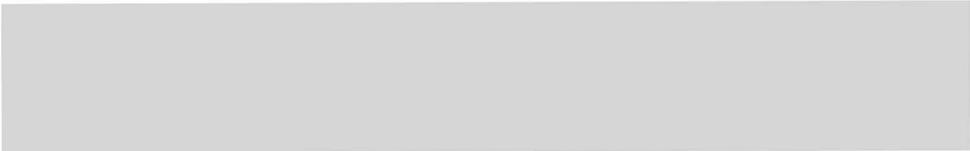




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JUL 01 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 nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

I. PROCEDURAL BACKGROUND

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a one-employee "IT support services" business established in [REDACTED]. In order to employ the beneficiary in a position it designates as a "Network Specialist" 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, determining that the record of evidence did not establish that the proffered position qualifies for classification as a specialty occupation.¹ On appeal, the petitioner asserts that the Director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding includes the following: (1) the Form I-129 and supporting documentation; (2) the service center'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), the petitioner's brief and additional documentation. We reviewed the record in its entirety before issuing our decision.²

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

II. THE PROFFERED POSITION

The petitioner identified the proffered position as a "Network Specialist" on the Form I-129, and attested on the required Labor Condition Application (LCA) that the occupational classification

¹ The Director also noted that the beneficiary's degree in statistics does not appear to be related to the proffered position. Although the Director did not deny the petition on this basis, we will briefly address this issue in our decision.

² We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Also, in light of the petitioner's references, in response to the service center's RFE, to the requirement that U.S. Citizenship and Immigration Services (USCIS) apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010).

for the position is "Computer Network Support Specialists," SOC (ONET/OES) Code 15-1152, at a Level I wage.

In the petitioner's letter in support of the petition, dated March 31, 2014, the petitioner stated that it "provides complete, outsourced IT services for small business and local governments who do not have their own full-time IT staff, or whose IT staff requires augmentation with additional expertise." The petitioner added that "[f]or each client organization, [the petitioner] designs, implements, maintains, and troubleshoots each and every computer resource they have, from common PCs and PC applications to specialized, complex vertical market applications, such as those used in police cars." The petitioner also stated that it "expects that a qualified applicant for the position must possess at least a Bachelor's degree in Mathematics, Statistics, or a related field."

In a response to the RFE, dated August 20, 2014, the petitioner provided the following version of the proffered position's duties:

1. Evaluate the technology needs and requirements of organizations and design solutions to meet those requirements. (25%)

- Design both wired and wireless network infrastructures using firewalls, routers, switches, VPN hosts, wireless access points and bridges, fiber optics, and "the cloud".
- Design IP based network configurations to maximize availability and speed while minimizing complexity, including Internet access, remote access, VPNs, and mobility.
- Design Microsoft Windows Active directory topologies to balance the security and workload of proposed servers with the cost and complexity.
- Design Microsoft Exchange and/or other Email structures that best meet the communications and collaboration needs of the organization.
- Implement the ideal SQL environment to support company's software while controlling the cost.
- Design the ideal strategy for threat protection and business continuity, including: continuous secure credentialing of all network resources, parasite protection, spam reduction and management, backup, disaster recovery and temporary relocation.
- Organize applications and information across servers and within folders, especially determine what should be physical and what should be virtualized, and what should be onsite vs. what should be cloud based.
- Determine the ideal specifications and configurations for all computer resources.
- Define the computer resources upgrade and replacement schedule which fits with the organization's goals, priorities, and budget.

- Develop itemized budgets for specific projects and for fiscal years.

2. Troubleshoot (40%)

- Get networks and network resources up and running ASAP when problems occur.
- Quickly determine the possible causes for each problem, evaluate each option in order of which is most likely to be true. Requires an in depth knowledge of all aspects of network servers, hardware, and communications, plus IBM iSeries servers, Microsoft Windows Server (all versions) and server products (Exchange, SQL, etc.); VMware; Symantec Backup Exec, Endpoint Protection and System Recovery Server; Microsoft Windows and Office (all versions); EASEUS ToDo Backup and data recovery tools; dozens of different specialized software packages; and all of the other products used by our customers.
- Gather evidence, and research and develop solutions. Be able to determine which solutions are safe and might be applicable, and which are not.
- Identify incompatibilities between hardware and/or software, and work with vendors to find solutions to fix their products in order to work properly in our customers' environments.
- Prove to third party vendors that the problem in [sic] theirs when they are unwilling to take responsibility for the problem.

3. Configuring and Implementing (17%)

- Expert level configuration and implementation of all aspects of networks, network servers, network infrastructure, and complex sever hardware and applications.

4. Programming (5%)

- Write scripts and batch files in DOS, SQL, and other script languages to streamline and/or automate reoccurring procedures.

5. Continuous learning (10%)

- Remain current with knowledge of new hardware and software
- Remain current on other technological advances needed to advise clients on what fits their needs.

6. Technical writing (3%)

- Develop detailed written instructions and procedures for organizations to keep and use concerning their IT resources.

III. SPECIALTY OCCUPATION

The primary issue in this matter is whether the proffered position qualifies as a specialty occupation.

A. Legal Framework

To meet its burden of proof, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

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

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

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must 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), 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. Analysis

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

We will first address the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I). This criterion requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position. We recognize the Department of Labor's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.³ The petitioner attested on the LCA that the occupational classification most closely corresponding to its proffered position is "Computer Network Support Specialists," SOC (ONET/OES) Code 15-1152, at a Level I (entry) wage.

We reviewed the chapter of the *Handbook* entitled "Computer Support Specialists" which includes the occupational classification of Computer Network Support Specialists as a sub-category.⁴ As the petitioner noted, this broad category includes generally the duties it ascribes to the proffered position.

The *Handbook*, however, does not indicate that "Computer Network Support Specialists" comprise an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. The subchapter of the *Handbook* entitled "How to Become a Computer Support Specialist" states the following about this occupational category, in pertinent part:

Because of the wide range of skills used in different computer support jobs, there are many paths into the occupation. A bachelor's degree is required for some computer support specialist positions, but an associate's degree or postsecondary classes may be enough for others.

Education

Education requirements for computer support specialists vary. Computer user support specialist jobs require some computer knowledge, but not necessarily a postsecondary degree. Applicants who have taken some computer-related classes are often qualified. For computer network support specialists, many employers

³ All of the references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>. The excerpt of the *Handbook* regarding the duties and requirements of the referenced occupational category is hereby incorporated into the record of proceeding.

⁴ For additional information regarding the occupational category "Computer Network Support Specialists," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Computer Support Specialists, <http://www.bls.gov/ooh/computer-and-information-technology/computer-support-specialists.htm> (last visited June 25, 2015).

accept applicants with an associate's degree, although some prefer applicants to have a bachelor's degree.

Large software companies that provide support to business users who buy their products or services often require a bachelor's degree. More technical positions are likely to require a degree in a field such as computer science, engineering, or information science, but for others, the applicant's field of study is less important.

To keep up with changes in technology, many computer support specialists continue their education throughout their careers.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Computer Support Specialists, <http://www.bls.gov/ooh/computer-and-information-technology/computer-support-specialists.htm#tab-4> (last visited June 25, 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 these positions. Rather, the *Handbook* indicates that an associate's degree or some postsecondary classes are also acceptable avenues to attain a position as a computer support specialist. Although the *Handbook* reports that some employers may prefer applications to have a bachelor's degree, preference is not synonymous with a normal minimum requirement.

When reviewing the *Handbook*, it also must be noted that the petitioner designated the proffered position as a Level I (entry level) position on the LCA. The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

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

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

Thus, in designating the proffered position at a Level I wage, the petitioner has indicated that the proffered position is a comparatively low, entry-level position relative to others within the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding

of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that she would be closely supervised; that her work would be closely monitored and reviewed for accuracy; and that she would receive specific instructions on required tasks and expected results. As noted above, according to DOL guidance, a statement that the job offer is for a research fellow, worker in training or an internship is indicative that a Level I wage should be considered. Although the petitioner asserts on appeal, that its proffered position is a "more technical position" due to its depth and scope, the Level I designation on the LCA does not comport with that assertion. Further, the evidence of record does not sufficiently demonstrate that the proffered position is a "more technical position."

When the *Handbook* does not support the proposition that a proffered position is one that meets the statutory and regulatory provisions of a specialty occupation, it is incumbent upon the petitioner to provide persuasive evidence that the proffered position more likely than not satisfies this or one of the other three criteria, notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other objective, 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.

We have reviewed the letters from the petitioner's customers that the petitioner submitted on appeal. We observe that the majority of the petitioner's customers (seven out of nine) indicated that the petitioner's requirement of a bachelor's degree without any indication that the degree be in a specific specialty, is sufficient to perform the duties of the position. We reiterate that to demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although 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 139, 147 (1st Cir. 2007).

The *Handbook* does not support the claim that the occupational category of computer network support specialists is one for which normally the minimum requirement for entry is a baccalaureate degree (or higher) in a specific specialty, or its equivalent. Even if it did (which it does not), the record lacks sufficient evidence to support a finding that the particular position proffered here, an entry-level computer network support specialist position (as indicated on the LCA), would normally have such a minimum, specialty degree requirement or its equivalent.⁵ The duties and requirements of the position as described in the record of proceeding

⁵ As the petitioner attested on the certified LCA that the proffered position is a computer network support specialist, the *Handbook's* report on other LCA occupations will not be discussed here. The petitioner's assertion that the proffered position encompasses duties that correspond to a variety of other occupations

do not indicate that this particular position proffered by the petitioner is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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 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.

On the Form I-129, the petitioner stated that it is an IT support services company with one employee. The petitioner stated its gross annual income as approximately \$209,178 and its net annual income as \$127,368. The petitioner designated its business operations under the North American Industry Classification System (NAICS) code 541519. According to the U.S. Census Bureau, 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 June 25, 2015). The NAICS code specified by the petitioner is designated for "Other Computer Related Services," and is defined by the U.S. Department of Commerce, Census Bureau as follows:

This U.S. industry comprises establishments primarily engaged in providing computer related services (except custom programming, systems integration design, and facilities management services). Establishments providing computer disaster recovery services or software installation services are included in this industry.

is discussed below.

U.S. Dep't of Commerce, U.S Census Bureau, 2012 NAICS Definition, 541519 – Other Computer Related Services, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited June 25, 2015).

The record in this matter includes a number of job postings, submitted in response to the service center's RFE and on appeal. The petitioner did not, however, provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting histories for the types of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

For the petitioner to establish that an organization is similar, it must demonstrate that it shares the same general characteristics with the advertising organization. Without such evidence, documentation submitted by a petitioner is generally 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 a legitimate basis for such an assertion.

Of the seven job postings submitted in response to the service center's RFE, six of the postings are for companies that do not appear to be in the petitioner's industry. Specifically, they are consultants, a large provider of products and services, a truck dealership, a creator and publisher of entertainment for consoles, a meal distributor, and a personnel services company. Moreover, these job postings provide a variety of paths to enter into the positions advertised, including a bachelor's degree or five years of experience, a bachelor's degree in MIS, Computer Science or related technical discipline and two years of experience or six years applicable work experience, a BA or BS in Computer Science, Information Systems or equivalent and a minimum of 3 years of IT-related experience, a bachelor's degree in Information Systems or equivalent experience, a bachelor's degree and 1-2 years of experience, and a bachelor's degree. The seventh job posting is from a company that the petitioner asserts is its competitor, and that company requires a bachelor's degree in Computer Science or related and 3-5 years of network administration work experience.

The advertisements submitted do not establish an industry-wide standard for the various positions posted. First, for those job postings that require a degree OR experience, the record does not include information on how the advertising organizations evaluate experience, training, or education in related fields. Accordingly, it is not possible to conclude that the advertising organizations routinely employ individuals with at least a bachelor's degree in a *specific specialty*, or *its equivalent*, for the positions advertised. Second, for those advertising organizations that require a degree and experience, it appears that the positions advertised are

more senior positions than the petitioner's position, as the petitioner has designated the proffered position as a Level I wage position and does not appear to require work experience.⁶

On appeal, the petitioner submitted copies of three job postings from its customers, which are involved in county and local government. The requirements for the three positions advertised include a college degree in computer science or related field and 2-3 years of IT management experience or experience in lieu of education, an associate's degree in information technology, public relations, marketing, communications or closely related field and 2-5 years of experience, and graduation from a four year college plus four years of relevant experience or a combination of education, training and experience. Again, the advertising organizations are not in the petitioner's industry and, for the same reasons discussed above, do not include sufficient information to establish that the advertising organizations routinely employ individuals with at least a bachelor's degree in a *specific specialty*, or its equivalent, for the positions advertised.

The petitioner also included job postings from its competitors in Iowa, five from a national company and one from a small company. The five postings from the national company, all require a bachelor's degree in information technology plus a varying amount of experience. The remaining posting is a duplicative copy of the posting submitted in response to the service center's RFE. We note that the petitioner's competitors routinely require experience in addition to the required bachelor's degree in information technology or computer science, which again indicates that the advertised positions are for more senior positions than the position proffered here, as the petitioner designated the proffered position as a Level I (entry) position on the LCA.⁷

Thus, the evidence of record does not establish that a requirement of a bachelor's or higher degree in a *specific specialty*, or its equivalent, is common to 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.

⁶ The petitioner's "Job Opening" posting does not list a requirement for experience.

⁷ Although the size of the relevant study population is unknown, the petitioner does not demonstrate what statistically valid inferences, if any, can be drawn from the job postings with regard to 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").

As such, even if the job announcements supported the finding that the position requires a bachelor's or higher degree in a *specific specialty* or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a *specific specialty* for entry into the occupation in the United States.

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 evidence of record also does not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." A review of the record of proceeding indicates that the petitioner has not credibly demonstrated that the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent. Even when considering the petitioner's assertion that the beneficiary will provide a myriad number of IT support duties, the evidence of record does not establish that the proffered position is so complex or unique that it can be performed only by an individual with a bachelor's or higher degree in a specific specialty, or its equivalent. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has not demonstrated how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position. The description of the duties does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. As noted above, the petitioner attested on the submitted LCA that the wage level for the proffered position is a Level I (entry) wage. Such a wage level which only requires a basic understanding of the occupation; the performance of routine tasks that require limited, if any, exercise of judgment; close supervision and work closely monitored and reviewed for accuracy; and the receipt of specific instructions on required tasks and expected results, is contrary to a position that requires the performance of complex duties.⁸

The petitioner's assertion that combining all the different aspects of the proffered position only intensifies the requirement of a bachelor's degree is not supported in the record. That is, a

⁸ 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.

variety of duties within a position does not, in and of itself, raise the educational requirements for a position. Performing the different duties of the position does not make the position unique or complex. Here, the petitioner must provide probative evidence and substantiating analysis that the duties as described require a bachelor's degree in a specific discipline. The record does not include sufficient evidence or analysis demonstrating that the proffered position is so unique or complex that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent. Consequently, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

To satisfy this criterion, the record must establish 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, or its equivalent, as the minimum for entry into the occupation as required by section 214(i)(1) of the Act. According to the Court in *Defensor*, "To interpret the regulations any other way would lead to an absurd result." *Id.* at 388. If USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position – and without consideration of how a beneficiary is to be specifically employed – then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.*

The petitioner has not submitted evidence that it has previously employed anyone in the proffered position. While a first-time hiring for a position is certainly not a basis for precluding a position from recognition as a specialty occupation, it is unclear how an employer that has never recruited and hired for the position would be able to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a demonstration that it normally requires at least a bachelor's degree in a specific specialty or its equivalent for the position. Upon review of the totality of the record, 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 fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

The record does not include evidence that the proffered position satisfies this criterion of the regulations. More specifically, in the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. Furthermore, we also reiterate our earlier comments and findings with regard to the implication of the petitioner's designation of the proffered position in the LCA as a Level I (the lowest of four assignable levels) wage. That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category, and hence one not likely distinguishable by relatively specialized and complex duties.

The evidence of record does not establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. For the reasons discussed above, the evidence of record does not satisfy the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The evidence of record does not satisfy 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 for classification as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

IV. LCA

Since the specialty occupation basis for denial is dispositive of the petitioner's appeal, we need not address another ground of ineligibility we observe in the record of proceeding. Nevertheless, we will briefly note and summarize it 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 the petitioner asserts that the position proffered encompasses elements of different occupational categories such as "Computer and Network Systems Administrator," "Computer Network Architect," "Computer Systems Analyst," "Database Administrator," "Information Security Analyst," "Computer and Information Systems Manager," "Computer Programmer," and "Computer Support Specialist."⁹ It appears from the

⁹ Although we recognize that a particular position may include overlapping duties, the petitioner here has not identified the primary duties so that we may analyze the actual position proffered and the level of responsibility expected of the beneficiary. To further elaborate, the problem associated with identifying a

petitioner's list of particular duties and the petitioner's designation of the corresponding *Handbook* occupational category, that the beneficiary will spend a significant portion of her time on systems analysis, network administration, and network architecture. These are distinct occupations and require varying wages.¹⁰

number of occupations with duties that will engage the beneficiary, is that the petitioner must submit an LCA that corresponds to the petition. That is the LCA serves as the critical mechanism for enforcing section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). See 65 Fed. Reg. 80110, 80110-80111 (indicating that the wage protections in the Act seek "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers" and that this "process of protecting U.S. workers begins with [the filing of an LCA] with [DOL]."). According to section 212(n)(1)(A) of the Act, an employer must attest that it will pay a holder of an H-1B visa the higher of the prevailing wage in the "area of employment" or the amount paid to other employees with similar experience and qualifications who are performing the same services. See 20 C.F.R. § 655.731(a); *Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 422 & n.3 (4th Cir. 2005); *Patel v. Boghra*, 369 Fed.Appx. 722, 723 (7th Cir. 2010); *Michal Vojtisek-Lom & Adm'r Wage & Hour Div. v. Clean Air Tech. Int'l, Inc.*, No. 07-97, 2009 WL 2371236, at *8 (Dept of Labor Admin. Rev. Bd. July 30, 2009).

Where a petitioner seeks to employ a beneficiary in two or more distinct occupations, the petitioner should file separate petitions for each occupation, requesting concurrent, part-time employment for each occupation. While it is not the case here, if a petitioner does not file separate petitions and if only one aspect of a combined position qualifies as a specialty occupation, USCIS would be required to deny the entire petition as the pertinent regulations do not permit the partial approval of only a portion of a proffered position and/or the limiting of the approval of a petition to perform only certain duties. See generally 8 C.F.R. § 214.2(h). Furthermore and as is the case here, the petitioner would need to ensure that it separately meets all requirements relevant to each occupation and the payment of wages commensurate with the higher paying occupation. See generally 8 C.F.R. § 214.2(h); U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf. Thus, filing separate petitions would help ensure that the petitioner submits the requisite evidence pertinent to each occupation and would help eliminate confusion with regard to the proper classification of the position being offered.

¹⁰ To further explain, if the position proffered here is actually a computer network support specialist, the wage offered on the Form I-129 and the LCA of \$36,400 would comply with DOL regulations. For more information regarding the prevailing wage for computer network architects in [redacted] Iowa, see the All Industries Database for 7/2013 – 6/2014 for Computer Network Support Specialists, Foreign Labor Certification Data Center, <http://www.flcdatabase.com/OesQuickResults.aspx?year=14&source=1> (last visited June 25, 2015). However, if the proffered position in this matter actually encompasses the duties of any of the occupations listed, except computer programmer which only accounts for five percent of the beneficiary's time, the petitioner's proffered wage of \$36,400 does not comply with the prevailing wage in the [redacted] Iowa geographical region. That is, if the occupational classification is for a computer systems analyst at a Level I wage in [redacted] Iowa, Missouri, the prevailing wage, when the petition was filed is \$55,099 annually. For more information regarding the prevailing wage for computer systems analysts in [redacted] Iowa, see the All Industries Database for 7/2013 – 6/2014 for Computer Systems Analysts, Foreign Labor Certification Data Center, <http://www.flcdatabase.com/OesQuickResults.aspx?year=14&source=1> (last visited June 25, 2015). If the occupational classification is

If the petitioner believes the proffered position encompasses a combination of occupations, it should have chosen the relevant occupational code for the highest paying occupation, in this case "Computer Systems Analyst."¹¹ However, the petitioner chose the occupational category "Computer Network Support Specialists" for the proffered position. Thus, the petitioner was able to obtain an LCA certified for an occupation at a much lower rate of pay, then turn to USCIS and claim that the position is for any number of occupations that require a much higher prevailing wage in an attempt to qualify the proffered position as a specialty occupation.

To permit this would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A), by allowing the petitioner to simply submit an LCA for a different occupation and at a lower prevailing wage than the one being petitioned for. Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. *See* section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A).

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS, is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

for a network and computer systems administrator at a Level I wage in [REDACTED] Iowa, the prevailing wage, when the petition was filed is \$44,366 annually. For more information regarding the prevailing wage for network and computer systems administrators in [REDACTED] Iowa, see the All Industries Database for 7/2013 – 6/2014 for Network and Computer Systems Administrators, Foreign Labor Certification Data Center, <http://www.flcdatabase.com/OesQuickResults.aspx?&year=14&source=1> (last visited June 25, 2015). If the occupational classification is for a computer network architect at a Level I wage in [REDACTED] Iowa, the prevailing wage, when the petition was filed is \$53,893 annually. For more information regarding the prevailing wage for computer network architects in [REDACTED] Iowa, see the All Industries Database for 7/2013 – 6/2014 for Computer Network Architects, Foreign Labor Certification Data Center, <http://www.flcdatabase.com/OesQuickResults.aspx?&year=14&source=1> (last visited June 25, 2015). Thus, the petitioner's proffer of an annual salary of \$36,400 would fall well below the required prevailing wage for these different distinct occupations. Accordingly, the LCA submitted in support of the petition does not actually correspond to the petition in terms of the occupational classification and the associated prevailing wage if the beneficiary is expected to perform the work of occupations other than that of a computer network support specialist.

¹¹ We reiterate, however, when a petitioner chooses to file only one petition, the petitioner must establish that the beneficiary would primarily perform the duties of that occupation.

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the [LCA] is a specialty occupation . . . and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.*

With respect to the LCA, DOL provides clear guidance for selecting the most relevant O*NET occupational code classification.¹² The "Prevailing Wage Determination Policy Guidance" states the following:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification If the employer's job opportunity has worker requirements described in a combination of O*NET occupations, the SWA should default directly to the relevant O*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the SWA shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

The instructions that accompany the LCA indicate that, when completing Section D, "Period of Employment and Occupation Information," the employer should enter the occupational code that most clearly describes the occupation "to be performed." The petitioner should, at the very least, specifically identify which tasks will primarily engage the beneficiary. Based on the petitioner's characterization of the proffered position, and the petitioner's task list and corresponding *Handbook* occupational classifications submitted on appeal, the LCA could include the occupational codes for "Computer Systems Analyst," "Computer and Network Systems Administrator," or "Computer Network Architect," among others. The petitioner, however, as discussed above, designated the occupational classification on the LCA as a "Computer Network Support Specialist," a lower paying occupational classification. The result is that the LCA submitted in support of the petition does not correspond to the petitioner's assertions that the duties of the proffered position encompass the duties of the higher paying occupations.

V. BENEFICIARY'S QUALIFICATIONS

In the instant matter, the Director found that the beneficiary would not be qualified to perform the duties of the proffered position. We do not, however, need to examine the issue of the

¹² 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.

beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the 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.

Nevertheless, we agree with the Director's determination regarding the beneficiary's qualifications. We find that the evidence of record does not adequately demonstrate that the beneficiary's bachelor's degree in statistics qualifies her to perform the services of a specialty occupation and that the academic courses pursued and knowledge gained is a realistic prerequisite to the particular position. The petitioner must demonstrate that the beneficiary obtained knowledge of the particular occupation in which he or she will be employed. *See e.g., Matter of Ling*, 13 I&N Dec. 35 (Reg. Comm'r 1968). Here, the petitioner did not submit sufficient evidence regarding the nature of the proffered position to make an assessment of whether the beneficiary obtained knowledge equivalent to at least a bachelor's degree in a specific specialty required by the particular occupation in which she would be employed. We acknowledge the letter from [REDACTED] Associate Professor of Computer Science, [REDACTED] dated December 1, 2014, which states that "both Mathematics and Statistics are indeed closely-related fields to Computer Science." However, the professor did not explain his statement and his letter does not adequately demonstrate a sound factual basis for his conclusion. In any event, as discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree in a specific specialty, or its equivalent, also cannot be determined.

VI. CONCLUSION

As set forth above, we find that the evidence of record does not sufficiently establish that the proffered position qualifies for classification as a specialty occupation. Accordingly, the appeal will be dismissed and the petition denied.

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.