



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: JUL 25 2014 OFFICE: CALIFORNIA 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)

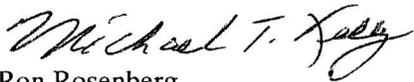
ON BEHALF OF PETITIONER:

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,

*for*   
Ron Rosenberg  
Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes it as an 11-employee Information Technology (IT) consulting and development business<sup>1</sup> established in 2006. In order to newly employ the beneficiary in what it designates as a computer programmer position with the job title "Programmer Analyst" the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, based upon her determination that the evidence of record failed to establish that the petition presented a basis for approval of the petition as a specialty occupation because it appears that the petition was not based upon a "a reasonable and credible offer of employment." We will address the director's decision by explaining why we conclude that the director's decision to deny the petition was correct because we find that the petition was not filed on the basis of definite, non-speculative employment for the beneficiary, and, in addition, also because the evidence of record does not provide a credible basis for finding that the proffered position, as presented in the record, would qualify as a specialty occupation even if it were not speculative at the time that the petition was filed.

The record of proceeding contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B, a letter from the petitioner, and supporting documentation.

#### I. STANDARD OF REVIEW

The petitioner indicates that the "preponderance of the evidence" standard is relevant to this matter. With respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part 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.

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<sup>1</sup> At the appropriate place on the Form I-129, the petitioner identified its industry by the North American Industry Classification System (NAICS) Code of 541511, "Custom Computer Programming Services." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "541511 Custom Computer Programming Services," <https://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

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.

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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.

Applying the preponderance of the evidence standard, we find that, upon review of the entire record of proceeding including the submissions on appeal, the evidence of record does not overcome the director's grounds for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

## II. LEGAL FRAMEWORK

To meet the petitioner's burden of proof with regard to the proffered position's classification as an H-1B specialty occupation, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

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

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

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

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal*

*Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

### III. THE PETITIONER AND THE PROFFESRED POSITION

As we noted above, the petitioner describes itself as an 11-employee IT consulting and development business that was established in 2006, and the petitioner identified its particular industry by the NAICS Code 541511, "Custom Computer Programming Services."

The September 18, 2013 two-page "To Whom It May Concern" letter that the petitioner's president submitted with as part of his response to the RFE includes the following statement about the petitioner's business as a generator of work for the beneficiary:

[The beneficiary] will provide his services from our office [in [REDACTED] California] and will be working for 40 hours per week. [The petitioner] has several ongoing projects and is making strategic investments in Product Development. Online Shopping Framework (OSF) is one such [of the petitioner's] project offering for [REDACTED]. It aims to support SAAS delivery model for Small Medium businesses at an affordable cost. [The petitioner] is working on putting together a team of Programmer Analyst, Business Analyst, and [REDACTED] Managers to design and implement this product solution. The job duties that [the beneficiary] will be performing on this product are the same/similar to what was included in the [petitioner's] cover letter and clearly shows [that] he will be performing the specialized duties of an H-1B caliber position at the petitioner's client. The validity of the project is to anticipated to continue with possible extension[;] however if the scheduled project is completed before the expiration of three years, the company will assign the beneficiary to one of the company's other ongoing, projects/products thus remaining on the company's payroll.

We will here state our finding that neither the statements above nor any related documentation submitted into this record of proceeding establish that, at the time of the petition's filing, the petitioner had secured definite, non-speculative work for the beneficiary that would conform to the duties that the petitioner identified as comprising the proffered position. We also accord no probative weight to the fact that the petitioner may be expanding, "has several ongoing projects," and "is making strategic investments in Product Development," for the record of proceeding lacks persuasive documentation that, particularly at the time of the petition's filing, any of those aspects of the petitioner's business had generated definite employment for the beneficiary to provide the services and perform the duties specified for the proffered position.

The Labor Condition Application (LCA) that the petitioner submitted in support of the petition was certified for use with a job prospect within the "Computer Programmers" occupational classification, SOC (O\*NET/OES) Code 15-1131, and a Level I prevailing wage rate. The LCA also reflects that, as mentioned above, the petitioner assigned "Programmer Analyst" as the position's job title.

In its March 25, 2013 letter, the petitioner described the proffered position and duties as follows:

We hereby confirm that we have offered the position of Programmer Analyst on a temporary basis to [the beneficiary]. . . . The duties of our Programmer Analyst position include the following: analyze and evaluate existing and proposed systems and devices, computer programs and systems, as well as related procedures to process data. The Programmer Analyst will prepare charts and diagrams to assist in problem analysis and submit recommendations for solutions. He will prepare program specifications and diagrams and develop coding logic flowcharts. He will create plans outlining steps required to develop programs using structured analysis and design. The Programmer Analyst will encode, test and install operating programs and procedures in conjunction with user development. Daily task activities will include: systems analysis 50%, program specifications, encoding and testing 30%, preparing diagrams, charts and documentation 20%.

This position is highly complex and professional in nature and requires an individual with an advanced analytical background and skills. The minimum level of education required by our company and by general current industry standards is a Bachelor Degree (or equivalent) in a related field<sup>2</sup> and preferably some relevant experience . . . .

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<sup>2</sup> We note that it was not until the September 18, 2013 response to the director's RFE that the petitioner stated the proffered position required a bachelor's degree in a specific specialty, namely, Computer Science or Equivalent.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on July 11, 2013. The petitioner was asked to submit probative evidence to establish that it had sufficient specialty occupation work that was immediately available upon the beneficiary's entry into the United States through the entire requested H-1B validity period. The petitioner was also asked to establish that the proffered position qualified as a specialty occupation. The director outlined some of the types of specific evidence that could be submitted.

In an attachment to the petitioner's September 18, 2013 response letter to the director's RFE, the petitioner provided the following description of the job duties, including level of responsibilities, hours per week of work, and the minimum education, training and experience necessary to do the job:

- Analyze business requirements for partner integrations: (1) Order Processing (2) Payment Processing 50%
  - Single owner responsibility for designing the modules of the software
  - Initially 40 hours per week
  - BS Comp. Sc or Equivalent
  - Knowledge eCommerce applications and Knowledge of Java J2EE technologies
- Program specifications design, encode and test the following modules: (1) Order Validation (2) Pick Release Order (3) Ship Confirm Orders (4) Payments, Tax and refunds (5) Settlement Processing 30%
  - Single owner responsibility for designing the modules of the software
  - Initially 40 hours per week
  - BS Comp. Sc or Equivalent
  - Knowledge of Java J2EE, Experience in XHTML technologies, Experience in Database technologies
- Prepare documents for business process flowcharts, setups 20%
  - Single owner responsibility for designing the modules of the software
  - Initially 40 hours per week
  - B.S. Comp Sc or Equivalent
  - Knowledge of business process documentation with focus on user and system interaction points

[The Petitioner] is a [REDACTED] CA based Software Solutions and Services company.

[The Petitioner] specializes in building and maintaining highly scalable and high performance eCommerce applications for consumers and businesses.

These applications intends (sic) to support online sales, order fulfillment and delivery for consumers, business units and supply chain partners operating in countries across the globe.

Starting in 2013, [the petitioner] is making strategic investments in Product development.

Online Shopping Framework OSF, is one such [petitioner] product offering for [redacted]. It aims to support SAAS delivery model for Small Medium businesses at an affordable cost. [redacted] is a first implementation of this framework. . . .

[The beneficiary] will work on design and development of following components to enable Supply Chain Integration for [redacted] . .

The first basic implementation [redacted] using [the petitioner] OSF platform, is tentatively planned for [redacted] by 1<sup>st</sup> week of December 2013 with one supplier integrated. Following this release, we intend to invite more suppliers onboard during 2014. . . .

This is an appropriate place for us to enter our finding that neither the information above nor any other descriptions of the proffered position's constituent duties in this record of proceeding are sufficient in themselves, even considered as a total group, to establish that performance of the proffered position would require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty, as would be required to satisfy the statutory and regulatory definitions of an H-1B "specialty occupation." In this regard, we also find that the petitioner has not supplemented the record with any persuasive evidence for a contrary determination. We also specifically note that the record of proceeding does not provide any objective measure or authoritative documentation by which we can determine that the work claimed for the proffered position satisfies any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Also, before proceeding further, upon consideration of the totality of all of the petitioner's duty descriptions, position descriptions, explanations, and assertions, as well as the complete complement of documents submitted in support of the petitioner's specialty occupation claim, we find that the evidence in the record of proceeding does not establish relative complexity, specialization and/or uniqueness as distinguishing aspects of either the proposed duties or the position that they are said to comprise. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

As already noted, the petitioner stated that the beneficiary "will provide his services from our office located at [REDACTED] CA and will be working for 40 hours per week." Also, the petitioner attested that it has control over the employment status of the beneficiary as well as control over any of his work assignments, and that the beneficiary will not be subcontracted to any other company but will "exclusively" provide services at the petitioner's [REDACTED] California location. The petitioner's letter also asserts that the petitioner "retains the ultimate control of the beneficiary and the beneficiary's services provided."

The petitioner included copies of the following documents in its RFE response, to support its assertion that it had sufficient work for the beneficiary, to perform in the proffered position, from the beneficiary's entry into the United States through the entire requested H-1B validity period:

- A Consulting Agreement with an incorporated Statement of Work (SOW) between the Petitioner and [REDACTED] with an effective date of November 19, 2007. We note that the document does not reference either the beneficiary or his position.
- Documents either extending, or amending to extend, the November 27, 2007 above-referenced [REDACTED] /Petitioner Consulting Agreement (1) to November 30, 2010; (2) to November 19, 2011; (3) to November 19, 2012, with automatic renewal for additional one-year terms "unless either party provides notice of its intention to not renew at least thirty (30) days prior to the end of the then-current Initial Term or Renewal Term."
- Two SOWs (denominated "A 27" and "A 29") entered by [REDACTED] and the petitioner. The most recent SOW, signed in March 2013, specifies a project end-date of September 3, 2013. Neither mentions the petitioner or the proposed position; and both specify, by name, persons other than the beneficiary to perform the petitioner's work under the SOW.
- A Vendor Agreement between [REDACTED] and the petitioner, in which the petitioner is identified as "Vendor." This document applies its terms and conditions to any Purchase Order or SOW that may be issued under it. We note that its Attachment A, self-described as a "purchase order," specifies, by name, not the beneficiary, but another employee of the petitioner to perform any work under the purchase order. While the purchase order specifies the "Client" as '[REDACTED]' we also note that, even read in conjunction with the Vendor Agreement to which it is attached, the purchase order does not indicate any specific services to be performed other than "information technology services for [REDACTED] or its client as set forth in the Exhibit A attached hereto and any [SOW] that may be assigned by both parties." Further, as neither the Vendor Agreement nor the attached purchase order bears a signature of [REDACTED] the legal status of the documents are

questionable. In addition, the purchase order duration does not appear to be coextensive with the period of employment specified in the petition.

- A Subcontractor Agreement between [REDACTED] and the petitioner, in which the petitioner is designated the Subcontractor. The agreement indicates an effective date of August 20, 2012 and a project length of 3 months, placing it outside the employment period specified in the petition. Also, while this document's Exhibit A identifies [REDACTED] as the client, it designates, by name, someone other than beneficiary to perform the petitioner's Subcontractor services. In addition, we note that Exhibit A (1) does not outline any of the duties to be performed, and (2) for "Project Specifications" merely states "will be given directly by client to Consultant from time-to-time."
- A Subcontractor Staffing Agreement between [REDACTED] and the petitioner. Said agreement indicates an end-date of December 31, 2012, which is also outside the employment period requested in the petition. Here the petitioner is designated the Contractor, and agrees to provide "staffing support to [REDACTED] on the terms and conditions set forth in [the] Agreement, its incorporated Exhibits, and any work authorization." Accompanying this Subcontractor Staffing Agreement is a Work Authorization which commits the petitioner to assign a named person (not the beneficiary) to work for [REDACTED] client "Esuarance" from August, 27, 2012 to December 31, 2012. We note that the Assignment Description portion of the Work Authorization reads: "\_\_\_\_\_."
- Four (4) SOWs between [REDACTED] and the petitioner. These SOWs also name other persons – and not the beneficiary – to perform the related services. What's more, the nature and associated duties are not specified: one of the SOWs states "Consulting Services" as "Description of Services to be performed"; the other three SOWs make no mention of the related services to be performed or positions to which the petitioner's staff member would be assigned. All of the SOW's indicate that the services would not be performed at the petitioner's offices.
- A copy of a Consulting Services Agreement between [REDACTED] and the Petitioner (presumably the Agreement governing the SOWs that we addressed immediately above). Said agreement states that the terms will commence on November 7, 2011 and will continue for a period of two years. Further, it provides no help in discerning the nature of the services to be performed under the aforementioned SOWs, for clause 1 states in part, that "[The petitioner] agrees . . . to provide personnel for technical services such as programming, systems analysis, technical writing, project management or other specialized services as an independent contractor." We see that this Consulting Services Agreement is followed by an additional SOW, signed by [REDACTED] and the petitioner on the same date as the Consulting Agreement. This SOW also

specifies someone other than the beneficiary as the person to be assigned. It also indicates that the services will not be performed at the petitioner's offices, but it nowhere describes what those services would be.

- Tabbed as "Past and present purchase orders," purchase orders from January to March 2013 which specify the petitioner as the "Supplier" and [REDACTED] Arizona address, as the "Invoice To" entity. We offer the table below to indicate some of the information in the invoices. (The "Ord.#" column refers to the order in which the document appears after the "Past and present purchase order" tab.)

Ord.#	Partial Description	Order Date	Delivery Date	Total \$ Amount
1.	[REDACTED]	3/19/2013	3/29/2013	[REDACTED]
2.	[REDACTED]	2/6/2013	2/18/2013	[REDACTED]
3.	[REDACTED]	2/16/2013	2/18/2013	[REDACTED]
4.	[REDACTED]	1/11/2013	1/29/2013	[REDACTED]
5.	[REDACTED]	2/27/2013	3/10/2013	[REDACTED]
6.	[REDACTED]	3/07/2013	3/19/2013	[REDACTED]
7.	[REDACTED]	1/30/2013	2/05/2013	[REDACTED]
8.	[REDACTED]	1/21/2013	2/01/2013	[REDACTED]
9.	[REDACTED]	2/16/2013	2/18/2013	[REDACTED]

With regard to all of the above documentation, we find that none of it provides a sufficient factual basis for us to reasonably determine that it establishes that the petition was filed for definite work for the beneficiary in the position described in the petition.

The director reviewed the documentation submitted in response to the RFE and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on November 12, 2013. The petitioner submitted an appeal of the denial of the H-1B petition. With the appeal, the petitioner submitted a brief and referenced exhibits – and we also find that none of the submissions on appeal overcome the grounds that the director specified for dismissal.

Next, we note that the Form I-129 requested H-1B specialty-occupation classification for the period of October 1, 2013 to September 2, 2016. In its December 3, 2013 letter in support of the instant appeal, the petitioner stated that the beneficiary will be working on the petitioner's Online Shopping Framework (OSF), "an open, extensible eCommerce platform framework based on Software as a service (SAAS) model.... [REDACTED] is one of the multiple product offerings [the

Petitioner] is investing in.... [The petitioner] had additionally submitted several contract/statement of work between [the petitioner] and [REDACTED] etc. to demonstrate that the company has other ongoing project/projects thus establishing that if the scheduled project is completed before the expiration of three years, the company will assign the beneficiary to one of the company's other ongoing project thus remaining on the company payroll."

The launch date for [REDACTED] provided by the petitioner in its document entitled Business Plan for [REDACTED] is November-December 2014. The petitioner has not provided any detailed evidence regarding projects and associated job duties that the beneficiary specifically would perform after [REDACTED] has been launched. More importantly, the evidentiary record does not include any SOWs that cover the entire period of employment requested on the Form I-129.<sup>3</sup> Therefore, the nature, scope, substantive duties, and associated performance and knowledge requirements of work for the beneficiary have not been established for the full period employment specified in the Form I-129 (that is, October 1, 2013 to September 2, 2016).

For all of the reasons discussed above, we thus find that the petitioner has not established that the petition had been filed for definite, non-speculative work for the beneficiary, in the proffered position as described in the petition, for the entire period requested. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). Moreover, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act.

A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248.<sup>4</sup> Consequently, if this petition were approvable on the basis of the current record of

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<sup>3</sup> On appeal, the petitioner submits extension documents to SOWs between the petitioner and [REDACTED] but the documents reflect a new end date of April 30, 2014.

<sup>4</sup> 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.

proceeding - which is not the case - it could not be approved beyond the period for which definite, non-speculative work in the specialty had been secured for the beneficiary as of the time of the petition's filing. As noted above, that period would be less than requested in this petition. In view of the foregoing, the petitioner has not established that it had filed the petition on the basis of definite, non-speculative employment for the beneficiary. For this reason, the petition may not be approved. Accordingly, the appeal will be dismissed and the petition will be denied.

#### IV. EVIDENCE ALSO INSUFFICIENT TO ESTABLISH SPECIALTY OCCUPATION

Based upon a complete review of the record of proceeding, we find that the evidence of record does not establish that the proposed duties would constitute a specialty occupation, even if they comprised definite, non-speculative work that had been secured for the beneficiary at time of filing and for period of employment requested in the petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

As evident in the list of duties quoted above, the record of proceeding presents the duties comprising the proffered position in terms of relatively abstract and generalized functions which are not rendered more concrete by the use of various unexplained computer and IT related acronyms and technical terms of art. They lack sufficient detail and concrete explanation to establish the substantive nature of the work and associated applications of specialized knowledge that that their actual performance would involve within the context of the petitioner's particular business operations.

Likewise, the record does not illuminate the substantive work and associated applications of specialized knowledge that would be involved in the referenced duty. Likewise, we see that the petitioner does not provide substantive information with regard to how the position's particular work and associated applications of computer/IT related knowledge would elevate it above other "Programmer Analyst" positions within the Computer Programmers occupational group. This is an important determination in that, as will be evident in our discussion of Department of Labor resources, Computer Programmers does not appear to be an occupational group which requires at least a bachelor's degree in a specific specialty for entry.

The duties of the proffered position, and the position itself, are described in relatively generalized and abstract terms that do not relate substantial details about either the position or its constituent duties that would establish the need for at least a bachelor's degree or the equivalent in a specific specialty. Further, we find that the petitioner has not supplemented the job and duty descriptions with documentary evidence establishing the substantive nature of the work that the beneficiary would perform, whatever practical and theoretical applications of highly specialized knowledge in a specific specialty would be required to perform such substantive work, and whatever correlation may exist

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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).

between such work and associated performance-required knowledge and attainment of a particular level of education, or educational equivalency, in a specific specialty.

Thus, we conclude that, as generally described as all of the elements of the constituent duties are, they do not - even in the aggregate - establish the nature of the position or the nature of the position's duties as more complex, specialized, and/or unique than those of programmer analyst positions within the "Computer Programmers" occupational classification that do not require the services of a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

We will now discuss application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

We will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition.

At the outset, aside from the evidentiary deficiencies mentioned above, we again note that, to the extent that the petitioner has described them in the record of proceeding, it appears that the proposed duties - if in fact they had been shown to relate to work actually secured for beneficiary for the employment period specified in the petition - would comport with the general duties or functions that the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* ascribes to the Computer Programmers occupational classification. We recognize the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.<sup>5</sup>

As noted above, the petitioner submitted an LCA in support of this position certified for a job offer titled Programmer Analyst, within the "Computer Programmers" occupational classification. Thus we look to the *Handbook's* chapter "Computer Programmers."

The *Handbook's* discussion of the duties of Computer Programmers states, in pertinent part, the following:

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

Computer programmers typically do the following:

- Write programs in a variety of computer languages, such as C++ and Java

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<sup>5</sup> The *Handbook*, which is available in printed form, may also be accessed online at <http://www.bls.gov/ooh>. The references to the *Handbook* are from the 2014-15 edition available online.

- Update and expand existing programs
- Debug programs by testing for and fixing errors
- Build and use computer-assisted software engineering (CASE) tools to automate the writing of some code
- Use code libraries, which are collections of independent lines of code, to simplify the writing

Programmers work closely with software developers, and in some businesses, their duties overlap. When this happens, programmers can do work that is typical of developers, such as designing the program. This entails initially planning the software, creating models and flowcharts detailing how the code is to be written, writing and debugging code, and designing an application or systems interface.

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

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

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Computer Programmers," <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-2> (accessed July 24, 2014).

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

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

Most programmers learn only a few computer languages while in school. However, a computer science degree gives students the skills needed to learn new computer

languages easily. During their classes, students receive hands-on experience writing code, debugging programs, and doing many other tasks that they will perform on the job.

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

*Id.* at <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4> (accessed July 24, 2014).

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

Further, with regard to the *Handbook's* statement that "most" computer programmers "possess a bachelor's degree," we note that the first definition of "most" in *Webster's New College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "[g]reatest in number, quantity, size, or degree." As such, if merely 51% of computer programmer positions require at least a bachelor's degree or a closely related field, it could be said that "most" system computer programmer positions require such a degree. It cannot be found, therefore, that a particular degree requirement for "most" positions in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. Instead, a normal minimum entry requirement is one that denotes a standard entry requirement but recognizes that certain, limited exceptions to that standard may exist. To interpret this provision otherwise would run directly contrary to the plain language of the Act, which requires in part "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." § 214(i)(1) of the Act.

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

baccalaureate or higher degree in a specific specialty or its equivalent is normally a minimum requirement for entry.

Furthermore, the materials referenced by the petitioner from DOL's Occupational Information Network (O\*NET OnLine) do not establish that the proffered position satisfies the first criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A), either. O\*NET OnLine is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a requirement for a given position, as the pertinent O\*NET OnLine Job Zone designation makes no mention of the specific field of study from which a degree must come. As was noted previously, we interpret 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. The Specialized Vocational Preparation (SVP) rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. Therefore, O\*NET OnLine information is not probative of the proffered position being a specialty occupation.

When, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies the criterion, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

This brings us to the four-page July 24, 2013 letter from [REDACTED] Associate Professor of Computer Applications and Information Systems, School of Business, [REDACTED] who made the following assertions:

I have had the opportunity over the years to become familiar with the qualifications required to attain the position of Programmer Analyst and similar professional positions, and the specialized and unique needs of the companies that recruit graduates for this position.....

\* \* \*

Currently, [the Petitioner] requires the services of a Programmer Analyst to perform various specialized duties that will help ensure the company's continued success as it expands. It is apparent that a Programmer Analyst with the specific duties listed below would be considered a professional position and would normally be filled by a graduate with a minimum of a Bachelor's Degree in Computer Science, Computer Information Systems, or a related area, or the equivalent. . . .

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

Upon review of the opinion letter, there is no indication that Professor [REDACTED] possesses any substantive knowledge of the petitioner's proffered position and its business operations. Rather, it appears that he rested his opinion upon the six generically stated functions that he lists in the letter. Professor [REDACTED] does not demonstrate or assert in-depth knowledge of the petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. Moreover, upon review of the letter, Professor [REDACTED] does not indicate that he visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. Furthermore, there is no indication that the petitioner and counsel advised Professor [REDACTED] that the petitioner characterized the proffered position as low and entry-level, for a beginning employee who has only a basic understanding of the occupation (as indicated by the Level I wage-level on the LCA). As we shall discuss in detail below, that prevailing wage-rate is appropriate for a position in which the beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; will be closely supervised and his work closely monitored and reviewed for accuracy; and will receive specific instructions on required tasks and expected results. We find this to be a relevant aspect of the position, as it reflects an assessment that the proffered position is of relatively low complexity in relation to other jobs within the position's occupational group. In this respect too, we find that Professor [REDACTED] opinion is not based upon a sufficient factual foundation. Without this information, the petitioner has not demonstrated that Professor [REDACTED] possessed the requisite information necessary to adequately assess the nature of the petitioner's position and appropriately determine the educational requirements based upon the job duties and responsibilities. Professor [REDACTED] has not provided sufficient facts that would support the contention that the proffered position requires at least a bachelor's degree in a specific specialty.

Moreover, we find that Professor [REDACTED] does not provide an adequate factual and analytical foundation for his ultimate conclusion that the proffered position qualifies as a specialty occupation. He states his observations as based upon what "becomes apparent," but he does not explain why such is the case. Further, Professor [REDACTED] opines about normal hiring practices, but he provides no documentation in support and he cites no studies, industry publications, surveys, or any authoritative source for his statements.

Additionally, Professor [REDACTED] credibility is undermined by his unsubstantiated statement that he has "reviewed the position in detail."

In short, we find that Professor [REDACTED] document is conclusionary and framed in assertions that the professor does not substantiate about the particular position here proffered and about relevant recruiting and hiring practices. Also, despite his self-endorsement, there is nothing in his letter, his resume, or any documentation in the record that establishes him as a person to whom we should defer to as a recognized authority in the area in which he here opines.

As the conclusion pronounced by Professor [REDACTED] is not supported by any persuasive degree of analytical and factual content and is not supplemented by independent, objective evidence supporting his findings and ultimate opinion. Also, the professor's submission is not helpful to us in our consideration of the appeal. Consequently, we find that Professor [REDACTED] submission is not probative evidence towards satisfying any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), and we treat it accordingly.

We, in our discretion, may use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). As a reasonable exercise of its discretion we discount the advisory opinion letter as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). It should be noted that, for efficiency's sake, the above discussion and analysis regarding Professor [REDACTED] letter is hereby incorporated as part of this decision's later analyses of the remaining criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Moreover, although the petitioner asserts in his December 3, 2013 letter in support of the appeal that "[a]s per the Administrative Appeals Office (AAO) a Programmer Analyst is a specialty occupation" we note that copies of these allegedly approved petitions were not included in the record. If a petitioner wishes to have unpublished service center or AAO decisions considered by USCIS in its adjudication of a petition, the petitioner is permitted to submit copies of such evidence that it either obtained itself and/or received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. Part 5. Otherwise, "[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility." 8 C.F.R. § 103.2(b)(2)(i).

Again, the petitioner has not submitted copies of these petitions and their respective approval notices. As the record of proceeding does not contain any evidence of the allegedly approved petitions, there were no underlying facts to be analyzed and, therefore, no prior, substantive determinations could have been made to determine what facts, if any, were analogous to those in this proceeding.

When "any person makes an application for a visa or any other document required for entry, or makes an application for admission, [ . . . ] the burden of proof shall be upon such person to establish that he is eligible" for such benefit. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972). Furthermore, any suggestion that USCIS must review unpublished decisions and possibly request and review each case file relevant to those decisions, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361.

Nevertheless, even if this evidence had been submitted and even if it had been determined that the facts in those cases were analogous to those in this proceeding, those decisions are not binding on USCIS. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, if the previous nonimmigrant petitions were approved based on substantially the same

documentation and assertions that are contained in the current record, the approvals would constitute error on the part of the director. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

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

Finally, it is noted that the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation, which signifies that the beneficiary is only expected to possess a basic understanding of the occupation.<sup>6</sup>

In the instant case, the petitioner has not established that the proffered position falls within an occupational category for which the *Handbook* (or other objective, authoritative source) indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum

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<sup>6</sup> The *Prevailing Wage Determination Policy Guidance* (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)) (last visited June 24, 2014) issued by DOL states the following with regard to Level I wage rates:

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

The proposed duties' level of complexity, uniqueness, and specialization, as well as the level of independent judgment and occupational understanding required to perform them, are questionable, as the petitioner submitted an LCA certified for a Level I, entry-level position. The LCA's wage-level is appropriate for a proffered position that is actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, by submitting an LCA with a Level I wage rate, the petitioner effectively attests that the beneficiary is only required to possess a basic understanding of the occupation; that she will be expected to perform routine tasks requiring 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.

requirement for entry into the occupation. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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

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

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

Nor are the three vacancy announcements submitted on appeal probative evidence towards satisfying this first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

First, the petitioner has not submitted any evidence to demonstrate that these advertisements are from companies "similar" to the petitioner in size, scope, and scale of operations, business efforts, expenditures, or other fundamental dimensions. Second, the petitioner has not established that these three positions are "parallel" to the proffered position. Specifically, it is noted that work experience is required in all of the vacancy announcements submitted. However, as referenced above, the petitioner indicated by the wage-level in the LCA that its proffered position is a comparatively low, entry-level position relative to others within its occupation and signifies that the beneficiary is only expected to possess a basic understanding of the occupation. It is therefore difficult to envision how these attributes assigned to the proffered position by the petitioner by virtue of its wage-level designation on the LCA would be parallel to these positions described in these job vacancy announcements. Again, the vacancy announcements submitted by the petitioner do not establish that the petitioner has met this prong of the regulations. Thus, further analysis regarding the specific information contained in each of the vacancy announcements is not necessary. That is, not every deficit of every vacancy announcement has been addressed.

In any event, those vacancy announcements are not supplemented by any documentary evidence establishing what is certainly not evident in their content, namely, that they relate to positions that are parallel to the proffered position, in such material terms as their level of responsibility, the range of their substantive duties, and even relative pay.

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

Next, we find that the evidence of record does not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree."

The petitioner's statements with regard to the claimed complex and unique nature of the proffered position are acknowledged. However, those assertions are further undermined by the fact that the petitioner submitted an LCA certified for a job prospect with a wage-level that is only appropriate for a comparatively low, entry-level position relative to others within its occupation. We incorporate here by reference and reiterate our earlier discussion regarding the LCA and its indication that the petitioner would be paying a wage-rate that is only appropriate for a low-level, entry position relative to others within the occupation, as this factor is inconsistent with the level of relative complexity and uniqueness required to satisfy this criterion. Based upon the wage rate selected by the petitioner, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate indicates that the beneficiary will perform routine tasks requiring limited, if any, exercise of independent judgment; that the beneficiary's work will be closely supervised and monitored; that he will receive specific instructions on required tasks and expected results; and that his work will be reviewed for accuracy.

Accordingly, given the *Handbook's* indication that there are positions located within the "Computer Programmers" occupational category which are performed by persons without at least a bachelor's degree in a specific specialty, or the equivalent, it is not credible that a position involving limited, if any, exercise of independent judgment, close supervision and monitoring, receipt of specific instructions on required tasks and expected results, and close review *would* be so complex or unique that it could only be performed by a person with at least a bachelor's degree in a specific specialty or the equivalent. Even more fundamentally, as discussed in detail above, the evidence of record does not establish that the proffered position possesses the relative complexity or uniqueness required to satisfy this program.

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

As the evidence of record therefore fails to establish how the beneficiary's responsibilities and day-to-day duties comprise a position so complex or unique that the position can be performed only by

an individual with at least a bachelor's degree in a specific specialty or its equivalent, the petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) either.

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

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

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. Additionally, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position.<sup>7</sup>

Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's assertion of a particular degree requirement is not necessitated by the actual performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

The director's July 11, 2013 RFE specifically requested the petitioner to document its past recruiting and hiring history with regard to the proffered position. The RFE included the following specific request for such documentation:

**Position Announcement:** To support the petitioner's contention that the position is a "specialty occupation," provide copies of the petitioner's present and past job vacancy announcements. The petitioner may also provide classified advertisements soliciting for the current position, showing that the petitioner requires its applicants to have a minimum of a baccalaureate or higher degree or its equivalent in a specific specialty.

**Past Employment Practices:** Provide evidence to establish that the petitioner has a past practice of hiring persons with a baccalaureate degree, or higher in a specific specialty, to perform the duties of the proffered position. Indicate the

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<sup>7</sup> Any such assertion would be undermined in this particular case by the fact that the petitioner submitted an LCA that had been certified for a Level I wage-level, which is appropriate for use with a comparatively low, entry-level position relative to others within the same occupation.

number of persons employed in similar positions. Further, submit documentation to establish how many of those persons have a baccalaureate degree or higher and the particular field of study in which the degree was attained. Documentation should include copies of transcripts and pay records or Quarterly Wage reports for the employees claimed to hold a baccalaureate degree in the specific field of study.

Although the director provided the petitioner with the opportunity to establish a history of recruiting and hiring only individuals for this position<sup>8</sup> with a bachelor's degree in a specific specialty, or the equivalent, the petitioner submitted no such evidence. Furthermore, with respect to the petitioner's past and present job vacancy announcements submitted in response to the director's RFE, we note that all the vacancy announcement provided require experience ranging from 2 to 7 years. The petitioner has failed to establish that the duties and responsibilities for these vacancies are the same as the beneficiary's in the proffered position, as the petitioner has not stated that experience is required for the proffered position. Further, we cannot discern from the advertisements that they reflect recruiting efforts before or contemporaneous with the date that this petition was filed. In fact, the printout dates are months later than the filing of the petition – thus undermining their relevancy. Moreover, on their very face the petitioner's postings for [REDACTED] are materially dis-similar in job categories (none appear to be computer programmers), duty descriptions, and levels of responsibility. As such, they are irrelevant. Also, the scope for consideration in the regulation is limited to the same position as specified in the petition – not positions that may be similar in some respects. Consequently we find that none of the petitioner's advertisements are relevant to this criterion. Thus, they merit no weight.

Also, the evidence does not establish that petitioner's asserted degree requirement for the proffered position is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position. This determination is strengthened by the petitioner's submission as the supporting LCA one that was certified for the lowest wage-level, which is appropriate for a comparatively low, entry-level position relative to others within its occupation.

As the record of proceeding does not demonstrate that the petitioner normally requires at least a bachelor's degree in a specific specialty or its equivalent for the proffered position, it does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next, we find that the evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them

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<sup>8</sup> In response to the RFE, the petitioner stated that it has several employees and they have "always required at least a Bachelor Degree or equivalent for entry into the position of Programmer Analyst." As evidence of this, the petitioner included copies of select degrees/transcripts and pay stubs. No identification was provided to establish that the documentation submitted by the petitioner pertained to the proffered position. Furthermore, the petitioner failed to establish that the duties and responsibilities of these individuals are the same as the beneficiary's in the proffered position.

is usually associated with the attainment of a baccalaureate or higher degree in the specific specialty or its equivalent.

In reviewing the record of proceeding under this criterion, we reiterate our earlier discussion regarding the *Handbook's* entries for positions falling within the "Computer Programmers" occupational category. Again, the *Handbook* does not indicate that a bachelor's degree in a specific specialty, or the equivalent, is a standard, minimum requirement to perform the duties of such positions; and the record indicates no factors that would elevate the duties proposed for the beneficiary above those discussed in the *Handbook*. As reflected in this decision's earlier discussion of the duty descriptions, the proposed duties as described in the record of proceeding contain no indication of specialization and complexity such that the knowledge they would require is usually associated with any particular level of education in a specific specialty. As they were described, the duties of the proposed position are not presented with sufficient detail and explanation to establish that their substantive nature as would be performed in the specific context of the petitioner's particular business operations would be as complex and specialized as to satisfy this particular criterion.

To the extent that they are described – to include all of the technical wording – the proposed duties do not establish their nature as so specialized and complex as to require knowledge usually associated with at least a bachelor's degree in a specific specialty, or the equivalent, or that their nature is more specialized or complex than the nature of the duties of other positions in the pertinent occupational classification that do not require knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty.

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

As earlier noted, the *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

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

U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at

[http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf) (last visited June 24, 2014).

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

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

*Id.*

The above descriptive summary indicates that even this higher-than-designated wage level is appropriate for only "moderately complex tasks that require limited judgment." The fact that this higher-than-here-assigned, Level II wage-rate itself indicates performance of only "moderately complex tasks that require limited judgment," is very telling with regard to the relatively low level of complexity imputed to the proffered position by virtue of the petitioner's Level I wage-rate designation.

Further, we note the relatively low level of complexity that even this Level II wage-level reflects when compared with the two still-higher LCA wage levels, neither of which was designated on the LCA submitted to support this petition.

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

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

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

*Id.*

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

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

*Id.*

Here we again incorporate our earlier discussion and analysis regarding the implications of the petitioner's submission of an LCA certified for the lowest assignable wage-level. As already noted, by virtue of this submission, the petitioner effectively attested to DOL that the proffered position is a low-level, entry position relative to others within the same occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II).

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

As the petitioner has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation.

## V. CONCLUSION AND ORDER

For the reasons discussed above, we conclude that the evidence in the record of proceeding supports the director's decision to deny the petition on the grounds specified in the decision. Accordingly, the appeal will be dismissed, and the petition will be denied.

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

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

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

(b)(6)

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(BIA 2013). Here, that burden has not been met. The appeal will be dismissed and the petition denied for this reason.

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