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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
and Immigration
Services

DATE: JUN 27 2014 OFFICE: VERMONT SERVICE CENTER FILE [REDACTED]

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

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

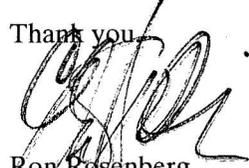
ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center on April 1, 2013. In the Form I-129 visa petition, the petitioner describes itself as a real estate business established in 2011. In order to employ the beneficiary in what it designates as a computer systems analyst 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 25, 2013, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding 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 notice of decision; and (5) the Form I-290B and supporting materials. We reviewed the record in its entirety before issuing our decision.

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

I. FACTUAL AND PROCEDURAL HISTORY

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a computer systems analyst on a full-time basis at the rate of pay of \$60,000 per year. In a letter dated March 26, 2013, the petitioner indicated that it has "acquired an entirely new client base consisting of high end foreign national investors, particularly Brazilian nationals." The petitioner claimed that "the Brazilian economy has grown significantly" in recent years and that the rise in the middle class in Brazil resulted in more spending power, which "translates into more investment into the United States, particularly, the commercial and residential real estate markets." The petitioner further stated that the beneficiary "will be catering to new markets that [the petitioner] has recently entered into and the client base is growing significantly." The petitioner provided a job description.

It is noted that the petitioner did not state that the proffered position has any particular academic requirements (or any other requirements). Thus, the petitioner does not claim that the position requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as the minimum for entry into the occupation, as required by the Act. However, the petitioner claims that the beneficiary is "amply qualified to fill the position as Computer Systems Analyst." In support, the petitioner submitted an equivalency evaluation determination stating that the beneficiary's years of experience in Computer Science is equivalent to a bachelor's degree in Computer Science in the

United States.

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

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on May 24, 2013. The director outlined the specific evidence to be submitted.

On August 19 2013, the petitioner and counsel responded to the RFE. The director reviewed the information provided by the petitioner and counsel. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on September 25, 2013. Counsel submitted an appeal of the denial of the H-1B petition.¹

II. THE DIRECTOR'S BASIS FOR DENIAL

The director determined that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, we agree with the director and find that the evidence fails to establish that the position as described constitutes a specialty occupation.

A. The Statutory and Regulatory Provisions for a Specialty Occupation Position

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:

¹ On appeal, counsel provided an expanded description of the duties for the proffered position. However, the new job description is not probative evidence as the description was provided by counsel, not the petitioner. Counsel's brief was not endorsed by the petitioner and the record of proceeding does not indicate the source of the duties and responsibilities that counsel attributes to the proffered position. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

- (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 illogical and absurd 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.

B. The Proffered Position Does not Qualify as a Specialty Occupation

When determining whether a position is a specialty occupation, it is important to consider the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain 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."

For H-1B approval, the petitioner must demonstrate a legitimate need for an employee exists and to substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. It is incumbent upon the petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent, to perform duties at a level that requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.

Further, it is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. See *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as

the size impacts upon the duties of a particular position. In matters where a petitioner's business is relatively small, we review the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in a position requiring the theoretical and practical application of a body of highly specialized knowledge that may be obtained only through a baccalaureate or higher degree in a specific specialty, or its equivalent. Additionally, when a petitioner employs relatively few people, it may be necessary for the petitioner to establish how the beneficiary will be relieved from performing non-qualifying duties. In the Form I-129 petition, the petitioner stated that it currently has one employee. Upon review of the record of the proceeding, we observe that the petitioner and counsel did not address or provide probative documentation as to how the beneficiary would be relieved from performing non-qualifying duties.

Moreover, we observe that in the letter dated March 26, 2013, the petitioner states that the beneficiary's specific duties are as follows:

Among his duties will be to analyze user requirements, procedures, and problems to improve our computer systems. He will writes [sic] detailed description of client and user needs, program functions, and steps required to develop and/or modify our computer programs such as IDX, MLS, and various web-based servers. [The beneficiary] will review computer system capabilities, workflow, and scheduling limitations to determine if program changes are possible within our existing system. He will study existing information processing systems to evaluate effectiveness and develop new systems to improve production or workflow as required. He will also prepare workflow charts and diagrams to specify in detail operations to be performed by equipment and computer programs and operations to be performed by personnel in system.

In response to the RFE, the petitioner provided a breakdown of the percentage of time spent on each duty as follows:

- (i) On a daily basis, analyze Brazilian as well as other user requirements, procedures, and problems to maintain and to improve our computer systems. Specifically, he will build and maintain Portuguese based web sites, convert English based tools into Portuguese based tools, maintain marketing data and reports (40%);
- (ii) Develop detailed descriptions of client and user needs, program functions, and steps required to develop and/or modify computer programs such as IDX, MLS, and various to build or maintain Portuguese web sites (15%);
- (iii) Review computer system capabilities, workflow, and scheduling limitations to determine if program changes are possible within our existing system (15%);
- (iv) Study existing information processing systems, especially as they relate to the

Brazilian market, to evaluate effectiveness and develop new systems to improve production or workflow as required (20%); and

- (v) Document operations to be performed by equipment and computer programs and operations to be performed by personnel in using systems (10%).

We find that the petitioner has failed to provide sufficient details regarding the nature and scope of the beneficiary's employment or any substantive evidence regarding the actual work that the beneficiary would perform. Specifically, the petitioner has described the duties of the beneficiary's employment in the same general terms as those used by the *Dictionary of Occupational Titles* (*DOT*) for the occupational category "Systems Analysts." That is, we note that the wording of some of the above duties as provided by the petitioner for the proffered position are taken virtually verbatim from the tasks associated with the occupational category "Systems Analysts" from *DOT*.

Specifically *DOT* states, in pertinent part, the following regarding the occupational title "Systems Analysts (profess. & kin.)" – Code 030.167-014:

Analyzes user requirements, procedures, and problems to automate processing or to improve existing computer system: Confers with personnel of organizational units involved to analyze current operational procedures, identify problems, and learn specific input and output requirements, such as forms of data input, how data is to be summarized, and formats for reports. **Writes detailed description of user needs, program functions, and steps required to develop or modify computer program.** **Reviews computer system capabilities, workflow, and scheduling limitations to determine if requested program or program change is possible within existing system.** **Studies existing information processing systems to evaluate effectiveness and develops new systems to improve production or workflow as required.** **Prepares workflow charts and diagrams to specify in detail operations to be performed by equipment and computer programs and operations to be performed by personnel in system.** Conducts studies pertaining to development of new information systems to meet current and projected needs. Plans and prepares technical reports, memoranda, and instructional manuals as documentation of program development. Upgrades system and corrects errors to maintain system after implementation. May assist COMPUTER PROGRAMMER (profess. & kin.) 030.162-010 in resolution of work problems related to flow charts, project specifications, or programming. May prepare time and cost estimates for completing projects. May direct and coordinate work of others to develop, test, install, and modify programs.

(Emphasis added.) *Dictionary of Occupational Titles*, Systems Analysts (profess. & kin.) – Code 030.167-014, on the Internet at <http://www.occupationalinfo.org/03/030167014.html> (last visited June 25, 2014).

This type of generalized description may be appropriate when defining the range of duties that may be performed within an occupational category, but it fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations and, thus, cannot

be relied upon by a petitioner when discussing the duties attached to specific employment. In establishing a position 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 operations, demonstrate that 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.

Without a meaningful job description, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. The tasks as described fail to communicate (1) the actual work that the beneficiary would perform, (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's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for entry into 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. Thus, the petitioner has failed to establish that the proffered position is a specialty occupation under the applicable provisions.

However, assuming *arguendo* that the proffered duties as described in the record are in fact the duties of a computer systems analyst, we will discuss them and the evidence of record with regard to whether the proffered position as described would qualify as a specialty occupation. To that end, we turn to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

We recognize the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.² As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Computer Systems Analysts."

² The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/ooh/>. Our references to the *Handbook* are to the 2014 – 2015 edition available online. We hereby incorporate into the record of proceeding the chapter of the *Handbook* regarding "Computer Systems Analysts."

We reviewed the *Handbook* regarding the occupational category "Computer Systems Analysts," including the sections regarding the typical duties and requirements for this occupational category.³ However, the *Handbook* does not support a finding that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation.

The subchapter of the *Handbook* entitled "How to Become a Computer Systems Analysts" states, in pertinent part, the following about this occupation:

A bachelor's degree in a computer or information science field is common, although not always a requirement. Some firms hire analysts with business or liberal arts degrees who have skills in information technology or computer programming.

Education

Most computer systems analysts have a bachelor's degree in a computer-related field. Because these analysts also are heavily involved in the business side of a company, it may be helpful to take business courses or major in management information systems.

Some employers prefer applicants who have a master of business administration (MBA) with a concentration in information systems. For more technically complex jobs, a master's degree in computer science may be more appropriate.

Although many computer systems analysts have technical degrees, such a degree is not always a requirement. Many analysts have liberal arts degrees and have gained programming or technical expertise elsewhere.

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

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

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Computer Systems Analysts, on the Internet at <http://www.bls.gov/ooh/computer-and-information->

³ For additional information regarding the occupational category "Computer Systems Analysts," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Cost Estimators, on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-1> (last visited June 25, 2014).

technology/computer-systems-analysts.htm#tab-4 (last visited June 25, 2014).

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. While the *Handbook's* narrative indicates that a bachelor's degree in computer or information science field is common, it states that it is not always a requirement. It further indicates that many analysts have liberal arts degrees and have gained programming or technical expertise elsewhere.

The *Handbook* states that most computer systems analysts have a bachelor's degree, but the *Handbook* does not report that it is normally a minimum occupational, entry requirement.⁴ Further, the *Handbook* indicates that many systems analysts have liberal arts degrees and have gained programming or technical expertise elsewhere. The *Handbook* does not support the claim that the proffered position falls under an occupational group for which normally the minimum requirement for entry is at a baccalaureate (or higher degree) in a specific specialty, or its equivalent.

Moreover, as mentioned, the petitioner did not state at the time of filing the petition that the proffered position has any particular academic requirements (or any other requirements). Rather, the petitioner stated that the beneficiary "has thirty-two (32) years of progressive employment experience as a Computer Systems Analyst" and claimed that "[the beneficiary] is amply qualified to fill the position as Computer Systems Analyst." However, the test to establish a position as a specialty occupation is not the skill set or work experience of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area, or its equivalent. *See* section 214(i)(1) of the Act.

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

⁴ The first definition of "most" in *Webster's New Collegiate 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 programmers possess a bachelor's degree, it could be said that "most" of these employees have such a degree. It cannot be found, therefore, that a statement that "most" employees in a given occupation equates to a normal minimum entry requirement for that occupation, much less for the particular position proffered by the petitioner. (As previously mentioned, the proffered position has been designated by the petitioner in the LCA as a low, entry-level position relative to others within the occupation.) 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.

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

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* (or other objective, authoritative source), reports a standard, industry-wide requirement of at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter. The record does not contain any letters from the industry's professional association, indicating that it has made a degree a minimum entry requirement. Further, the petitioner did not provide letters or affidavits from firms or individuals in the industry as evidence to establish eligibility under this criterion of the regulations.

Thus, based upon a complete review of the record, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common (1) to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) located in organizations that are similar to the petitioner. The petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

Upon review of the record of proceeding, we find that the petitioner has failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. That is, we reviewed the record in its entirety and 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. As discussed, the petitioner does not state that the proffered position has any particular academic requirements (or any other requirements).

In response to the RFE, the petitioner provided documents entitled "Business Plan Summary" and accompanying slides, "Sample Marketing Presentation Requiring Translation to Portuguese." However, the documents provide rather general information. For example, 2013 marketing plan includes the following:

- Develop presentations and web sites in English for the domestic buyers and sellers, with emphasis on Orlando attraction area vacation home investments.
- Find and acquire web domains in all of our target markets, including Brazil.
- Analyze target market buying customs and culture, to ensure that our presentations and web site content align with that culture. This is critical for Brazil.
- Translate and convert existing English presentations and web sites to Brazilian Portuguese.
- Develop relationships with Brazilian computer system providers in order to develop a marketing infrastructure and presence in Brazil.
- Acquire and maintain a Customer Relationship Management System to manage prospects, leads and customer information for all target markets.

However, the petitioner's business plan does not establish that the petitioner's business operations or the duties of the proffered position entail any particular level of complexity, uniqueness and/or specialization. For example, the marketing plan and the accompanying slides require translation duties, but the petitioner does not assert that such duties are so complex or unique that it can only be performed by an individual with a degree in a specific specialty. Further, on appeal, counsel asserts that while the "petitioner's business plan is built around marketing to the Brazilian market" and the "Beneficiary will be expected to employ his native language in his day to day duties," but "it does not follow that because [the] Beneficiary will use Portuguese in his day to day job duties that he will also be expected to perform translation services."

However, as previously noted, the petitioner is a business with only one employee. Again, it is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. See *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position. In matters where a petitioner's business is relatively small, we review the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in position requiring the theoretical and practical application of a body of highly specialized knowledge that may be obtained only through a baccalaureate degree or higher in a specific specialty, or its equivalent. Additionally, when a petitioner employs relatively few people, it may be necessary for the petitioner to establish how the beneficiary will be relieved from performing non-qualifying duties.

We reviewed the record in its entirety and find 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. This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. The LCA indicates a wage level at a Level I (entry level) wage. The wage-level of the proffered position indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and

reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results. Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique as 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 example, 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."⁵ The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

It is further noted the record of proceeding does not establish that the petitioner's requisite knowledge for the proffered position can only be obtained through a baccalaureate or higher degree program in a specific specialty, or its equivalent. We note that the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While a few related courses may be beneficial 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 particular position here proffered.

The petitioner claims that the beneficiary's professional experience will assist him in carrying out the duties of the proffered position. However, as previously mentioned, 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 requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not sufficiently explain or clarify which of the duties, if any, of the proffered

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

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

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

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 has thus failed to establish the proffered position as satisfying the second prong of the criterion at 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. We usually review the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. In the instant case, the record does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

While a petitioner may believe or otherwise assert that a proffered position requires a specific degree, that opinion 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.

The petitioner stated in the Form I-129 petition that it has only one employee and that it was established in 2011. The petitioner and its counsel do not claim that the proffered position qualifies as a specialty occupation under this criterion of the regulations. Upon review of the record, the petitioner has not provided any 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.

We incorporate our earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a low, entry-level position relative to others within the occupation. The petitioner designated the position as a Level I position (the lowest of four assignable wage levels), which DOL indicates is appropriate for "beginning level employees who have only a basic understanding of the occupation." Without further evidence, it is not credible that the petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level III (experienced) or IV (fully competent) position, requiring a significantly higher prevailing wage. As previously discussed, 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 nature of the specific duties of the proffered position is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. We, therefore, conclude that the petitioner failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has 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. The appeal will be dismissed and the petition denied for this reason.

III. BEYOND THE DECISION OF THE DIRECTOR

Upon review of the records, it appears that the petitioner did not establish that it will pay the beneficiary an adequate salary for his work. As mentioned, the LCA designation for the proffered position corresponds to the occupational classification of "Computer Systems Analysts" – SOC (ONET/OES Code) 15-1121, at a Level I (entry level) wage.

Wage levels should be determined only after selecting the most relevant O*NET code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.⁶

Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.⁷ DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received as indicated by the job description.

In the instant case, the petitioner emphasizes the importance of foreign language skills for the proffered position. For example, in response to the RFE, the petitioner stated the following:

In addition to providing traditional computer system analyst skills, [the beneficiary]'s command of the Brazilian Portuguese language, and understanding of Brazilian culture, uniquely qualifies him to design, implement, and maintain computer systems needed to market and sell Florida real estate to Brazilian clients. This ability is critical to the execution of the [petitioner's] business plan.

In accordance with the guidance provided by DOL, a language requirement other than English in a petitioner's job offer generally is considered a special skill for all occupations, with the exception of "Foreign Language Teachers and Instructors," "Interpreters," and "Caption Writers." *Id.* In the instant case, the petitioner designated the proffered position under the occupational category "Computer Systems Analysts" at a Level I (the lowest of four assignable wage levels), and it has not established that the foreign language requirement was reflected in the wage-level for the proffered position. Therefore, the petitioner has failed to establish that it would pay the beneficiary an adequate salary for his work, as required under the Act, if the petition were granted.

⁶ For additional information on wage levels, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

⁷ A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for special skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses supervisory duties, with a "1" entered unless supervision is generally required by the occupation.

IV. CONCLUSION AND ORDER

An application or petition that fails to comply with the technical requirements of the law may be denied by us 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.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.