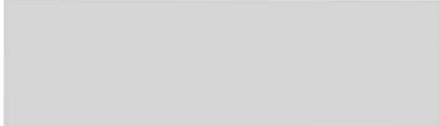




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **AUG 04 2015**

PETITION RECEIPT #:

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:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes its business as "IT [(Informational Technology)] and Software Development." In order to employ the beneficiary in what it designates as an "[REDACTED] Developer" position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The Director denied the petition on each of two separate grounds, namely, that the evidence of record (1) had not established the employer-employee relationship with the beneficiary that is necessary for standing to file an H-1B petition as a "United States employer" as defined at 8 C.F.R. § 214.2(h)(4)(ii); and (2) had not established that the proffered position is a specialty occupation. On appeal, the petitioner asserts that the Director's grounds for denying the petition were erroneous and that the evidence of record satisfied all eligibility requirements.

The record of proceeding before us contains: (1) the 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 Notice of Appeal or Motion (Form I-290B) and supporting materials. We reviewed the record in its entirety before issuing our decision.

Upon review of the entire record of proceeding, including all of the submissions on appeal, we conclude that the Director's decision to deny the petition on each of the grounds specified in her decision was correct. We shall focus chiefly upon the specialty occupation issue, as our adverse decision on that issue is dispositive of the appeal and therefore renders the beneficiary's qualifications immaterial to the approvability of the petition before us. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

I. SPECIALTY OCCUPATION

For the reasons that will be discussed below, we have determined that the Director's decision to deny the petition because the petitioner did not establish that the proffered position qualifies as a specialty occupation was correct and that the petitioner's appeal has not overcome that basis for denial. Accordingly, the appeal will be dismissed, and the petition will be denied.

A. The Law

The chief issue on appeal is whether the petitioner provided 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 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. The Proffered Position and Its Organizational Context

1. The petitioner and its in-house project

In its letter of support, filed with the Form I-129, the petitioner described itself as a "full service provider of IT workforce consulting services" and, as such, "build[s] contingent IT workforces for may Fortune corporations in various industries including manufacturing, financial, healthcare, and biotechnology industries." The letter also states that the petitioner "supports clients across the full IT lifecycle, including software development lifecycle, vendor management systems, data migrations projects, and enterprise initiatives." We again note that, according to its entries on the Form I-129, the petitioner was established in [REDACTED], employs seven people, and has a gross and net annual incomes of \$1,525,075 and \$232,061, respectively.

The petitioner's organizational chart identifies specific persons holding seven positions. Those positions are (1) CEO; (2) VP - Practice Lead; (3) VP - Sales & Operations; (4) Director - (5) Director - Data Warehousing; (6) Account Manager; and (7) Sales Manager. It appears that those seven persons are the seven employees claimed in the Form I-129. The organizational chart identifies seven additional position types, without any persons named as holding them. The chart identifies these apparently empty job-slots as (1) "Module lead(s)"; (2) "Functional Analyst(s)"; (3) "Programmer Analyst(s)"; (4) "ETL & Reporting Lead"; (5) ETL Analyst(s); and (6) Reporting Analysts.

Consistent with its submission of a Labor Condition Application (LCA) certified for use with a position within the Computer Programmers occupational group (SOC Code 15-1131), the petitioner presents the proffered position as a computer programming position. According to the petition, the beneficiary would perform her work exclusively upon the continuing development of what the petitioner describes as its own software product named

The petitioner's letter of support, filed with the Form I-129, includes the following comments about

Over the years serving the manufacturing and process industries, [the petitioner] has gained profound knowledge of ERP and MES's application in these industries. More importantly, [the petitioner] has realized the gaps in business processes between ERP and MES systems. Manufacturing Execution Systems (MES) are widely used by hi-tech, industrial machine & equipment, semiconductor component manufacturers, and process industries such as beverage, chemical & pharmaceutical companies. ERP systems require MES data in order to perform Inventory Management, Product Costing and Batch/Lot traceability.

However, there are significant incompatibilities between these two systems that interfere with data merger. MES are designed to require minimum data entry. So that it can be used by non-skilled users. On the other hand, ERP systems can only be used by highly skilled users. Moreover, MES systems are site specific but not designed to handle traceability, shipping, warehouse management, etc. On the contrary, ERP systems are designed to handle traceability, shipping, and warehouse management. [The petitioner's clients] have been looking for [an] effective and efficient way to integrate the MES and ERP systems in order to achieve optimal integration of product costing, inventory/warehouse management, inventory valuation, and end to end traceability.

Targeting to bridging such gaps, [the petitioner] has developed its own product that addresses such business project gaps and integrates the MES system with ERP. is especially useful to the semiconductor component manufacturer.

According to this letter, the beneficiary would be fully engaged in [REDACTED] product development throughout the three-year period specified in the petition, and would be so engaged in a team effort with other employees of the petitioner. In this regard, the letter states:

[REDACTED] 1.0 has completed initial development and is being currently installed in client sites. The 1.0 version is specifically developed for semi-conductor component manufacturing clients. [REDACTED] 2.0 is in the development process and will [be] suite[d] for all manufacturing clients. [REDACTED] 3 will be developed for all process industry clients. In addition, [a] separate version will be developed for [REDACTED] ERP systems. A series of fully developed [REDACTED] products require multiple years of commitment of [the petitioner's] IT employees, including Business Analysts, [REDACTED] Developers, [REDACTED] Development Leads and Analysts, and QA Testers.

We note that there is a material discrepancy between the number and types of employee-filled positions identified in the Form I-129 and the petitioner's organization chart and the types of employees that the petitioner has identified in the paragraph quoted above.

2. The duties comprising the proffered position

The petitioner's letter of support described the duties of the proffered position as follows:

[The beneficiary] will be responsible for:

- Participate in design work shops with [REDACTED] Functional Lead and Development Lead.
- Performs complex to highly complex source code development.
- Perform [REDACTED] ABAP development in all phases and rollouts of [REDACTED].
- Assists in complex to highly complex unite test case development.
- Analyzes different versions of [REDACTED] ERP and will do the development which suits all versions from [REDACTED] R/3 4.7.
- Assists in the development of [REDACTED] documentation
- Provides functional/system integration testing support.
- Performs Quality Assurance architecture and design guide review.
- Contributes complex to highly complex technical alternatives.
- Conducts complex to highly complex impact analysis.

- Develops complex to highly complex component design.
- Develops Build and Deployment guide.

In its letter replying to the RFE, the petitioner compressed the above-quoted duties into a single paragraph, and it supplemented that information with 64 bullet-points outlining "details" of the position's requirements during the requested employment period. The RFE-reply letter also comments on the proffered position as follows:

Overall, the beneficiary will spend 60% of worktime on development/upgrade of software program's various versions, 30% on testing and debugging, and 10% on user supports. The beneficiary will be supervised by the Functional Lead and Development Lead, and will have no supervisory responsibilities. The beneficiary will be required to work a minimum of 40 hours per week since this proffered position is a full time job.

In order to perform the above listed job duties, proficiency in ABAP development, software development full cycle implementation, BAPIs, BADIs, ALE, RHCs, Proxies, switch framework, Web services, IDOCS, Enhancements, SmartForms, screen painter/module pool, and Workflow development is required.

The letter then presents the petitioner's view as to the credentials required to perform the proffered position, stating:

Evidently, the scope and complexity of the above described job duties and required skills need someone with a [a] minimum of a bachelor's degree or foreign equivalent in CS/CIS/CE or other closely related with related work experience.

We do not agree that the petitioner's descriptions of the proffered position and its duties make it self-evident that the claimed degree-requirement is accurate. We are not persuaded by the multitude of undefined acronyms (such, as for instance, ABAB, BAPIs, BADIs, ALE, RHCs, IDOCS, GAPS, and Paint points), unexplained technical phrases (such as Proxies, SmartForms) and generalized functions (such as assisting in "complex to highly complex" unit case development and providing "functional system integration testing) that the petitioner uses to describe the proffered position. The evidence of record does not develop an objective correlation between the proffered position and a requirement for the practical and theoretical application of at least a bachelor's degree level of a body of highly specialized knowledge in any specific specialty, as would be required to meet the "specialty occupation" definition at section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

We also find that the petition cannot be approved because, as we noted earlier, the petitioner did not submit evidence showing that, at the time of the petition's filing, it had secured the necessary types of personnel that the petitioner claimed would also be required for the [REDACTED] project claimed by the petitioner. 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 at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

3. Application of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)

Taking into account all of the comments and findings that we have already made, we shall now specifically apply the supplementary criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence of record.

A baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position

The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) is satisfied by establishing that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position that is the subject of the petition.

We recognize the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.¹ In the instant case, the LCA submitted in support of the petition was certified for use with a position within the Computer Programmers occupational group.

We reviewed the chapter of the *Handbook* entitled "Computer Programmers," including the sections regarding the typical duties and requirements for this occupational category.² However, the *Handbook* does not indicate that "Computer Programmers" comprise an occupational group for which normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent.

The subchapter of the *Handbook* entitled "How to Become a Computer Programmer" states the following about this occupation:

Education

¹ The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. Our references to the *Handbook* are from the 2014-15 edition available online. We hereby incorporate into the record of proceeding the excerpt from the *Handbook* regarding the occupational category "Computer Programmers."

² For additional information regarding the occupational category "Computer Programmers," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Computer Programmers, available at <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-1> (last visited July 7, 2015).

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

Most programmers learn only a few computer languages while in school. However, a computer science degree gives students the skills needed to learn new computer languages easily. During their classes, students receive hands-on experience writing code, debugging programs, and doing many other tasks that they will perform on the job.

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

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Computer Programmers, available at <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4> (last visited July 7, 2015).

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 the Computer Programmers occupational group. Rather, the *Handbook* indicates that the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty. The *Handbook* states that some employers hire workers who have an associate's degree. Furthermore, while the *Handbook's* narrative indicates that most computer programmers obtain a degree (either a bachelor's degree or an associate's degree) in computer science or a related field, the *Handbook* does not report that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. The *Handbook* also reports that employers value computer programmers who possess experience, which can be obtained through internships.

Unlike the petitioner, we accord little probative value to the O*NET's information with regard to computer programmers. The O*NET OnLine's summary report for Computer Programmers occupational group does not state a requirement for a bachelor's degree. Rather, it assigns this occupation a Job Zone "Four" rating, which groups it among occupations of which "most," but not all, "require a four-year bachelor's degree." Further, O*NET OnLine does not indicate that four-year bachelor's degrees required by Job Zone Four occupations must be in a specific specialty directly related to the occupation. Further, the breakdown of the responses to the voluntary survey

of computer programmers does not indicate the majors or academic concentration for bachelor's or higher degree responses.³ Therefore, O*NET OnLine information has little probative weight.

As neither the *Handbook* nor information submitted into the record from another authoritative source indicates that the proffered position falls within an occupational category for which normally the minimum requirement for entry is at least a baccalaureate degree in a specific specialty, or its equivalent, a position's inclusion within the Computer Programmers occupational group is not sufficient to establish that that particular position is one for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally a minimum requirement for entry.

Thus the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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 in specific specialty, or its equivalent

A petitioner satisfies the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) by establishing that a bachelor's or higher degree in a specific specialty, or its equivalent, is a common requirement for positions with the three characteristics of being (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) 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 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. Also, there are no submissions from a professional association in the petitioner's industry or firms or persons in the petitioner's own industry attesting to relevant employment and recruiting practices.

The petitioner provided copies of job-vacancy announcements that it retrieved from the Internet. As we shall now discuss, we find that they have little probative value towards satisfying this criterion.

³ See Employment & Training Administration, U.S. Dept. of Labor, O*NET OnLine, Summary Report for Computer Programmers, available at <http://www.onetonline.org/link/summary/15-1131.00> (last visited July 7, 2015).

In the Form I-129 and supporting documentation, the petitioner presented itself as a company engaged in IT consulting and software development that was established in [REDACTED] and employed seven persons. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 541511 – Custom Computer Programming Services.⁴ The U.S. Department of Commerce, Census Bureau website describes this NAICS code as follows:

541511 Custom Computer Programming Services

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

See U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 541511 - Custom Computer Programming Services, available at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited July 7, 2015).

For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such evidence, documentation submitted by a petitioner would be outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. When determining whether the petitioner and the advertising organization share the same general characteristics, such factors may include information regarding the nature or type of organization and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the petitioner to claim that an organization is similar and in the same industry without providing an objective basis for the assertion.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner provided copies of job advertisements. However, we find that the petitioner's reliance on these job postings is misplaced.

The advertising organizations do not appear to be similar to the petitioner. More specifically, the advertisements include:

- [REDACTED] (a manufacturer of wallpaper products);
- [REDACTED] (a staffing agency advertising on behalf of a banking client);
- [REDACTED] (recruiting for another company (unnamed));

⁴ NAICS is used to classify business establishments according to type of economic activity, and each establishment is classified to an industry according to the primary business activity taking place there. See U.S. Dep't of Commerce, U.S. Census Bureau, NAICS, available at <http://www.census.gov/eos/www/naics/> (last visited July 7, 2015).

- [REDACTED] (self-described as strengthening the international community's ability to provide humanitarian assistance, disaster response, and peacekeeping operations);
- [REDACTED] (a manufacturer of lift trucks);
- [REDACTED] (an employment agency); and

The petitioner did not state which aspects or traits (if any) it shares with the organizations for which the advertisements were placed. Without further information, the advertisements appear to be for organizations that are not similar to the petitioner, and the petitioner has not provided any probative evidence to suggest otherwise. The petitioner did not supplement the record of proceeding to establish that the advertising organizations are similar to it.

Also, the staffing companies - [REDACTED], [REDACTED] and [REDACTED] - provide little or no information regarding the hiring employers for which the advertisements were issued. Consequently, there is insufficient information regarding these employers' business operations to conduct legitimate comparison to the petitioner's operations.

Further, some of the advertisements do not appear to be for positions parallel to the one for which the petition was filed.

We note that the October 1, 2014 copy of the petitioner's own Internet advertisement for a [REDACTED] Developer specifies only "relevant professional IT experience" as a requirement, without specifying any particular amount of experience. In contrast, the petitioner's March 20, 2014 letter specified the following minimum-experience requirements:

- At least 3 years of experience in ABAP development
- At least 2 years of experience in Object Oriented ABAP development
- At least 2 years of experience in 2-3 full lifecycle implementations
- At least 2 years of experience in any combination of 3: BAPI's, BADIs, ALE, RFCs, Proxies, switch framework, Web services, IDOCS, enhancements, Smartforms; screen painter/module pool
- Multi-implementation [REDACTED] project experience.

In contrast, [REDACTED] specifies five years of [REDACTED] experience; [REDACTED] listed several periods of required experience of an apparently different nature than specified by the petitioner (including minimums of five years in understanding [REDACTED] integration architecture; two years in understanding of data models; and three years in complex data modeling); and the [REDACTED] advertisement includes a minimum of three years of experience in [REDACTED] BW/BOBJ – working on Business Warehouse (BW) 7.0 or later and Business Objects (BOBJ) 4.0 or later – and three years in Open Hub and Integrated Planning functionality within BW. However, the petitioner designated the proffered position on the LCA as a Level I (entry level) position, and, therefore, these three

advertised positions appear to be for more senior positions than the proffered position.⁵ More importantly, the petitioner has not established that the primary duties and responsibilities of these advertised positions are parallel to those of the proffered position.⁶

As the documentation does not establish that the petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary. That is, as the evidence does not establish that similar organizations in the same industry routinely require at least a bachelor's degree in a specific specialty, or its equivalent, for parallel positions, not every deficit of every job posting has been addressed.

In sum, we find that the petitioner did not establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common for positions that are identifiable as being (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the petitioner. Therefore, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The particular position is so complex or unique that it can be performed only by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent

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

The evidence of record is not sufficient to establish the level of complexity or uniqueness required to satisfy this criterion. We have considered the petitioner's claims in this regard, but we find that they are not substantiated by the evidence of record. The evidence of record has not distinguished either the proposed duties, or the position that they comprise, from such computer programmer positions that the *Handbook* indicates can be performed by a person without at least a bachelor's degree in a specific specialty or its equivalent. The requisite level of complexity or uniqueness is not self-evident in the totality of the evidence, and the petitioner has not presented any objective standard by which it measures the proffered position as meeting the requisite level of complexity or uniqueness.

⁵ By submitting a Labor Condition Application (LCA) that had been certified for use with a position meriting only a Level I prevailing-wage - which is the lowest-paying of the four assignable prevailing-wage levels - the petitioner signified that it assessed the proffered position as an entry-level position appropriate for an employee who has only basic understanding of the occupation. See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

⁶ Also, the petitioner did not provide any independent evidence of how representative the job postings are of the particular advertising employers' recruiting history for the type of job advertised. As the advertisements are only solicitations for hire, they are not evidence of the actual hiring practices of these employers.

Further, we also find that the petitioner's submission of an LCA that had been certified for use with a job opportunity that merits only a Level I prevailing-wage rate (the lowest of the four rates assignable) is inconsistent both with the relative level of complexity or uniqueness required of a position to satisfy this criterion and also with the relative level of complexity and specialization required of a position's duties to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). As we have noted, by submitting an LCA certified for a Level I prevailing-wage rate, the petitioner indicated that it assessed the proffered position as entry-level and appropriate for an employee who has only a basic understanding of the occupation.⁷

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Because the evidence of record does not show that the particular position that is the subject of this petition is so complex or unique that it can be performed only by a person with at least a bachelor's degree in a specific specialty, or its equivalent, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The employer normally requires a baccalaureate or higher degree in a specific specialty, or its equivalent, for the position

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, we review the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position, and any other documentation submitted by a petitioner in support of this criterion of the regulations.

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has an employment history of requiring the degree or degree equivalency 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. Were USCIS limited

⁷ The issue here is that the petitioner's designation of this position as a Level I, entry-level position undermines its claim that the position is particularly complex, specialized, or unique compared to other positions *within the same occupation*. Nevertheless, it is important to note that a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation. In certain occupations (doctors or lawyers, for example), an entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty or its equivalent. That is, a position's wage level designation may be a consideration but is not a substitute for a determination of whether a proffered position meets the requirements of section 214(i)(1) of the Act.

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 persons 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 does not establish that its stated degree requirement is necessitated by the performance requirements of the proffered position, the position would not meet the statutory or regulatory definition of a specialty occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

In any event, the evidence of record does not establish that, at the time of the petition's filing, the petitioner had previously employed any persons for the position that is the subject of this petition. We have taken into account the documentation that the petitioner has presented to show that it has previously hired persons with bachelors or higher degrees in IT-related specialties. However, the record does not indicate that any of those persons served in the proffered position. Also, even for whatever positions to which the documentation may apply, the petitioner has not shown that it has not also hired for such positions persons with less than a bachelor's degree or equivalent.

Therefore, the evidence does not establish that the petitioner 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 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 in a specific specialty, or its equivalent

The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) is satisfied when a petitioner establishes 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.

Based upon our review of all of the evidence presented in support of the petition, we find that the petitioner has established that the nature of the duties as stated by the petitioner would require knowledge obtained from a background in programming, but not that the requisite knowledge is usually associated with at least a bachelor's degree in a specific specialty. In particular, we find that the evidence of record does not demonstrate that the nature of the duties of the proffered position as specified in the record is so specialized and complex that the duties could not be performed by knowledge usually associated with an associate's degree in computer programming, or usually associated with some combination of education, training, and work experience short of a bachelor's degree equivalent in a specific specialty. We note in particular, that the petitioner has not established a usual correlation between the ability to perform the proposed duties and knowledge that could be obtained only by completion of a particular bachelor's degree curriculum in a specific specialty.

We here also incorporate our earlier comments and findings with regard to the negative import of the petitioner's submission of an LCA certified for use with a position meriting only a Level I prevailing-wage rate.

As the petitioner has not established that the duties of the position are 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 conclude that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

II. THE U.S. EMPLOYER ISSUE

Since our decision on the specialty occupation basis is dispositive of the petitioner's appeal, we need not address the additional ground upon which the Director denied the appeal, namely, the Director's conclusion that the petitioner had not established the employer-employee relationship with the beneficiary that is necessary for standing to file an H-1B petition as a "United States employer" as defined at 8 C.F.R. § 214.2(h)(4)(ii).

In our consideration of the specialty occupation issue we assumed for the sake of adjudication of that issue that the petitioner intended to employ the beneficiary exclusively in-house on the [REDACTED] project as described in the record. However, significant aspects of the record raise questions as to whether, in fact, the petitioner would be hiring the beneficiary for the [REDACTED] project rather than hiring her as an asset for future assignment to other employers as part of the petitioner's business of "build[ing] contingent IT workforces." We note, as one instance, that, as proof of the availability of the first version of [REDACTED] the petitioner points, in part, to contract documents with Freescale. However, the document commencing with "Software and License Grant" refers to licensing of [REDACTED] Software, which may refer to software provided by [REDACTED], a German multinational software company known for making enterprise resource planning (ERP) software.⁸ Performance of the [REDACTED] Statement of Work (SOW) is, by the SOW's terms, contingent upon a Freescale purchase order, which has not been provided. We also note that, while the employment-agreement letter signed by the petitioner and the beneficiary references the petitioner's commitment to future efforts to enter into client contracts for the petitioner's placement or to making commitments with clients to place them in a project, the agreement nowhere mentions the [REDACTED] project for which the petition was filed. Further, we see that, although the petitioner references sources consulted, substantial parts of the documents it presents as its own with regard to [REDACTED] are derived from other sources.

The above is not meant to be a comprehensive and conclusive analysis of the U.S. employer issue. We reserve the option to provide such an analysis, if needed in the future. It serves, however, to

⁸ For an Internet discussion of [REDACTED] as the acronym for [REDACTED] Integration, see [REDACTED] (last visited July 29, 2015).

place the petitioner on notice that it has not submitted sufficient evidence to establish that the petitioner and the beneficiary would have the requisite employer-employee relationship.

III. CONCLUSION AND ORDER

We may deny an application or petition that does not comply with the technical requirements of the law 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 the enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1037, *aff'd*, 345 F.3d 683; *see also BDPCS, Inc. v. Fed. Communications Comm'n*, 351 F.3d 1177, 1183 (D.C. Cir. 2003) ("When an agency offers multiple grounds for a decision, we will affirm the agency so long as any one of the grounds is valid, unless it is demonstrated that the agency would not have acted on that basis if the alternative grounds were unavailable.").

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.