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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: AUG 11 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:

NO REPRESENTATIVE OF RECORD

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 petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

I. PROCEDURAL BACKGROUND

On the Form I-129 visa petition, the petitioner describes itself as a 152-employee "Quality Assurance Solutions provider, Testing [S]ervices and IT Development" company established in In order to employ the beneficiary in what it designates as a "Quality Assurance Automation/Tester" position at a salary of $66,500 per year,[1] the petitioner seeks to extend his classification 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, concluding that the evidence of record did not establish that (1) the proffered position qualifies as a specialty occupation; (2) the beneficiary qualifies to perform the duties of a specialty occupation; and, (3) the petitioner would have an employer-employee relationship with the beneficiary.

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

Upon review of the entire record of proceeding, we find that the evidence of record does not overcome the Director's bases for denying this petition.[2] Accordingly, the appeal will be dismissed, and the petition will be denied.

II. SPECIALTY OCCUPATION

We will first address the Director's determination that the proffered position is not a specialty occupation. Based upon a complete review of the record of proceeding, we agree with the Director and find that the evidence of record does not establish that the position as described constitutes a specialty occupation.

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[1] The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the "Computer Occupations, All Other" occupational classification, SOC (O*NET/OES) Code 15-1199, and a Level II (qualified) prevailing wage rate.

[2] The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)).

A. Legal Framework

To meet the petitioner's burden of proof in establishing the proffered position as a specialty occupation, the evidence of record must establish that the employment the petitioner is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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

In the Form I-129, the petitioner stated that it wishes to employ the beneficiary in a quality assurance automation/tester position on a full-time basis. The petitioner further stated that the beneficiary would work at the location of its end-client, the Washington State

, in , Washington. In its support letter, the petitioner provided the following information regarding the duties of the proffered position:

> [The beneficiary's] primary duties will include:
>
> - Conduct various tests including functional testing, integration testing, system testing, regression testing, GUI testing and backend testing.
> - Identify the defects in the application and report it to the developer.
> - Perform regression testing when a defect is fixed and smoke testing whenever there is a release or build.
> - Develop complex frameworks like data driven, keyword driven and hybrid frameworks using Quick Test pro (QTP).
> - Perform requirement analysis and gap analysis.
> - Develop test plans, test cases, test scripts, test data and traceability matrix.
> - Work with tools and technologies including: Java, VB Scripts, SQL, Oracle, XML, QTP.
> - Bachelor[']s is required.

In its RFE response letter, the petitioner provided the following duties with percentages of time the beneficiary would spend on each task as follows:

> - Conduct various tests including functional testing, integration testing, system testing, regression testing, GUI testing and backend testing – 10% time spend – Average of 4 hours/Week
> - Identify the defects in the application and report it to the developer – 10% time spend – Average of 4 hours/Week
> - Perform regression testing when a defect is fixed and smoke testing whenever there is a release or build – 15% time spend – Average of 6 hours/Week
> - Develop complex frameworks like data driven, keyword driven and hybrid frameworks using Quick Test pro (QTP) – 25% time spend – Average of 10 hours/Week
> - Perform requirement analysis and gap analysis – 5% time spend – Average of 2 hours/Week
> - Develop test plans, test cases, test scripts, test data and traceability matrix – 10% time spend – Average of 4 hours/Week
> - Work with tools and technologies including: Java, VB Scripts, SQL, Oracle, XML, QTP – 15% time spend – Average of 6 hours/Week
> - Designing, developing and implementing client/server business application software using HP Quality Center, Rational Functional Tester and Oracle, SQL, Unix scripts – 10% time spend – Average of 4 hours/Week

(Errors in original.).

The petitioner stated that a "Bachelor[']s degree with years of experience" is needed for the proffered position.

The petitioner also submitted a letter dated August 29, 2014 from its client, which claims to have arranged for placement of the beneficiary at the end-client site. In this letter, , Human Resources Coordinator, stated that the technical environment of the position would include "IBM Rational, HP, XML SPY, XML Schema, SOAPUI, Oracle, TOAD, SQL, PL/SQL Developer 1.5, Trizetto Tacets 4.61/5.0, UNIX, and Tibco, MS-Office, Windows NT/XP, and MQ Series v6." further stated that a "Baccalaureate or higher or its equivalent in computer science or a related field" is required for the position.

The petitioner also submitted a letter dated August 28, 2014, from Deputy Chief Information Officer at the State of Washington In his letter, stated the beneficiary would be responsible for the following duties:

- Develop, document and execute effective test cases for testing large complex systems.
- Apply knowledge in Software Development Life Cycle and development methodologies to produce quality software.
- Analyze and document complex business processes and workflows.
- Utilize QA testing principles and strategies to deliver quality applications to users.
- Perform Smoke testing, system testing and regression testing on the applications/functional areas assigned.
- Log and track defects using IBM Rational ClearQuest.
- Work with relational databases to perform backend testing using complex SQL queries.
- Utilize test management tool, HP ALM/Quality Center to document requirements and to write test cases.
- Build and run automated test scripts using HP Functional Tester.

C. Analysis

As noted, the petitioner asserts that the beneficiary will work at the end-client's location in Washington. As recognized in *Defensor v. Meissner*, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location(s) in order to properly ascertain the minimum educational requirements necessary to perform those duties. *See Defensor v. Meissner*, 201 F.3d at 387-388. In other words, as the nurses in that case would provide services to the end-client hospitals and not to the petitioning staffing company, the petitioner-provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination. *See id.*

However, as will be discussed later, the record of proceeding in this case does not establish an end-client as there is no binding contract, and therefore no corresponding work order (or similar

documentation) between the parties that is valid beyond June 30, 2013. Although we acknowledge the letter from listing the duties of the beneficiary, the record does not support assertion that the beneficiary will be working at the location for the duration of the employment period requested as there is no corresponding work order. Furthermore, the duties listed in letter are generic[3] and the letter is silent as to the educational requirements of the proffered position.

In addition, on appeal, the petitioner submits a job advertisement by the , and states that it needs "someone with Bachelor[']s degree for [the] same role (Specialty Occupation Position)." According to the job advertisement by the duties of the position "Program Specialist 4-Quality Assurance" are:

> [P]roviding expertise and technical assistance to ensure delivery of offender change programs in the Department are in alignment with evidence–based practices, and address offender risks, needs, and behaviors, to support offender success in prison, community supervision, and to prepare offenders for successful re-entry. This position reports directly to the Offender Programs and Quality Assurance (QA) Manager and provides a lead role in the development, implementation, oversight, and fidelity of offender change programs statewide.

Furthermore, the states that it requires candidates to have a "Bachelor's degree in criminal justice, psychology, sociology, counseling, or closely allied field" for this position. If this position is the same as the proffered position, as asserted by the petitioner, then the duties of the proffered position as stated by the petitioner and are inconsistent with the duties stated by the in its job advertisement.[4]

While petitioner-provided job duties and requirements are often outside the scope of consideration for establishing whether the position qualifies as a specialty occupation in cases such as this where the petitioner asserts that the beneficiary would work at an end-client's location, we will nevertheless analyze the duties as described by the petitioner and the evidence of record to determine whether the proffered position as described would qualify as a specialty occupation. To that end and to make our determination as to whether the employment described above qualifies as a specialty occupation, we turn first 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.

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[3] For example, states that the beneficiary will "[d]evelop, document and execute effective test cases," "[a]pply knowledge in Software Development Life Cycle," "[u]tilize QA testing principles and strategies," and "[w]ork with relational databases." description is generalized and generic in that it does not convey the substantive nature of the work that the beneficiary would actually perform, any particular body of highly specialized knowledge that would have to be theoretically and practically applied to perform it, or the educational level of any such knowledge that may be necessary.

[4] It would also call into question the validity of the LCA.

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

USCIS recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.[5] As noted above, the LCA corresponds to the occupational classification "Computer Occupations, All Other" - SOC(ONET/OES) code 15-1199, at a Level II (qualified) wage.

We reviewed the *Handbook* regarding the occupational category "Computer Occupations, All Other." However, the *Handbook* does not provide a detailed narrative account nor does it provide summary data for this occupational category. More specifically, the *Handbook* does not provide the typical duties and responsibilities for "Computer Occupations, All Other." It also does not provide any information regarding the academic and/or professional requirements for these positions. Thus, the *Handbook* does not support the claim that the occupational category here is one for which normally the minimum requirement for entry is a baccalaureate degree (or higher) in a specific specialty, or its equivalent.

There are occupational categories which are not covered in detail by the *Handbook*, as well as occupations for which the *Handbook* does not provide any information. The *Handbook* states the following about these occupations:

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

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Data for Occupations Not Covered in Detail," http://www.bls.gov/ooh/About/Data-for-Occupations-Not-Covered-in-Detail.htm (last visited July 29, 2015).

Thus, the narrative of the *Handbook* indicates that there are many occupations for which only brief summaries are presented and that detailed occupational profiles for these occupations are not developed.[6] The *Handbook* suggests that for at least some of the occupations, little meaningful information could be developed.

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[5] All of the references are to the 2014-2015 edition of the *Handbook*, which is available at http://www.bls.gov/OCO/. The excerpts of the *Handbook* regarding the duties and requirements of the referenced occupational category are hereby incorporated into the record of proceeding.

[6] We note that occupational categories for which the *Handbook* only provides summary data includes a range of occupations, including for example, postmasters and mail superintendents; agents and business managers

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

In response to the RFE, the petitioner indicated that according to the Occupational Information Network (O*NET), "Software Quality Assurance Engineers and Testers" fall under the occupational category "Computer Occupations, All Other." The petitioner stated that according to O*NET, a Bachelor's degree is normally required for "Software Quality Assurance Engineers and Testers" positions. However, under the subsection entitled "Education," O*NET states that "[m]ost of these occupations require a four-year bachelor's degree, but some do not." Moreover, O*NET does not state that for positions that do require a bachelor's degree, the degree must be in a *specific specialty*.

Nor does the petitioner require a bachelor's degree in a *specific specialty*, which indicates further that the proffered position is not a specialty occupation. The petitioner's claim that a bachelor's degree is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. We interpret the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. There must be a close correlation between the required specialized studies and the position; thus, the mere requirement of a degree, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). ("The mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility."). Thus, while a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

Finally, with regard to the opinion letter submitted by the petitioner, we note that the preparer, does not list the reference materials on which he relies as a basis for his conclusion. Instead, it appears that did not base his opinion on any objective evidence, but instead restates the duties of the proffered position as provided by the petitioner. Upon review, we find that there is no indication that possesses any substantive knowledge of the petitioner's proffered position and its business operations. does not demonstrate or assert in-depth knowledge of the

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of artists, performers, and athletes; farm and home management advisors; audio visual and multimedia collections specialists; clergy; merchandise displayers and window trimmers; radio operators; first-line supervisors of police and detectives; crossing guards; travel guides; agricultural inspectors, as well as others.

petitioner's specific business operations or how the duties of the position would actually be performed in the context of the petitioner's business enterprise. Moreover, does not indicate that he visited the petitioner's business, observed the petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that these workers apply on the job. His level of familiarity with the actual job duties as they would be performed in the context of the petitioner's business has therefore not been substantiated.

Moreover, states that positions such as the proffered position require the attainment of a bachelor's degree or its equivalent in computer information systems, engineering, business administration or a related field. Even if established by the evidence of record, which it is not, the requirement of a bachelor's degree in business administration is inadequate to establish that a position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). In addition to demonstrating that a job requires the theoretical and practical application of a body of specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must also establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As explained above, USCIS interprets the supplemental degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) as requiring a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

For all of these reasons, we find that the letter from is not probative evidence towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). We may, in our discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. at 791.

Upon review, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other authoritative source, indicates that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is normally required 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 particular position that is the subject of this petition 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 did not satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

The requirement of a baccalaureate or higher degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations

Next, we will review the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common 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.

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

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook* (or other independent, authoritative source) reports a standard industry-wide requirement for 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 the industry's professional association indicating that it has made a degree a minimum entry requirement.

The petitioner submitted an article written by in which she discussed the field of information technology services, its growth, and careers within that field. The petitioner drew our attention to statement that "[c]omputer support specialties is [sic] the only computer occupation that does not typically require a bachelor's degree for entry." also included a table in her article stating that "Bachelor's degree" is a "typical education needed for entry" for positions such as computer systems analysts, computer programmers, and software developers, but she did not state that the bachelor's degree must be in a specific specialty. Accordingly, article is insufficient to 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.

The petitioner also submitted copies of job advertisements in support of the assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations. However, the petitioner's reliance on the job advertisements is misplaced.

In the Form I-129, the petitioner stated that it is a "Quality Assurance Solutions provider, Testing services and IT Development" company with 152 employees established in The petitioner reported a gross annual income over $27 million and over $1.3 million as its net annual income. The petitioner designated its business operations under the North American Industry Classification

System (NAICS) code 541511,[7] which is designated for "Custom Computer Programming Services."

For the petitioner to establish that an organization in its industry is similar under this criterion of the regulations, it must demonstrate that the petitioner and the organization share the same general characteristics. Without such information, evidence submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations within the industry that are also similar to the petitioner.

We will briefly note that, without more, the job advertisements do not appear to be from organizations similar to the petitioner.[8] When determining whether the petitioner and the 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 a legitimate basis for such an assertion. 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. 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

In addition, some of the advertisements do not appear to involve parallel positions. For example, the position with requires healthcare experience, and the position with requires financial and lending experience. More importantly, the petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to those of the proffered position.

Further, some advertisements do not indicate that at least a bachelor's degree in a directly related specific specialty (or its equivalent) is required.[9] For instance, the advertisements from

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[7] According to the U.S. Census Bureau, the North American Industry Classification System (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* http://www.census.gov/eos/www/naics/ (last visited July 29, 2015).

[8] For example, an advertisement from indicates that it is a healthcare staffing company; an advertisement from an unidentified employer indicates that it is in the healthcare industry; and an advertisement from states that it provides computer programmers to the Philippine corporate world. Furthermore, the advertisements from staffing companies contain little or no information about their end-clients. In addition, some advertisements do not identify the hiring employer. The petitioner did not supplement the record of proceeding to establish that the advertising organizations are similar to it. Consequently, the record does not contain sufficient information regarding the advertising organizations to conduct a legitimate comparison of the organizations to the petitioner.

[9] As discussed, the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but a degree in a specific specialty that is directly related to the duties of the position. *See* section 214(i)(1)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

and an unidentified company require a bachelor's degree, but do not specify a specialty, and the advertisement from requires a "Bachelor's degree in Liberal Arts or Science."[10] In addition, the advertisement from allows work experience in lieu of a bachelor's degree which undermines the petitioner's assertion that a bachelor's degree is a minimum requirement for the proffered position.[11]

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 advertisements is not necessary.[12] That is, not every deficit of every job advertisement has been addressed.[13]

The petitioner's reliance on letter is also misplaced as the record of proceeding contains insufficient evidence to support his claims regarding his experience in businesses similar to the petitioner's industry and his educational credentials. Again, simply 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. at 165.

The evidence of record has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are (1) in the petitioner's industry, (2) parallel to the proffered position, and also (3) located in organizations that are similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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[10] Neither "Liberal Arts" nor "Science" constitute specific specialties.

[11] Similarly, the federal job advertisements submitted by the petitioner are insufficient to demonstrate that the proffered position is a specialty occupation because the federal positions allow relevant experience for qualification without a degree requirement.

[12] The petitioner did not provide any independent evidence of how representative the job advertisements 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.

[13] Even if all of the job postings indicated that a requirement of a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

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

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 evidence of record shows that the petitioner's 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.

Here, the evidence of record does not credibly demonstrate relative complexity or uniqueness as aspects of the proffered position. Specifically, it is unclear how the quality assurance automation/tester position, as described, necessitates the theoretical and practical application of a body of highly specialized knowledge such that a person who has attained a bachelor's or higher degree in a specific specialty or its equivalent is required to perform them.[14] The petitioner did not demonstrate how the duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While related courses may be beneficial, or even essential, in performing certain duties of a quality assurance automation/tester position, the evidence of record does not 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 petitioner's proffered position. As currently constituted, the record of proceeding does not distinguish the proffered position from other positions within the occupational category that do not require a bachelor's degree in a specific specialty, or the equivalent.

The petitioner claims that the beneficiary is well qualified for the position, and references his qualifications. However, the test to establish a position as a specialty occupation is not the education or experience of a proposed beneficiary, but whether the position itself requires at least a bachelor's degree in a specific specialty, or its equivalent. The evidence of the record 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.

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[14] In fact, as discussed previously, the petitioner's statements indicate that a bachelor's degree in a specific specialty is *not* required.

To merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. While a petitioner may assert that a proffered position requires a specific degree, that statement alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty, or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388.

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.

The record contains copies of degrees and Form W-2 Wage and Tax Statements relating to several individuals. The petitioner also submitted a list of its employees, the degrees they possess, their immigration status, and the positions they hold. The petitioner claims that these documents demonstrate its hiring history. However, the record does not contain sufficient evidence demonstrating that the duties of these individuals are the same as those of the proffered position that it offers to the beneficiary. As the record of proceeding does not demonstrate that the petitioner normally requires at least a bachelor's degree in a specific specialty or its equivalent for the proffered position, it does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*).

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 fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to demonstrate 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.

Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position's duties. The record of proceeding lacks sufficient, credible evidence establishing that the duties of the proffered position are so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a bachelor's degree in a specific specialty, or the equivalent.

Although the petitioner asserts that the nature of the specific duties is specialized and complex, the record lacks sufficient evidence to support this claim. Thus, the petitioner has not satisfied the criterion of the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

Accordingly, as the evidence of record does not satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

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

III. EMPLOYER-EMPLOYEE RELATIONSHIP

We will next address the second basis of the Director's decision: whether the petitioner will be a "United States employer" having "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii).

More specifically, section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant in pertinent part as an alien:

> subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . ., who meets the requirements for the occupation specified in section 214(i)(2) . . ., and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1) . . . .

The term "United States employer" is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows (emphasis added):

> *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:
>
> (1) Engages a person to work within the United States;
>
> (2) *Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee*; and
>
> (3) Has an Internal Revenue Service Tax identification number.

8 C.F.R. § 214.2(h)(4)(ii); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

The United States Supreme Court determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

> "In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

Darden, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); *see also Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 445 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

As discussed above, the petitioner claims that the beneficiary will be employed at the location of the end-client, the Washington State . In support of this assertion, the petitioner submits an agreement entered into by the petitioner and , the middle-client, on February 12, 2008, and a June 2007 agreement between the and . The agreement stated that the agreement's initial term would be from July 1, 2007 (or date of last signature) through June 30, 2009. Although the agreement stated that the term could be extended by up to four additional one-year terms, the total term of this contract "shall not be extended beyond June 30, 2013."[15] The petitioner is requesting to extend the beneficiary's H-1B nonimmigrant classification for the period of August 1, 2014 to June 30, 2017. Accordingly, this contract expired more than a year prior to the employment start-date requested in this petition. The record does not contain any binding agreements or work orders beyond June 30, 2013 that outline in detail the nature and scope of the beneficiary's employment at the end-client's location. Furthermore, assertion that he supervises the beneficiary through "Quick 10 Minute conference meeting[s]" and his reliance on feedback provided by the beneficiary and the end-client are insufficient to demonstrate

[15] The record indicates that this agreement was, in fact, extended by four additional one-year terms, through June 30, 2013.

that the petitioner has control over the beneficiary's daily work activities by overseeing and directing his work on a daily basis. Therefore, the key element in this matter, which is who exercises control over the beneficiary, has not been substantiated.

We also acknowledge letter, in which he states the beneficiary started working for on March 24, 2014, and that the "does not retain ultimate control over [the beneficiary's] salary, benefits, right to hire/fire, and enforce terms of employment, among other things." However, letter is silent on who assigns, directs, and oversees the beneficiary's daily work activities. Therefore, letter is insufficient to demonstrate that the petitioner exercises control over the beneficiary.[16]

The petitioner also submits timesheets issued to the beneficiary for the period of August 1 to August 31, 2014.[17] However, while social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. The record contains insufficient evidence to demonstrate that the requisite employer-employee relationship exists between the petitioner and the beneficiary. Without further evidence of all of the relevant factors, we are unable to properly assess whether the requisite employer-employee relationship will exist between the petitioner and the beneficiary. We therefore agree with the Director's decision that the evidence of record does not demonstrate that the petitioner will have an employer-employee relationship with the beneficiary.

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[16] Although refers to a master service agreement with there is no agreement in the record between and that is valid beyond June 30, 2013. Nor is there a corresponding work order in the record supporting assertion.

[17] The petitioner submits affidavits from individuals who claim they are employees of the In their affidavits, these individuals claim that the beneficiary has been working at the since March 2014 and that he will continue to work there for the duration of the project. We find these assertions insufficient to demonstrate that the petitioner has an employer-employee relationship with the beneficiary as there is no probative evidence, such as contracts or work orders for the duration of the requested employment period, to support these assertions. Again, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici* at 165. Furthermore, the record of proceeding contains insufficient evidence demonstrating that the petitioner has control over the beneficiary's daily work activities while the beneficiary is at the end-client's location. Claims that the petitioner remotely supervises the beneficiary via 10-minute quick conference meetings and feedback obtained from the beneficiary and end-client are not sufficient to demonstrate that the petitioner exerts control over the beneficiary's daily work activities.

IV. SECURING OF WORK FOR THE BENEFICIARY AT THE TIME OF FILING

Since the identified bases for denial are dispositive of the petitioner's appeal, we need not address any other grounds of ineligibility we observe in the record of proceeding. Nevertheless, we will briefly note and summarize one of them here with the hope and intention that, if the petitioner seeks again to employ the beneficiary or another individual as an H-1B employee in the proffered position, it will submit sufficient independent objective evidence to address and overcome this additional ground in any future filing.

Here, we note that the evidence of record does not establish that at the time of this petition's filing, the petitioner had secured work for the beneficiary to perform.

The petitioner filed the instant petition on August 4, 2014. As discussed earlier, on the Form I-129, the petitioner stated that the beneficiary will work off-site at in Washington. The petitioner requested to extend the beneficiary's H-1B nonimmigrant classification for the period of August 1, 2014 to June 30, 2017. In its August 1, 2014 support letter, the petitioner stated that the beneficiary will work as a "Quality Assurance Automation/Tester" at the Washington State Washington facility.

The record contains no evidence to establish that there was non-speculative work for the beneficiary to perform as of the petition's filing date. The Master Agreement entered into by and in June 2007 expired on June 30, 2013; it stated that the "total Term of this Contract shall not be extended beyond June 30, 2013." The record contains no contracts or work orders demonstrating that there was a non-speculative employment available for the beneficiary at the time of the filing of the petition.

With respect to the August 28, 2014 letter from Chief Information officer of Washington State we note that it was issued after the petition was filed. Thus, even if this letter from did constitute credible evidence regarding work that the petitioner may have secured for the beneficiary to perform for the during the requested period of employment, it would not constitute evidence that, by the time of the petition's filing, the petitioner had secured definite, non-speculative employment for the beneficiary.[18]

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[18] The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

> Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the

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)(12). 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). Accordingly, this aspect of the petition also precludes its approval. Thus, even if it were determined that the petitioner had overcome the Director's grounds for denying this petition (which it has not), the petition could still not be approved.

V. CONCLUSION AND ORDER

An application or petition that does not 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 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.[19] In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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

> alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (Jun. 4, 1998).

[19] As the grounds discussed above are dispositive of the petitioner's eligibility for the benefit sought in this matter, we will not address and will instead reserve our determination on the additional issues and deficiencies that we observe in the record of proceeding with regard to the approval of the H-1B petition.