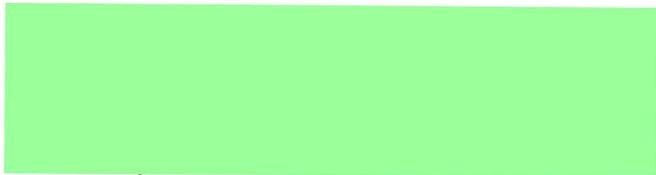


(b)(6)

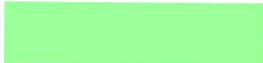
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



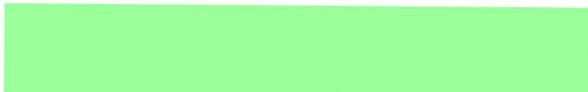
U.S. Citizenship
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Services



DATE: **JUN 02 2014**

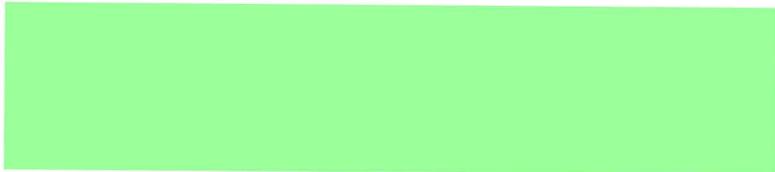
OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



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

A handwritten signature in black ink, appearing to read "Ron Rosenberg", written over the typed name.

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on April 1, 2013. In the Form I-129 visa petition and supporting documentation, the petitioner describes itself as an information technology (IT) staffing and consulting business established in 1997. In order to employ the beneficiary in what it designates as a "QA lead (functional developer)" position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on September 4, 2013, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation and that it had sufficient work for the requested period of employment. On appeal, counsel for the petitioner asserts that the director's grounds for denial of the petition were erroneous and contends that the petitioner satisfied all evidentiary requirements.

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

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

I. Factual and Procedural Background

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a QA lead (functional developer) to work on a full-time basis at a rate of pay of \$64,438 per year. In a support letter dated March 23, 2013 the petitioner stated that the proffered position involves the following duties and requirements:

The QA Lead (Functional Developer) will lead the development and maintenance of quality management system standards for the IT organization. He will be accountable for compliance with established methodologies and IT standards. He will track quality assurance metrics (e.g., defect counts, test status, test results). He will document issues and drives their resolution. He will serve as an internal quality consultant to advise business or technical partners.

The QA Lead (Functional Developer) will be responsible for the following day to day specialized duties:

- Defining and implementing the role testing plays within the organizational

structure.

- Defining the scope of testing within the context of each release/delivery.
- Deploying and managing the appropriate testing framework to meet the testing mandate.
- Implementing and evolving appropriate measurements and metrics.
- To be applied against the Product under test.
- To be applied against the Testing Team.
- Planning, deploying, and managing the testing effort for any given engagement/release.
- Managing and growing Testing assets required for meeting the testing mandate:
 - Team Members
 - Testing Tools
 - Testing Process
 - Retaining skilled testing personnel.

This position requires a minimum of a bachelor's degree in a relevant field of work or equivalent work experience. This position we require the candidate to have some experience in addition to the educational background because the candidate must independently resolve with minimum supervision related to cost-effective analysis or technical workload. These minimum requirements for this position offered clearly mark such position as a specialty occupation a person of this distinguished merit and ability.¹

The petitioner indicated that the beneficiary is qualified to perform services in the proffered position by virtue of his academic credentials and professional experience. The petitioner provided a copy of the beneficiary's diploma from [REDACTED] which states that he was granted a Master of Science in Engineering Management in December 2010. The petitioner also submitted the beneficiary's foreign diploma and transcripts, and the beneficiary's resume.

In addition, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational classification "Computer Occupations, All Other" - SOC (ONET/OES Code) 15-1799, at a Level II

¹ The petitioner references the proffered position as a specialty occupation for "a person of distinguished merit and ability." However, to clarify, the term "distinguished merit and ability" was defined in the regulations as "one who is a member of the professions . . . or who is prominent in his or her field." See 8 C.F.R. § 214.2(h)(4) (1991). The *Immigration Act of 1990* ("IMMACT 90") deleted the term "distinguished merit and ability" from the general H-1B description and replaced it with the requirement that the position be a "specialty occupation." Pub. L. No. 101-649, 104 Stat. 4978, 5020. The implementation of this change occurred on April 1, 1992. The *Miscellaneous and Technical Immigration and Naturalization Amendments of 1991* ("MTINA"), which was enacted on December 2, 1991, modified the H-1B definition to include fashion models of distinguished merit and ability. Pub. L. No. 102-232, 105 Stat. 1733. While the term "distinguished merit and ability" is still used with regard to fashion models, it must be noted that the term has not been applicable to the general H-1B classification ("specialty occupations") for over 20 years.

wage.

The petitioner also submitted various documents pertaining to its business operations, including corporate documents, selected tax documents, a brochure regarding the petitioner's services, printouts from the petitioner's website and copies of consulting and staffing agreements to which the petitioner is a party. In addition, the petitioner provided a copy of its offer of employment to the beneficiary, signed by both the petitioner and the beneficiary, and a copy of the employment agreement.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on May 6, 2013. The director outlined the evidence to be submitted. The AAO notes that the director specifically requested that the petitioner submit probative evidence to establish that there was sufficient specialty occupation work available for the beneficiary for the entire requested validity period of the H-1B visa.

On July 29, 2013, the petitioner's counsel responded to the director's RFE. In addition to a cover letter, counsel provided (1) copies of previously submitted documents; (2) an internal project proposal for [REDACTED]; (3) numerous purchase orders, statements of work, and invoices; (4) a list of the petitioner's employees; (5) the petitioner's federal quarterly tax returns for 2012; and (6) a copy of the petitioner's lease.

The director reviewed the information provided in the initial H-1B petition and in response to the RFE. The director determined that the petitioner failed to establish eligibility for the benefit sought and denied the petition on September 4, 2013.

Counsel for the petitioner submitted an appeal of the denial of the H-1B petition. In support of the appeal, counsel submitted a brief. The AAO reviewed the record in its entirety.

II. Analysis

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

A. Statement of the Law

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 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

B. Material Findings

In ascertaining the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized

knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent). The AAO finds that the petitioner has not done so.

More specifically, the duties provided by the petitioner for the proffered position are recited virtually verbatim from Internet sources not related to the petitioner. An expired position announcement on Dice.com for a quality assurance analyst seeks an individual to perform the following duties, among others:

Participate in test planning, writing test cases/test scripts, test execution, and test automation. Track quality assurance metrics (e.g., defect counts, test status, test results). Document all issues and assists in their resolution. Participate in the internal quality consultation provided to business or technical partners.

Advertisement for a position at American Water in Woorhees, NJ, available on the Internet at <http://seeker.dice.com> (last visited on May 30, 2014).

In addition, the technology employment site Dev Bistro, provides an article entitled "Testing & The Role of A Test Lead/Manager, which states the following regarding the responsibilities of a "Test Lead/Manager":

The Test Lead / Manager is responsible for:

- Defining and implementing the role testing plays within the organizational structure.
- Defining the scope of testing within the context of each release / delivery.
- Deploying and managing the appropriate testing framework to meet the testing mandate.
- Implementing and evolving appropriate measurements and metrics.
 - To be applied against the Product under test.
 - To be applied against the Testing Team.
- Planning, deploying, and managing the testing effort for any given engagement / release.
- Managing and growing Testing assets required for meeting the testing mandate:
 - Team Members
 - Testing Tools
 - Testing Process
- Retaining skilled testing personnel.

David W. Johnson, Testing & the Role of a Test Lead/Manager, Dev Bistro, available on the Internet at <http://www.devbistro.com/articles/Testing/Role-of-Test-Lead-Manager> (last visited on May 30, 2014).

The duties of the proffered position, as described by the petitioner and counsel, reiterate verbatim job duties from the above cited Internet sources, which do not appear to have any relationship to the petitioner or the proffered position. The AAO notes that copying a job description from Internet sources is generally not sufficient for establishing H-1B eligibility as the description does not adequately convey the substantive work that the beneficiary will perform within the petitioner's

business operations. In establishing a position as qualifying as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner's business activities, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

Further, the petitioner did specify the amount of time that the beneficiary would devote to each task. Thus, the petitioner did not specify which tasks are major functions of the proffered position, nor did it establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at irregular intervals). As a result, the petitioner did not establish the primary and essential functions of the proffered position.

In the instant case, it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they are described, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire period requested, so as to persuasively support the claim that the position's work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the duties and responsibilities of the proffered position, or its equivalent. The job description fails to communicate (1) the actual work that the beneficiary would perform on a day-to-day basis; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. The petitioner has not provided sufficient details regarding the demands, level of responsibilities and requirements necessary for the performance of the duties of the proffered position.

In addition, the AAO observes that the wage level at which the petitioner certified the proffered position on the LCA is inconsistent with the petitioner's description of the proffered position. Specifically, the petitioner designated the proffered position as a Level II (qualified level) position on the LCA.³ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance."⁴ A Level II wage rate is described by DOL as follows:

³ Wage levels should be determined only after selecting the most relevant O*NET code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

⁴ 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

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.

U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

Thus, in designating the proffered position at a Level II wage, the petitioner has indicated that the proffered position is a comparatively low level position relative to others within the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, the selected wage rate indicates that the beneficiary is only required to perform "moderately complex tasks that require limited judgment." However, in its letter dated March 23, 2013, the petitioner stated that it "require[s] the candidate to have some experience in addition to the educational background because *the candidate must independently resolve with minimum supervision* [issues] related to cost-effective analysis or technical workload (emphasis added)." Thus, it appears that the exercise of independent judgment required by the petitioner exceeds the expectations of a position appropriately designated at a Level II wage, which would require only "limited judgment." No explanation for the petitioner's selection of what appears to be an inappropriately low wage rate was provided.

Finally, the petitioner has not established that it has sufficient specialty occupation work available for the beneficiary for the requested period of validity of the visa. The petitioner has provided numerous purchase orders, statements of work, and invoices that indicate that the petitioner regularly assigns its employees to contracts with specific end-clients. The petitioner indicated that the proffered position is an in-house position. However, as noted above, the petitioner has not sufficiently described the proffered position to establish that specialty occupation in-house work exists for the beneficiary for the entire requested period of H-1B classification. In response to the RFE, counsel provided a *proposal* for a possible future project with Westfield. In its March 23, 2013 letter, the petitioner did not mention this project. The proposal is dated April 5, 2013. The AAO observes that the petitioner has provided a copy of a statement of work for another project that indicates that the work is to be performed at "[t]he Offices of Los Angeles, CA."

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). 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 (Reg. Comm'r 1978). Here, it is not apparent from the evidence provided that at the time of filing, or at a

judgment required, and amount of close supervision received.

subsequent time, the petitioner had sufficient in-house work for the beneficiary. Notably the record contains (1) an offer of employment that acknowledges that the beneficiary may "be assigned to work on a project off-site for one of [the petitioner's] clients, (2) numerous purchase orders and statements of work that establish the petitioner's practice of assigning employees to off-site projects with end-clients, and (3) a lease indicating the petitioner's locale consists of approximately 921 square feet, which is insufficient work space for the petitioner's 21 employees, as described on the employee list provided by the petitioner. Further, as noted above, the petitioner had not sufficiently described the available in-house projects that would occupy the beneficiary for the duration of the requested validity period of the visa. Without a sufficient description of the work to be performed, and in consideration of all of the evidence of record, the AAO is unable to conclude that specialty occupation work is available for the beneficiary. Rather, the evidence of record indicates that it is more likely than not that the beneficiary would be assigned to an end-client with duties and requirements that have not been established.

C. Review of Criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)

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

Nevertheless, assuming, *arguendo*, that the duties of the proffered position as described by the petitioner would in fact be the duties performed by the beneficiary, the AAO will nevertheless discuss them and the evidence in the record of proceeding. The AAO will first discuss the proffered position 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.

As previously mentioned, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Computer Occupations, All Other" - SOC (ONET/OES Code) 15-1799.

The AAO notes that the Standard Occupational Classification (SOC) System is used by DOL for classifying occupations. Under the SOC system, workers are classified at four levels of aggregation: (1) major group (of which there are 23); (2) minor group (of which there are 96); (3) broad occupation (of which there are 449); and (4) detailed occupation (of which there are 821). Occupations are classified based upon work performed, skills, education, training, and credentials.

The SOC system includes residual categories within the various levels of the system to permit the reporting of occupations not identified at the detailed level. That is, if an occupation is not included as a distinct detailed occupation in the structure, it is classified in the appropriate residual occupation. Residual occupations contain all occupations within a major, minor or broad group that are not classified separately. Thus, for the less populous occupations, residual categories (that is, "All Other" categories) have been created within most levels of the SOC system. Residual categories provide a complete accounting of all workers employed within an establishment and allow aggregation and analysis of occupational employment data at various levels of detail. Approximately 5 percent of all employment falls under categories for which little meaningful information could be developed (i.e., "All Other" residual categories). For additional information regarding the SOC system and residual categories, see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., on the Internet at <http://www.bls.gov/home.htm> (last visited May 30, 2014).

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁵ The petitioner claims that the proffered position falls under the occupational category "Computer Occupations, All Others." The AAO reviewed the *Handbook* regarding this occupational category. However, the *Handbook* simply describes this category as "[a]ll computer occupations not listed separately." The *Handbook* does not provide a detailed narrative account nor does it provide summary data for the occupational category "Computer Occupations, All Others." Accordingly, the *Handbook* lacks sufficient information regarding the occupational category (e.g., duties, academic requirements) to be deemed probative evidence in this matter.

Accordingly, in certain instances, the *Handbook* is not determinative. When the *Handbook* does not support the proposition that a proffered position is one that meets the statutory and regulatory provisions of a specialty occupation, it is incumbent upon the petitioner to provide persuasive evidence that the proffered position more likely than not satisfies this or one of the other three criteria, 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 objection, authoritative sources) that supports a finding that the particular position in question qualifies as a specialty occupation. Whenever more than one authoritative source exists, an adjudicator will consider and weigh all of the evidence presented to determine whether the particular position qualifies as a specialty occupation.

On appeal, counsel states that the according to the Dictionary of Occupational Titles (DOT) and the Occupational Information Network (O*NET), the proffered position corresponds to an "SVP of 7 and therefore normally requires someone with the minimum of a bachelor's degree." In regard to the SVP rating, the AAO observes that an SVP rating of 7 does not indicate that at least a four-year bachelor's degree is required for an occupational category that has been assigned such a rating or, more importantly, that such a degree must be in a specific specialty directly related to the

⁵ All of the AAO's references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

occupation. Rather, the SVP rating indicates that the occupation requires over two years up to and including four years of training.⁶ This training may be acquired in a school, work, military, institutional, or vocational environment. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.

The petitioner has not established that the proffered position falls under an occupational category for which the *Handbook* (or other independent, authoritative source) indicates that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. 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 has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

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

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook* (or other authoritative source) reports a standard industry-wide requirement for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, the AAO incorporates by reference the previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement. Furthermore, the petitioner did not submit any letters or affidavits from similar firms or individuals in the petitioner's industry attesting that such firms "routinely employ and recruit only degreed individuals."

Thus, based upon a complete review of the record of proceeding, the AAO finds that the petitioner has not established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry for positions that are (1) parallel to the proffered

⁶ For more information on SVP ratings, see National Center for O*NET Development, *Stratifying Occupational Units by Specific Vocational Preparation (SVP)* (1999), available on the Internet at http://www.onetcenter.org/dl_files/SVP.pdf.

position; and, (2) located in organizations similar to the petitioner. The petitioner has therefore not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

In support of its assertion that the proffered position qualifies as a specialty occupation, the petitioner submitted various documents, including information regarding the proffered position and evidence regarding its business operations. For example, the petitioner submitted brochures, tax documents, statements of work, purchase orders, invoices, and an employee list, among other documentation. The AAO reviewed the record of proceeding in its entirety. However, upon review of the record, the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position.

A review of the record of proceeding indicates that the petitioner has failed to credibly demonstrate the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent. Additionally, the AAO finds that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent.

Thus, based upon the record of proceeding, it does not appear that the proffered position is so complex or unique that it can only be performed by an individual who has completed a baccalaureate program in a specific discipline that directly relates to the proffered position. Specifically, the petitioner has not demonstrated how the duties of the position as described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it may believe are so complex and unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position.

The petitioner has indicated that the beneficiary's educational background and prior work experience will assist him in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself qualifies as a specialty occupation. In the instant case, the petitioner does not establish which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment. The petitioner failed to demonstrate that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a

specific specialty, or its equivalent. Consequently, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

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

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

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific

specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

In the instant case, the petitioner stated in the Form I-129 petition that it has nineteen employees and was established in 1997 (approximately sixteen years prior to the filing of the H-1B petition), but it did not provide the total number of people it has employed to serve in the proffered position. The petitioner provided a list of 21 employees in response to the RFE; however, none were classified under the same occupational category as the proffered position. Upon review of the record, the petitioner has not provided sufficient evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

The AAO reviewed the petitioner's statements and the documentation provided regarding its business operations and the proffered position. However, the petitioner has not established that the proffered position satisfies this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position.

Furthermore, the AAO reiterates its earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA at a Level II wage. That is, the Level II wage designation is indicative of a lower level position relative to others within the occupational category and hence one not likely distinguishable by relatively specialized and complex duties. Without further evidence, petitioner has not demonstrated that its proffered position is one with specialized and complex duties. For instance, such a position would likely be classified at a higher-level, such as a Level III (experienced) or 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. The AAO, therefore, concludes that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

D. Conclusion and Order

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; *see e.g., 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.