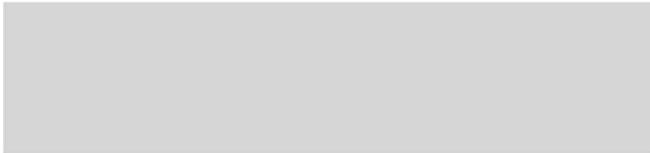




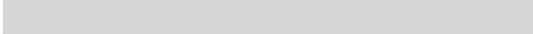
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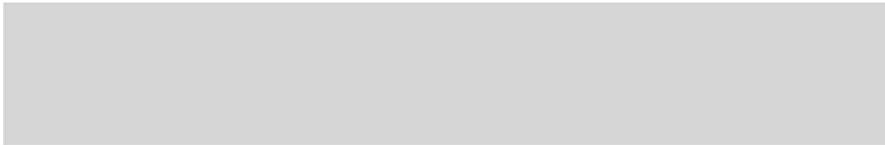
DATE: **JUL 01 2015**

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)

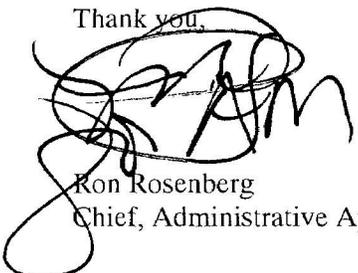
ON BEHALF OF PETITIONER:



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 dismissed a subsequently filed motion. 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 15-employee "Advanced Software Development & Consulting" business established in [REDACTED]. In order to employ the beneficiary in a position it designates as a "Programmer Analyst" position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The Director denied the petition, determining that the record of evidence did not establish that the proffered position qualifies for classification as a specialty occupation. 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; (5) the petitioner's motion to reopen and reconsider the decision and supporting documentation; (6) the Director's motion decision; (7) 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.¹

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.

II. THE PROFFERED POSITION

The petitioner identified the proffered position as a "Programmer Analyst" on the Form I-129, and attested on the required Labor Condition Application (LCA) that the occupational classification for the position is "Computer Programmers," SOC (ONET/OES) Code 15-1131, at a Level I wage. The LCA was certified on March 11, 2014, for a validity period from September 3, 2014 to September 2, 2017, in the [REDACTED] Illinois metropolitan area. The petitioner indicated on the Form I-129 that the beneficiary would not work off-site.

In the petitioner's letter in support of the petition, dated March 27, 2014, the petitioner stated that it "is a staffing organization with a vision of providing a cost-effective service to [its] clients" and its "staffing and consulting solutions support a broad spectrum of solutions serving across all

¹ We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

domains, be it contract or permanent, fixed-cost or time-and-materials, on-site or off-site, we have proven experience." The petitioner described the proffered position as follows:

The Programmer Analyst will be required to plan, analyze, develop, test and document computer programs using applications, languages, tools and technologies.

In addition, he is responsible for the following job duties:

1. Modify existing software to correct errors, allow it to adapt to new hardware, or to improve its performance. Develop and direct software system testing and validation procedures, programming, and documentation. Confer with systems analysts, engineers, programmers and others to design system and to obtain information on project limitations and capabilities, performance requirements and interfaces.
2. Analyze user needs and software requirements to determine feasibility of design within time and cost constraints.
3. Design, develop and modify software systems, using scientific analysis and mathematical models to predict and measure outcome and consequences of design.
4. Store, retrieve, and manipulate data for analysis of system capabilities and requirements.
5. Coordinate software system installation and monitor equipment functioning to ensure specifications are met.
6. Obtain and evaluate information on factors such as reporting formats required, costs, and security needs to determine hardware configuration.
7. Client interaction
8. Requirements gathering
9. High Level Impact Analysis
10. Architecture and Design
11. Development & Defect fixing
12. Test Planning and Strategy
13. Functional & Performance Testing
14. User Acceptance Testing Support
15. Status Reporting
16. Process compliance activities
17. Documentation

The petitioner further stated the following:

This is a professional level position, and as such, we absolutely require, at a minimum, the functional equivalent of a Bachelor's degree with some exposure in software development, programming and designing. These requirements are consistent with both the demands of the job and the specifications set forth by our clients.

The petitioner also submitted a letter, dated March 27, 2014, signed by [REDACTED] Executive Vice President of [REDACTED] verifying that it intends "to extend an offer of assignment to [the beneficiary] beginning October 1, 2014" and that the beneficiary's position with its company will be as a Programmer Analyst. Mr. [REDACTED] continued by providing an overview of a project and indicating that "the project is presently on-going and long term." Mr. [REDACTED] also provided the same description for the beneficiary's responsibilities as the petitioner's numbered list of duties. Mr. [REDACTED] identified the educational requirements to perform its position of programmer analyst as a bachelor's degree or equivalent in computer science, computer applications, any engineering, IT, management information systems, or related area of study.

In response to the service center's RFE, the petitioner provided additional information regarding the project discussed in the March 27, 2014 [REDACTED] letter. The petitioner also stated that "[t]his position is closer to that of a computer systems analyst than a computer programmer" and referenced the Department of Labor's *Occupational Outlook Handbook's (Handbook)* chapter on the educational requirements for computer systems analysts. The petitioner also referenced the O*Net Online (O*NET) Summary Report for computer programmers. The petitioner submitted excerpts from the *Handbook* and O*NET on these occupations. The petitioner repeated its initial description of the proffered position adding that the beneficiary will also be responsible for "User Interface designer." The petitioner stated that the beneficiary "will perform these duties for the end client, [REDACTED], but at the petitioner's location."² The petitioner also submitted [REDACTED] project overview of the [REDACTED] which corresponds to the petitioner's description of the proposed project.

On motion, the petitioner asserted that the beneficiary will perform the following duties:

- Documents and provides design specification for technical programming assignments, and develop process and work flow diagrams.
- Designs and code programs and applications according to specifications and following development standards.
- Designs, develops and modifies existing software.
- Develops and directs software system testing & validation procedures.
- Understands and interprets systems statements, develops work flows and perform structured programming tasks in systems development.
- Maintains computer systems and programming guidelines by writing and updating policies and procedures.
- Works on project planning and reporting tools.
- Maintains, revises and upgrades current programs.
- Designs, programs, tests, documents, and implements new programs and application systems as assigned within designated time commitments.
- Follows departmental guidelines and procedures.

² The evidence in the record regarding the petitioner's end client identifies the company as [REDACTED] or [REDACTED].

- Supports and improves existing applications.
- Provides analysis, problem identification and support for a applications.
- Provides status reports on projects[.]

[Verbatim.]

On appeal, the petitioner asserts that its proffered position "has been classified under SOC of 15-1132, Software Developers, Applications," an occupation in the Job Zone Four category and that the *Handbook* "states that the minimum education usually required for computer programmers, software developers, or related occupations that fall into the same SOC is a bachelor's degree."³ Additionally, the petitioner borrows from its initial description of the beneficiary's responsibilities to allocate the beneficiary's time to the various responsibilities as follows:

Gathering and analyzing requirements – 5%
Store, retrieve, and manipulate data for analysis of system capabilities and requirements – 10%
Design and develop user interface – 5%
Design and develop software testing – 25%
Plan test strategy and fix the defects. Document the defects - 25%
Perform functional, perform [*sic*], and user acceptance tests – 10%
Client and other team members [*sic*] interaction and process compliance – 15%
Other similar professional responsibilities as necessary – 5%

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

³ The petitioner has classified the proffered position on the attested LCA as corresponding most closely to SOC 15-1131, the O*NET designation for a Computer Programmer occupation, not 15-1132, Software Developers, Applications.

- (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.

We note that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. See *Defensor v. Meissner*, 201 F.3d at 387-388. The court held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

B. Analysis

The petitioner submitted a general overview of the proffered position in its letter in support of the petition and again in response to the service center's RFE. A portion of these duties paraphrased the duties listed for a software developer, applications, as outlined in the O*NET Summary Report on the occupation. The duties described that did not paraphrase the O*NET description provided little information regarding the beneficiary's actual day-to-day tasks. As a significant portion of the duties correspond, although only generally, to the occupation of a

software developer, applications, it appears that the proffered position would also encompass those duties. Thus, the petitioner's description of duties conflicts with the petitioner's attestation on the LCA that the occupational classification for the position is that of a computer programmer.⁴

On motion and on appeal, the petitioner provides a different set of duties, but also appears to rely on some of the initially described duties when allocating the percentage of time the beneficiary will spend performing various functions. Although a particular position may include overlapping duties, the petitioner must sufficiently identify the occupation with a consistent and detailed description of the duties so that the beneficiary's actual duties may be ascertained and the duties and level of responsibility expected of the beneficiary be analyzed.⁵

In this matter, the duties are not consistently described and do not include the level of detail necessary for analysis. Thus, upon review, it is not evident that the proposed duties as described, and the position that they comprise, merit recognition of the proffered position as qualifying as a specialty occupation. That is, to the extent that they are described, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the performance of the proffered position for the entire period requested. The overall responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's operations. The evidence of record does not sufficiently demonstrate how the performance of the duties of the proffered position, as described by the petitioner, would require the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent.

⁴ The petitioner incorrectly claims on appeal that the proffered position "has been classified under the SOC of 15-1132, Software Developers, Applications."

⁵ It is noted that, 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 two 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.

Even if considering that the proffered position is comprised of one or more overlapping occupations, there is insufficient evidence in the record to demonstrate which occupation will primarily engage the beneficiary. This is critically important in our determination of the merits of this appeal, because we must analyze the actual duties the beneficiary will perform and then determine whether the duties encompass duties that would require the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent. In this matter, we find that there are significant discrepancies in the record of proceeding with regard to the petitioner's description of the duties and responsibilities of the proffered position, as well as the petitioner's choice of the occupational classification that best corresponds to those duties. Based upon a complete review of the record of proceeding, we find that the evidence of record does not contain sufficient consistent and credible information to establish that the proffered position is a specialty occupation.

The abstract level of and inconsistent information provided regarding the duties of the proffered position preclude a determination that the position proffered here is a specialty occupation position. The petitioner has not provided sufficient details regarding the nature and scope of the beneficiary's employment or substantive evidence regarding the actual work that the beneficiary would perform. Without a meaningful job description, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. The tasks as described fail to communicate (1) the substantive nature and scope of the beneficiary's employment; (2) the actual work that the beneficiary would perform; (3) the complexity, uniqueness and/or specialization of the tasks; and/or (4) the correlation between that work and a need for a particular educational level of highly specialized knowledge in a specific specialty (or its equivalent). Consequently, this lack of evidence prohibits a determination that the petitioner's proffered position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions.

That is, the failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for entry into the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Thus, the evidence of record does not establish that the proffered position is a specialty occupation under the applicable provisions.

The material deficiencies in the record regarding the actual duties of the proffered position require the dismissal of this appeal. However, assuming for the sake of argument that the proffered position is a computer programmer position as the petitioner claimed in the LCA, we will continue our analysis pursuant to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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)(1). 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 (DOL) *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁶ Again, the petitioner claims in the LCA that the proffered position corresponds to SOC code and title 15-1131, Computer Programmers, from O*NET. The *Handbook* states the following about the educational requirements of computer programmer positions, in pertinent part:

Education

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

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Computer Programmers," <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4> (last visited June 23, 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 is an acceptable avenue to attain a position as a computer programmer.

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,

⁶ 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.

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 he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he 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.

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

The petitioner's reliance on the document titled "Characteristics of H1B Specialty Occupation Workers, Fiscal Year 2012 Annual Report to Congress" is also misplaced. Notably, the petitioner quotes a section in the Fiscal Year 2012 Annual Report which indicates that "specialty occupations may include, but are not limited to, computer systems analysts and programmers." Although there are circumstances that may substantiate that a particular computer systems analyst or programmer position may be a specialty occupation, as discussed above, the petitioner has not submitted probative evidence establishing that the proffered position in this matter is either a computer systems analyst or a computer programmer.

The *Handbook* does not support the claim that the occupational category of computer programmers 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 programmer position (as indicated on the LCA), would normally have such a minimum, specialty degree requirement or its equivalent. The duties and requirements of the position as described in the record of proceeding 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)(I).

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 find that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common 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 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)).

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other reliable and authoritative source, indicates that there is a standard, minimum entry requirement of at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

The Internet job postings submitted on motion and on appeal do not establish that the degree requirement is common to the industry in parallel positions among similar organizations. First, we note that the petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting history for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices.

Second, upon review of the advertisements, they do not provide sufficient information about the advertising organizations to establish that they are similar to the petitioner. Without such evidence, these advertisements are generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the petitioner. Moreover, the descriptions of responsibilities in the advertisements are generally perfunctory and do not

provide sufficient information to determine the role the successful applicant will play in the advertising organization or the level of responsibility that will be required of the successful applicant. We also note that some of the advertising organizations require experience in addition to a bachelor's degree but the advertising organizations do not offer information on how they evaluate experience, training or education in related fields.

Further, as the petitioner characterized the proffered position as a Level I (entry) position, any requirement for experience would further disqualify the advertised positions from a consideration that the positions are parallel to the proffered position. Several of the advertised positions indicate that a general bachelor's degree or a degree in the general field of business is acceptable. However, 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 Assocs.*, 19 I&N Dec. 558 (Comm'r 1988). Other advertisements indicate that a bachelor's degree with an emphasis on computer information systems is acceptable or a general bachelor's is acceptable with only a preference for computer science degree or a related information systems field. However, preference for a degree is not synonymous with a requirement for such a degree. Additional advertisements indicate that experience alone may be an acceptable alternative to a bachelor's degree. The advertisements that indicate acceptance of experience alone, also do not specify how the advertising companies evaluate experience and its equivalency to a bachelor's degree.

Finally, even if all of the vacancy announcements were for parallel positions with organizations similar to the petitioner and in the petitioner's industry and required a minimum of a bachelor's degree in a specific specialty or its equivalent, the evidence of record does not demonstrate what statistically valid inferences, if any, can be drawn from these announcements with regard to the common educational requirements for entry into parallel positions in similar organizations.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.

⁷ USCIS "must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). As just discussed, the relevance of the job advertisements to the proffered position has not been established. Even if their relevance had been established, the evidence of record still fails to demonstrate what inferences, if any, can be drawn from these few job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the same industry. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995).

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 general descriptions of the proffered position's duties, the evidence of record does not establish why a few related courses or industry experience alone is insufficient preparation for the proffered position. 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

Therefore, the evidence of record does not establish that this position is significantly different from other positions in the occupation such that it refutes the *Handbook's* information to the

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.

effect that there is a spectrum of degrees acceptable for such positions, including degrees not in a specific specialty, and that some positions may require only an associate's degree or experience. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent. As the evidence of record does not demonstrate how the proffered position is so complex or unique relative to other positions within the same occupational category that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, 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

We will next address the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which may be satisfied if the petitioner demonstrates that it normally requires a minimum of a bachelor's degree in a specific specialty or its equivalent for the proffered position. The petitioner asserts on appeal that it normally requires a degree or its equivalent to perform the duties of the proffered position and that such a requirement is also supported by the end client. However, the petitioner does not assert that it requires a bachelor's degree in a specific specialty, or its equivalent. That is, the petitioner states that it requires, "at a minimum, the functional equivalent of a Bachelor's degree with some exposure in software development, programming and designing." On appeal, the petitioner groups several different occupations together, including computer programmers and software developers as well as related occupations, and notes that these occupations all require bachelor's degrees. Thus, upon review of the totality of the record, the petitioner does not claim to require a bachelor's degree in a specific specialty in order to perform the duties of the proffered position.⁹ Accordingly, the petitioner's own standards do not support the proffered position as being a specialty occupation.

We note that the petitioner claims that the duties of the proffered position can only be performed by a degreed individual. While a petitioner may assert that a proffered position requires a degree in a specific specialty, 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 employer 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

⁹ The petitioner's client's educational requirements to perform the duties of its project work are a bachelor's degree or equivalent in computer science, computer applications, any engineering, IT, management information systems, or related area of study. Although the petitioner's client identifies several different degrees as acceptable to perform the duties of its project work, the degrees it specifies are so varied that they ultimately establish only that a general bachelor's degree is required.

Defensor v. Meissner, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree, or its equivalent, to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. See section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation"). Here, the evidence of record does not establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on the petitioner's normal hiring practices.

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

Finally, we will address the alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner establishes that the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent. In the instant case, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. We again refer to 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. Upon review of the totality of the record, the petitioner has not established 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. ADDITIONAL ISSUE

Since the identified 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 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.

With respect to the LCA, DOL provides clear guidance for selecting the most relevant O*NET occupational code classification. 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.

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

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." In this matter, due to the vagueness and inconsistencies within the petition and supporting documents, it is not possible to accurately identify the proffered position as a computer programmer position as attested on the LCA. It is not possible to find that it is more likely than not that the beneficiary will perform primarily the duties of a computer programmer.

The OFLC Online Data Center, All Industries Database, for July 2013 to June 2014, the pertinent time period, indicates the prevailing wage for "Computer Programmers," SOC (ONET/OES) Code 15-1131, in the [REDACTED] Illinois metropolitan statistical area (MSA) at a Level I wage as \$50,211.¹⁰ If the position proffered here is actually a computer programmer, the wage offered on the Form I-129 would comply with DOL regulations. However, the petitioner's proffered wage of \$51,000 does not comply with the prevailing wage in the [REDACTED] Illinois MSA for a position that encompasses the duties of a "Software Developer, Applications" position. The prevailing wage for a software developer, applications (SOC Code 15-1132) at the Level I (entry) wage, in the [REDACTED] Illinois MSA is \$62,712, a wage significantly higher than that proffered

¹⁰ For more information regarding the wages for "Computer Programmers" – SOC (ONET/OES Code) 15-1131, in the [REDACTED] Illinois, MSA for the period 7/2013 – 6/ 2014, see <http://www.ficdatacenter.com/OesQuickResults.aspx?&year=14&source=1> (last visited June 23, 2015).

by the petitioner.¹¹ The attested salary of \$51,000 per year on the Form I-129 falls well below that required by law for the position of software developer, applications.

V. 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.¹²

ORDER: The appeal is dismissed.

¹¹ For more information regarding the wages for "Software Developers, Applications" – SOC (ONET/OES Code) 15-1132, in the [REDACTED], Illinois, MSA for the period 7/2013 – 6/2014, see <http://www.flcdatacenter.com/OesQuickResults.aspx?&year=14&source=1> (last visited June 23, 2015).

¹² As the identified ground of ineligibility is dispositive of the petitioner's appeal, we need not address all the additional issues in the record of proceeding that preclude approval of the petition.