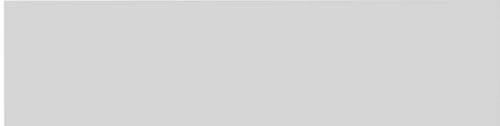




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **MAR 26 2015** OFFICE: VERMONT SERVICE CENTER FILE: 

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:



INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

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

On the Form I-129 visa petition, the petitioner describes itself as a 20-employee "Import, distribution of uniforms" firm established in [REDACTED]. In order to employ the beneficiary in what it designates as a "computer programmer" 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, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, the petitioner asserts that the director's basis for denial was erroneous and contends that it has satisfied all evidentiary requirements.

As will be discussed below, we have determined that the director did not err in her decision to deny the petition on the specialty occupation issue. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

We base our decision upon our review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and the petitioner's submissions on appeal.

## I. THE LAW

The issue before us is whether the petitioner has demonstrated that the proffered position qualifies as a specialty occupation. 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 also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens

who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

## II. EVIDENCE

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a Computer Programmer position, and that it corresponds to Standard Occupational Classification (SOC) code and title 15-1131, Computer Programmers, from the Occupational Information Network (O\*NET). The LCA further states that the proffered position is a Level I, entry-level, position.

With the visa petition, counsel submitted evidence that the beneficiary received an associate's degree in "Information System Development" from the [REDACTED] in Korea. The petitioner also provided evidence pertinent to the beneficiary's employment experience. An evaluation in the record states that the education and employment experience, considered together, are equivalent to a U.S. bachelor's degree in Computer Information Systems.

The petitioner also submitted, *inter alia*: (1) An undated employment contract signed by the beneficiary and an unidentified representative of the petitioner, and (2) a letter, dated March 30, 2013, from the president of [REDACTED], [REDACTED]<sup>1</sup>

The undated employment contract states, *inter alia*: "The [beneficiary's] duties may be reasonably modified at the [petitioner's] discretion from time to time."

As to the duties of the proffered position, Mr. [REDACTED] states in his March 30, 2013 letter the following:

<sup>1</sup> The letter states that the petitioner "conduct[s] its business in trade mark name of [REDACTED] medical uniform products."

[The beneficiary] will utilize his technical expertise in computer science, including information technology, analysis, and programming in the professional position of Computer Programmer for [REDACTED]. Working under the manager, [the beneficiary] will be responsible providing technical assistance and expertise to [the petitioner] and its clients with respect to our proprietary software products including the line of products and the internal systems which support the software. He will develop, among other things, improvements to current ordering system, respond to inquiries, and provide technical expertise on product usage, ensuring that integrity and functionality of product order system and other products. He will identify systems usage errors and instruct clients to correct software problems, diagnose and isolate their probable cause and develop appropriate solutions. He will also identify those situations which do not involve a problem with current ordering system and/or [the petitioner's] products but may have arisen as a result of an operating system or third party vendor problem.

[Verbatim]

As to the educational requirement of the position, that letter states:

Due to the technical nature of the duties to be performed by the Computer Programmer, the position requires that the incumbent must possess at minimum a Bachelor (or its equivalent) degree in Computer Science or related discipline. All Computer Programmer at [the petitioner] satisfy an educational prerequisite.

[Verbatim]

On April 30, 2014, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation. The service center provided a non-exhaustive list of items that might be used to satisfy the specialty occupation requirements.

In response, the petitioner submitted (1) an organizational chart of the petitioner's operations; (2) a printout of the O\*NET report at SOC code 15.1131.00 pertinent to computer programmers; (3) a printout of a portion of the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)* chapter pertinent to computer programmers; (4) a printout of content from the careerplanner.com website; and (5) an unsigned, unattributed statement on counsel's letterhead

Although the petitioner's organizational chart is barely legible, it appears to list more than 20 employees.<sup>2</sup>

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<sup>2</sup> We note that none of the listed employees appear to be described as computer programmers or any closely-related job title.

The unsigned, unattributed statement on counsel's letterhead cites the O\*NET report, the *Handbook* chapter, and the information from careerplanner.com as evidence that the proffered position qualifies as a specialty occupation position. Those items of evidence will be discussed below. That document also lists the following as the duties of the proffered position:

| Task  | Percentage<br>(Approximate) |
|---|-----------------------------|
| Write Programs                                  | <20                         |
| Update and expand existing programs             | >45                         |
| Debug programs by testing for and fixing errors | <20                         |
| Employee Program training                       | <5                          |
| Network and System maintenance                  | <5                          |
| Others  | <5%                         |

The director denied the petition on June 19, 2014, finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent. More specifically, the director found that the petitioner had satisfied none of the supplemental criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, the petitioner submitted, *inter alia*: (1) a report on the *Characteristics of Specialty Occupation Workers (H-1B) Fiscal Year 2003*, (2) the same report for Fiscal Year 2012, (3) a copy of a 2009 AAO decision, and (4) a brief.

In the appeal brief, the petitioner again cited the *Handbook* and O\*NET as evidence that the proffered position qualifies as a specialty occupation position. The petitioner also cited a 2009 non-precedent AAO decision for that proposition. Further, the petitioner cited the 2003 and 2012 reports provided.

Counsel noted that the 2012 report states, "Specialty occupations may include . . . computer . . . programmers." He further noted that the report states that 51% of the H-1B visa petitions approved during fiscal year 2012 were for computer systems analysts or programmers.

### III. ANALYSIS

As an initial matter, we will address the petitioner's citation of an unpublished, non-precedent AAO decision as evidence that the proffered position, by virtue of being a computer programmer position, qualifies as a specialty occupation position. The case cited by the petitioner is irrelevant to the instant matter as that case pertained to an immigrant visa pursuant to section 203(b)(2) of the Act

and whether the proffered position required an advanced degree professional<sup>3</sup>; therefore, our determination in that matter is irrelevant to the specialty occupation issue in the instant matter.

We will now address the director's basis for denial of the petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, we agree with the director and find that the evidence fails to establish that the position as described constitutes a specialty occupation. To determine whether the proffered position qualifies as a specialty occupation, we turn to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

We will first address the requirement under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1): A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. We recognize the *Handbook*, cited by the petitioner, as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>4</sup>

The petitioner claims in the LCA that the proffered position corresponds to SOC code and title 15-1131, Computer Programmers from O\*NET. We reviewed the chapter of the *Handbook* (2014-2015 edition) entitled "Computer Programmers," including the sections regarding the typical duties and requirements for this occupational category. The *Handbook* states the following with regard to the duties of computer programmers:

### **What Computer Programmers Do**

Computer programmers write code to create software programs. They turn the program designs created by software developers and engineers into instructions that a computer can follow. Programmers must debug the programs—that is, test them to ensure that they produce the expected results. If a program does not work correctly, they check the code for mistakes and fix them.

### **Duties**

Computer programmers typically do the following:

- Write programs in a variety of computer languages, such as C++ and Java
- Update and expand existing programs
- Debug programs by testing for and fixing errors

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<sup>3</sup> The regulation at 8 C.F.R. § 204.5(k)(2) defines an "advanced degree" as "any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate."

<sup>4</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. Our references to the *Handbook* are to the 2014 – 2015 edition available online.

- Build and use computer-assisted software engineering (CASE) tools to automate the writing of some code
- Use code libraries, which are collections of independent lines of code, to simplify the writing

Programmers work closely with software developers, and in some businesses, their duties overlap. When this happens, programmers can do work that is typical of developers, such as designing the program. This entails initially planning the software, creating models and flowcharts detailing how the code is to be written, writing and debugging code, and designing an application or systems interface.

Some programs are relatively simple and usually take a few days to write, such as creating mobile applications for cell phones. Other programs, like computer operating systems, are more complex and can take a year or more to complete.

Software-as-a-service (SaaS), which consists of applications provided through the Internet, is a growing field. Although programmers typically need to rewrite their programs to work on different systems platforms such as Windows or OS X, applications created using SaaS work on all platforms. That is why programmers writing for software-as-a-service applications may not have to update as much code as other programmers and can instead spend more time writing new programs.

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-2> (last visited Mar. 19, 2015).

The duties described in Mr. [REDACTED] March 30, 2013 letter and the unsigned unattributed statement submitted in response to the RFE are consistent with the duties of computer programmers as described in the *Handbook*. We find that, if those descriptions are assumed to be a faithful description of the duties the beneficiary would perform, then the proffered position is a computer programmer position as described in the *Handbook*.

The *Handbook* states the following about the educational requirements of computer programmer positions:

### **How to Become a Computer Programmer**

Most computer programmers have a bachelor's degree in computer science or a related subject; however, some employers hire workers with an associate's degree. Most programmers specialize in a few programming languages.

### **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.

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

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

### **Licenses, Certifications, and Registrations**

Programmers can become certified in specific programming languages or for vendor-specific programming products. Some companies may require their computer programmers to be certified in the products they use.

### **Other Experience**

Many students gain experience in computer programming by completing an internship at a software company while in college.

### **Advancement**

Programmers who have general business experience may become computer systems analysts. With experience, some programmers may become software developers. They may also be promoted to managerial positions. For more information, see the profiles on computer systems analysts, software developers, and computer and information systems managers.

### **Important Qualities**

**Analytical skills.** Computer programmers must understand complex instructions in order to create computer code.

**Concentration.** Programmers must be able to work at a computer, writing lines of code for long periods of time.

**Detail oriented.** Computer programmers must closely examine the code they write because a small mistake can affect the entire computer program.

**Troubleshooting skills.** An important part of a programmer's job is to check the code for errors and fix any they find.

*Id.* at <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4> (last visited Mar. 19, 2015).

When reviewing the *Handbook*, we must note again that the petitioner designated the wage level of the proffered position as a Level I position on the LCA. This designation is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess 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. Furthermore, DOL guidance indicates that a Level I designation is appropriate for a position as a research fellow, a worker in training, or an internship.

The *Handbook* makes plain that computer programmer positions do not, as a category, require a minimum of a bachelor's degree in a specific specialty or its equivalent. It indicates that some employers hire programmers with only an associate's degree. It further states, "Most programmers get a degree in computer science or a related subject," which suggests that some do not have a degree related to computers. For both reasons, the *Handbook* does not support the contention that the proffered position requires a minimum of a bachelor's degree in a specific specialty or its equivalent.

Where, as here, the *Handbook* does not support the proposition that the proffered position satisfies this first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), it is incumbent upon the petitioner to provide persuasive evidence that the proffered position otherwise satisfies this criterion by a preponderance of the evidence standard, notwithstanding the absence of the *Handbook's* support on the issue. In such a case, it is the petitioner's responsibility to provide probative evidence (e.g., documentation from other authoritative sources) that supports a favorable finding with regard to this criterion. To this end, the petitioner cited the O\*NET report pertinent to computer programmers and the information from [careerplanner.com](http://careerplanner.com).

On Mar. 19, 2015, we accessed the pertinent section of the O\*NET Internet site, which addresses Computer Programmers under the Department of Labor's Standard Occupational Classification code of 15-1131.00. O\*NET does not state a requirement for a bachelor's degree for such positions. Rather, it assigns computer programmer positions a Job Zone "Four" rating, which groups them among occupations of which "most," but not all, "require a four-year bachelor's degree." Further, the O\*NET does not indicate that four-year bachelor's degrees required by Job Zone Four

occupations must be in a specific specialty closely related to the requirements of that occupation. Therefore, the O\*NET information is not probative of the proffered position's being a specialty occupation.

The printout of the careerplanner.com website content states: "About 8 out of 10 computer programmers held an associate's [sic] degree or higher in 2006; nearly half held a bachelor's [sic] degree, and 2 out of 10 held a graduate degree."

That statement indicates that more than half of all computer programmers during 2006 had less than a bachelor's degree, and that approximately 20% of them did not even have an associate's degree. The evidence from careerplanner.com does not support the proposition that a minimum of a bachelor's degree in a specific specialty or its equivalent is normally the minimum requirement for entry into a computer programmer position.

Further, we find that, even assuming the duty descriptions provided are accurate, the duties that the petitioner ascribes to the proffered position indicate a need for a range of knowledge of programming, but do not establish any particular level of formal, postsecondary education leading to a bachelor's or higher degree in a specific specialty as minimally necessary to attain such knowledge.

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree in a specific specialty, or the equivalent, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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 at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

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, individuals, or similar firms 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.

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.

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 indicates that the petitioner has failed to credibly demonstrate that the duties that comprise the proffered position entail such complexity or uniqueness as to constitute a position so complex or unique that it can be performed only by a person with at least a bachelor's degree in a specific specialty.

Specifically, even assuming the duty descriptions provided are accurate, the petitioner failed to demonstrate how those duties that collectively constitute the proffered position require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While related courses may be beneficial, or even required, in performing certain duties of the proffered position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here.

Further, as was also noted above, the LCA submitted in support of the visa petition is approved for a Level I computer programmer, an indication that the proffered position is an entry-level position for an employee who has only a basic understanding of computer programming.<sup>5</sup> This does not support the proposition that the proffered position is so complex or unique that it can only be performed by a person with a specific bachelor's degree, especially as the *Handbook* and all of the other evidence cited by counsel suggests that some computer programmer positions do not require such a degree.

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 effect that there is a spectrum of degrees acceptable for such positions, including degrees less than a bachelor's

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<sup>5</sup> 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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

degree and degrees not in a specific specialty. 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 petitioner fails to 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).

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.<sup>6</sup>

In his March 30, 2013 letter, Mr. [REDACTED] stated that the petitioner requires a minimum of a bachelor's degree in computer science or a related discipline, or its equivalent, for the proffered position. He further stated, "All Computer Programmer [sic] at [the petitioner] satisfy an educational prerequisite." However, the petitioner's organizational chart appears to indicate that the petitioner does not employ any computer programmers, and on appeal the petitioner admits that the petitioner has never employed a computer programmer.

In any event, the petitioner has not provided any evidence pertinent to the qualifications of any computer programmers it may have previously employed, and the record contains no evidence for analysis under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Although the fact that a proffered position is a newly-created one is not in itself generally 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 can satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a demonstration that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position. The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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<sup>6</sup> While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in a specific specialty or its equivalent. See *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 § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

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.

Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. Even assuming that the duties of the proffered position have been correctly described and would not be changed, as the beneficiary's employment agreement indicates it may, those duties, such as writing, updating, expanding, testing, and debugging programs contain no indication of a nature so specialized and complex they require knowledge usually associated attainment of a minimum of a bachelor's degree in a specific specialty or its equivalent. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than the duties of computer programmer positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent.

Further, as was noted above, the petitioner filed the instant visa petition for a Level I computer programmer position, a position for a beginning level employee with only a basic understanding of computer programming. This does not support the proposition that the nature of the specific duties of the proffered position is so specialized and complex that their performance is usually associated with the attainment of a minimum of a bachelor's degree in a specific specialty or its equivalent, directly related to computer programming, especially as the *Handbook* indicates that some computer programming positions require no such degree.

For the reasons discussed above, the evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

#### IV. CONCLUSION

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

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