal that the duties of the proffered position 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. We nonetheless reviewed all of the evidence in the record, including the consulting agreement, purchase order, tax documents, opinion letters, and letters from the mid-vendor and end-client where the beneficiary will be placed. We also considered the petitioner's statements regarding the proffered position. However, the record does not support the assertion that the proffered position satisfies this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

Furthermore, we also reiterate our earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels). That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category, and hence one not likely distinguishable by relatively specialized and complex duties.

The petitioner has not established that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. We, therefore, conclude 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 not established 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

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.