



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **JUL 17 2014** Office: VERMONT SERVICE CENTER

File: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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 Vermont Service Center on April 3, 2013. On the Form I-129 visa petition the petitioner states that it is a software development services business with 40 employees, established in 2005. In order to employ the beneficiary in a position to which it assigned the job title "QA Analyst," the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on October 25, 2013, finding that: (1) the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation; and, (2) the petitioner failed to establish that it will have a valid employer-employee relationship with the beneficiary. On appeal, the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that it satisfied all evidentiary requirements.

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 petitioner's Notice of Appeal or Motion (Form I-290B) and supporting documentation. We reviewed the record in its entirety before issuing our decision.<sup>1</sup>

Upon review, we find that there is insufficient evidence to support the director's finding that the petitioner failed to establish that it will have a valid employer-employee relationship with the beneficiary. Accordingly, this ground for the denial will be withdrawn. However, the petitioner has not established that the proffered position qualifies as a specialty occupation. Accordingly, the appeal will be dismissed, and the petition will be denied.

## I. FACTUAL AND PROCEDURAL HISTORY

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position that it designates as QA Analyst to work on a full-time basis at a salary of \$53,000 per year. The petitioner stated that the dates of intended employment are from October 1, 2013 until September 12, 2016.

In a support letter dated April 1, 2013, the petitioner indicated that the beneficiary will be assigned to the "[REDACTED] in-house software development project," and that the petitioner "envisions this as a long term assignment extending until September 12, 2016." The petitioner also provided the following description of the job duties to be performed by the beneficiary in the proffered position:

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

Perform complex system testing to ensure that all the products and services meet Company quality standards and [p]roduct requirements. Thoroughly test complex, project-level software to ensure proper operation and freedom from defects. Write test plans and test cases and execute them. Track defects and paths to closure in product development, software application development, information systems, and operations systems. Review software design, change specifications, and plans against contractual and/or process requirements. Apply proven analytical and problem-solving skills to help validate IT processes through careful testing in order to maximize the benefit of business investments in IT initiatives. Participate in establishing software quality standards for life cycle, documentation, development methods, testing and maintenance. Interface with software developers to discuss system specifications and desired results. May participate in system/product design sessions. Ensure that project and process control documentation are compliant with requirements and objectives. Perform software testing, verification and validation including software and software work-product early defect detection and removal, testing (e.g. types, levels, strategies, tools and documentation) and verification and validation methods and techniques. Maintain appropriate confidentiality regarding [the petitioner's] information and product development information. Participate as a project team member collaborating with other programmer analyst assigned to the [redacted] project.

The petitioner added:

...[w]e require that all [of the petitioner's] QA Analysts possess the minimum of a Bachelor's Degree in one of the following; Engineering, Computer Science, CIS, Mathematics, Electronics, Communications, Technology, Business Administration, Management or a related field.

The petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The LCA designation selected by the petitioner for the QA Analyst position corresponds to the occupational classification "Computer Occupations, All Other" - SOC (ONET/OES) Code 15-1799 at a Level I (entry level) wage.

The petitioner also submitted a document entitled, [redacted] Technical Document." The document provides a summary of the petitioner's [redacted] project plan. The petitioner provided a second digitally rendered document, entitled "Statement of Qualifications & Business Plan 2013/2014." This document is a power point presentation that provides a brief overview of the following topics: company profile, core services, guiding principles, staff augmentation, recruitment methodology, product development, technology expertise, infrastructure, client list, and value proposition.

On June 24, 2013, the director issued an RFE requesting, in part, information regarding the in-house employment of the beneficiary in the [redacted] project and other types of evidence that the petitioner believed established it had sufficient specialty occupation work for the beneficiary to perform. The director outlined the evidence that could be submitted.

In response to the RFE, counsel for the petitioner provided the following explanation of the in-house project, [REDACTED], as follows:

However, as [the petitioner] grew technically more diverse, the company began actively seeking opportunities to develop their own proprietary software platform. Moving in this same direction, Petitioner is in the process of creating a highly adaptable software product (platform) tailored specifically to the small and medium-size business technology market. The "[REDACTED]" software platform is a powerful blend of in-depth customized HR software solutions configured with specified application modules which provide a business with fully integrated professional services, automated software system that collects, stores, analyzes and manages information on employees, human resources, accounts management, employee management, sales, customers, resources, etc. The unique feature of [REDACTED] is the software's ability to integrate front office and back office solutions while using an adaptable business architecture. [REDACTED] goes beyond a typical Applicant Tracking System (ATS) and Professional Services Automation (PSA) and runs the entire business with one integrated system.

[The petitioner's] research has revealed that there are almost no comprehensive "out of the box" software applications available in the price range of \$1,000.00 - \$2,000.00 in the North American marketplace which automates the complete business process for small to mid-range IT companies. As a result, [the petitioner's] senior management developed a comprehensive business plan, obtained the requisite facilities in our Delaware Offices, [the petitioner] is in the process of forming a technical team capable of collaborating and bringing [REDACTED] to fruition.

Counsel contends that the beneficiary "was carefully selected by Petitioner for this specialty occupation position of QA Analyst assigned specifically to the [REDACTED] technical team."

The petitioner re-submitted several of the documents initially filed with the petition. The petitioner also submitted a second organizational chart; tax returns for 2011 and 2012; a lease agreement signed by the petitioner; the petitioner's employee handbook; the petitioner's promotional materials; and a credential evaluation for the beneficiary indicating she has obtained the equivalent of a Bachelor's Degree in Engineering from an accredited institution of higher education in the United States.

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director specifically found that the record does not establish the role of the beneficiary or whether the work meets the definition of specialty occupation work. The director denied the petition on October 25, 2013. Counsel for the petitioner submits an appeal of the denial of the H-1B petition and supporting documentation. Counsel does not directly address the director's determination that the petitioner had not established that the work described meets the definition of specialty occupation work. However, as discussed below, the record precludes a determination that the position proffered here is a specialty occupation.

## II. LAW AND ANALYSIS

### A. Standard of Review

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 its 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" 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.

*Id.*

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.

#### B. Failure to Establish that the Proffered Position Qualifies as a Specialty Occupation

We will now address whether the petitioner's proffered position qualifies as 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 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

The petitioner stated on the Form I-129 that the beneficiary would be employed as a QA Analyst. The LCA designation selected by the petitioner for the QA Analyst position corresponds to the occupational classification "Computer Occupations, All Other" - SOC (ONET/OES) Code 15-1799 at a Level I (entry level) wage.

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 evidence in the record of proceeding establishes that performance of the particular proffered position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

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."

In this matter, the petitioner provided a broad description of the beneficiary's proposed duties. Thus, it is not possible to discern the substantive nature of the work to be performed by the beneficiary. The failure to detail the beneficiary's actual day-to-day duties, therefore, 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.

Assuming for the sake of argument that the proffered duties as generally described by the petitioner in its initial letter would in fact be the duties to be performed by the beneficiary, we will analyze them and the evidence of record to determine whether the proffered position as described would qualify as a specialty occupation. In that regard, we observe the petitioner attested on the required LCA that the proffered position corresponds most closely to the grouping of Computer Occupations, All Other.

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

We will first review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position that is the subject of the petition.

We recognize the Department of Labor's *Occupational Outlook Handbook (Handbook)* as an

authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>2</sup> However, we note that there are occupational categories which are not covered in detail by the *Handbook*, as well as occupations for which the *Handbook* does not provide any information. The *Handbook* states the following about these occupations:

### **Data for Occupations Not Covered in Detail**

Although employment for hundreds of occupations are covered in detail in the [the *Handbook*], this page presents summary data on additional occupations for which employment projections are prepared but detailed occupational information is not developed. For each occupation, the Occupations Information Network (O\*NET) code, the occupational definition, 2012 employment, the May 2012 median annual wage, the projected employment change and growth rate from 2012 to 2022, and education and training categories are presented.

Thus, the narrative of the *Handbook* indicates that there are occupations for which only brief summaries are presented. (That is, detailed occupational profiles for these occupations are not developed.)<sup>3</sup> The *Handbook* suggests that for at least some of the occupations, little meaningful information could be developed.

When reviewing the *Handbook*, we must also note that the petitioner designated the prevailing wage for the proffered position as a wage for a Level I (entry level) position on the LCA.<sup>4</sup> This

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<sup>2</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet at <http://www.bls.gov/ooh/>. The references to the *Handbook* are to the 2014-2015 edition available online.

<sup>3</sup> The occupational categories for which the *Handbook* only includes summary data includes a range of occupations, including for example, postmasters and mail superintendents; agents and business managers of artists, performers, and athletes; farm labor contractors; audio-visual and multimedia collections specialists; clergy; merchandise displayers and window trimmers; radio operators; first-line supervisors of police and detectives; crossing guards; travel guides; agricultural inspectors, as well as others.

<sup>4</sup> Wage levels should be determined only after selecting the most relevant Occupational Information Network (O\*NET) code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

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

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*,

designation is indicative of a comparatively low, entry-level position relative to others within the occupation.<sup>5</sup> That is, in accordance with the relevant DOL explanatory information on wage levels, this Level I wage rate is only appropriate for a position in which the beneficiary is only required to have a basic understanding of the occupation and would be expected to perform routine tasks that require limited, if any, exercise of judgment. This wage rate also indicates that the beneficiary would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results.

Further, the petitioner's own claimed entry requirement of at least a bachelor's degree in one of the following: Engineering, Computer Science, CIS, Mathematics, Electronics, Communications, Technology, Business Administration, Management or a related field for the proffered position, without more, is inadequate to establish that the proposed position qualifies as a specialty occupation. In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" 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 communications 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," the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. See section 214(i)(1)(B) of the Act; 8 C.F.R.

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Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

<sup>5</sup> The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is describes as follows:

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

*Id.*

§ 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.

In this matter, the petitioner claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). The director's decision must therefore be affirmed and the petition denied on this basis alone.

Moreover, the petitioner's claim that the duties of the proffered position can be performed by an individual with a bachelor's degree in a variety of fields including Engineering, Computer Science, CIS, Mathematics, Electronics, Communications, Technology, Business Administration, Management or a related field also precludes a determination that the proffered position is in fact a specialty occupation. Neither the petitioner nor counsel explains how the separate fields of "engineering," "management," "communications," and "business administration" are directly related to the duties and responsibilities of the position proffered here. Furthermore, a general engineering degree 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, besides a degree in electrical engineering, it is not readily apparent that a general degree in engineering or one of its other sub-specialties, such as chemical engineering or nuclear engineering, is closely related to the position at hand 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 these disciplines are closely related fields, or (2) that all of the fields are directly related to the duties and responsibilities of the proffered position. As the evidence of record fails to establish how these dissimilar fields of study form either a body of highly specialized knowledge in a specific specialty, or its equivalent, the petitioner's assertion that the job duties of this particular position can be performed by an individual with a degree in any of these fields confirms that the proffered position is not in fact a specialty occupation. Therefore, absent probative 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 at least a bachelor's degree in a specific specialty, or its equivalent.

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 petitioner has not supplied additional probative evidence on this issue. In the instant matter, the petitioner did not provide any persuasive evidence to indicate that the proffered position qualifies as a specialty occupation under this criterion. Thus, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 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*, or other authoritative source, reports an industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent. Thus, we incorporate by reference our previous discussion on the matter. The record of proceeding does not contain any evidence from an industry professional association to indicate that a degree in a specific discipline is a minimum entry requirement. The petitioner did not submit any letters or affidavits from firms or individuals in the industry.

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.

The petitioner in this matter provided a broad description of the duties of the proffered position. As determined above, it is not possible to ascertain what the beneficiary will actually do on a daily basis. In addition, the petitioner contends that the beneficiary will work on the [REDACTED] project, which is a product the petitioner is developing in-house. In response to the request for evidence, counsel stated that the petitioner "is in the process of forming a technical team;" thus, it is not clear if that team will be developed in time for the beneficiary's start date. In addition, counsel stated that the petitioner did research and developed a "comprehensive" business plan but upon review of the business plan, it failed to provide substantial detail of this project. A business plan should contain, for example, a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should also list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials

required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible. Instead, the petitioner in this matter provided a business plan with general concepts and no concrete plans for the [REDACTED] project. 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'r 1972)).

The petitioner in this matter fails to demonstrate how the duties described here require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. Consequently, as the petitioner fails to demonstrate how its particular position is so complex or unique relative to other positions in the pertinent occupation that can be performed by an individual without at least a bachelor's degree in a specific specialty, or its equivalent for entry into the occupation in the United States, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).<sup>6</sup>

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. We usually review the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position in order to assess this criterion.

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. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent. Accordingly, the petitioner has not satisfied the requirements of this criterion.

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.

Incorporating the discussion above, the petitioner's statements and the submitted documentation fail to support the assertion that the proffered position qualifies as a specialty occupation under

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<sup>6</sup> Moreover, the LCA, which is certified for an entry level position, is at odds with any claim that the duties of the proffered position are "complex and unique," as such a position would be classified as a Level III or IV position, requiring a significantly higher prevailing wage.

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 wage (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. As noted earlier, DOL indicates that a Level I designation is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, as previously mentioned, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

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

We acknowledge the petitioner's claim that the position qualifies for H-1B classification; however, an assertion without supporting evidence is insufficient for a petitioner to satisfy its burden of proof. The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). For the reasons discussed above, 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.

### C. Speculative Employment

Although not specifically addressed by the director, we find beyond the decision, that the petitioner has not established that it has specialty occupation work available for the beneficiary for the requested employment period. In that regard, we have reviewed the information in the record regarding the petitioner's IT and management consulting business. Upon review of this information, we find that the record of proceeding lacks documentation regarding the petitioner's business activities and the actual work that the beneficiary will perform to sufficiently substantiate the claim that the petitioner has H-1B caliber work for the beneficiary for the period of employment requested in the petition. That is, the record does not include sufficient work product or other documentary evidence to confirm that the petitioner has ongoing projects or actual work that the beneficiary will perform to sufficiently substantiate the claim that the petitioner has H-1B caliber work for the beneficiary for the period of employment requested in the petition. The petitioner contends that it "envision[s] this [the ██████████ project] as a long term assignment extending until September 12, 2016." However, the petitioner did not provide any

documentation to support the claim that this project will last for three years such as a business plan with a detailed timeline, a budget, or general information on how long a new product development usually takes to complete. In addition, the petitioner did not provide any evidence of the job duties to be performed by the beneficiary if the [REDACTED] project fails or is completed prior to September 12, 2016. Thus, the record does not include sufficient work product or other documentary evidence to confirm that the petitioner has ongoing projects to which the beneficiary will be assigned.

The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

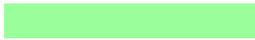
Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E). In this matter, even if the petitioner had established the position proffered here is a specialty occupation, which it has not, the petition must still be denied for this additional reason.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

### III. CONCLUSION

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.