



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF N-T-, INC.

DATE: OCT. 6, 2015

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a custom software programming, analysis, design, development, testing and implementation firm, seeks to employ the Beneficiary as a software quality assurance tester and to classify him as a nonimmigrant worker in a specialty occupation. *See* Immigration and Nationality Act (the Act) § 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, California Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Director reviewed the information and determined that the Petitioner had not established eligibility for the benefit sought. The Director denied the petition, finding that the Petitioner (1) does not establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions; (2) does not comply with the Labor Condition Application (LCA) requirement at 8 C.F.R. § 214.2(h)(4)(i)(B)(1); and (3) does not establish that it will be a “United States employer” having an employer-employee relationship with the Beneficiary as an H-1B temporary employee. The matter is now before us on appeal.

The record of proceeding contains: (1) the Petitioner’s Form I-129 and supporting documentation; (2) the Director’s request for evidence (RFE); (3) the Petitioner’s response to the RFE; (4) the Director’s decision; and (5) the Form I-290B, Notice of Appeal or Motion and supporting documentation. We reviewed the record in its entirety before issuing our decision.¹

For the reasons that will be discussed below, we agree with the Director’s decision that the Petitioner does not establish eligibility for the benefit sought. Accordingly, the Director’s decision will not be disturbed. The appeal will be dismissed.

I. PROFFERED POSITION

In the support letter, the Petitioner provided the duties of the proffered position. In addition, the Petitioner stated that “[a] Bachelor’s Degree in Computer Science and Engineering or related is

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

required, together with at least 3-5 years relevant experience” for the proffered position. In the same letter, the Petitioner also stated that the proffered position “requires a Masters and Bachelor of Science degree, or its equivalent, in Computer Science, Computer Engineering, Computer Applications, Management Information Systems, Electrical Engineering, Electronics Engineering, or a degree with specialized course work in mathematics, programming or equivalent experience.”

Thereafter, in response to the RFE, the Petitioner provided a revised job description, along with the approximate percentage of time the beneficiary will spend performing each duty, as follows:²

The purpose of this position is to design, develop, configure and implement business applications, test plans/programs and scripts. This is accomplished by performing tests on system modifications and preparing for implementation; identifies and performs complex analysis of business critical scenarios including Disaster Recovery testing, Emergency Management scenarios, testing suing Table Top, Parallel mode, Simulation, Fall over and Fall back tests methods and documents identified problems in details with program function, output, online screen or content, and interfacing with end users to determine the system testing requirements to improve systems efficiency, accountability and workflow. Other duties include assisting with business and IT recovery strategies and solutions, test plan development, impart awareness training programs, participate in product design reviews and providing valuable input on function requirements, schedules and/or potential problems.

ESSENTIAL FUNCTIONS:

Code	Essential Functions	% Time
1	Design test plans, scenarios, scripts, or procedures. Develop testing programs that address areas such as database impacts, software scenarios, regression testing, negative testing, error or bug retests, or usability. Identify, design, develop and perform complex analysis of business critical scenarios, perform the tests and document in detail the problems using bug tracking system and report defects to software developers. Monitor the team on bug resolution efforts; perform regressive testing until its resolution.	55
2	Plan, develop and manage test schedules or strategies in accordance with project scope and/or	25

² We observe that the wording of the duties provided by the Petitioner for the proffered position in response to the RFE is taken almost verbatim from the Occupational Information Network (O*NET) OnLine’s list of tasks associated with a software quality assurance engineer and tester position.

	delivery dates. Document software test cases in database(s), bugs and other required documentation to ensure technical accuracy, compliance, or completeness, or to mitigate risks. Develop or specify standards, methods, or procedures to determine product quality or release readiness. Investigate and analyze complex customer problems referred by technical support. Review requirements, specifications, and user documentation and implement tests cases to ensure compliance.	
3	Conduct audits; provide feedback and recommendations to developers on software usability and functionality, monitor program performance to ensure efficient and problem-free operations, conduct software compatibility tests with programs, hardware, operating systems, or network environments. Identify program deviance from standards, and suggest modifications to ensure compliance.	15
4	Provide technical support during software installation and or configuration. Participate in Business Continuity Planning (BCP) and recommend improvements and best practices.	5

Further, the Petitioner stated that the position requires “a Bachelor’s degree in Computer Science, Computer Engineering, Computer Applications, Management Information Systems or a related field.” In addition, in the same letter, the Petitioner stated “the candidate must possess a four-year degree in Computer Science and Engineering, Management Information Systems, or a closely related field.”

II. SPECIALTY OCCUPATION

We will first address the issue of whether the Petitioner’s proffered position qualifies as a specialty occupation. For an H-1B petition to be granted, the Petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position.

A. Legal Framework

To meet its burden of proof in this regard, the Petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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

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

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

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that 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 387. 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.

The Petitioner asserted that the Beneficiary would be employed as a software quality assurance tester. However, 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

Upon review, we observe that the Petitioner’s job description submitted in response to the RFE is recited virtually verbatim from the O*NET OnLine Summary Report's list of duties associated with software quality assurance engineer and tester.³ Providing job duties for a proffered position from O*NET or other Internet source is generally not sufficient for establishing H-1B eligibility. That is,

³ For additional information, see O*NET OnLine, available at <http://www.onetonline.org/link/summary/15-1199.01> (last visited Sept. 29, 2015).

while this type of description may be appropriate when defining the range of duties that may be performed within an occupational category, it generally cannot be relied upon by a Petitioner when discussing the duties attached to specific employment for H-1B approval as this type of generic description does not adequately convey the substantive work that the Beneficiary will perform on a day-to-day basis. In establishing a position as qualifying as a specialty occupation, a Petitioner must describe the specific duties and responsibilities to be performed by a Beneficiary in the context of the Petitioner's (or client's) business operations, demonstrate that a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

Further, we find that the Petitioner has provided inconsistent information regarding the minimum requirements for the proffered position. In the letter of support, the Petitioner stated that “[a] Bachelor’s Degree in Computer Science and Engineering or related is required, together with at least 3-5 years relevant experience.” However, in the same letter, the Petitioner stated that the proffered position “requires a Masters and Bachelor of Science degree, or its equivalent, in Computer Science, Computer Engineering, Computer Applications, Management Information Systems, Electrical Engineering, Electronics Engineering, or a degree with specialized course work in mathematics, programming or equivalent experience.” In response to the RFE, the Petitioner stated that the position requires “a Bachelor’s degree in Computer Science, Computer Engineering, Computer Applications, Management Information Systems or a related field.” In addition, in the same letter, the Petitioner stated “the candidate must possess a four-year degree in Computer Science and Engineering, Management Information Systems, or a closely related field.” The Petitioner also submitted a copy of its job posting for the proffered position, which states that the position requires a “Masters [*sic*] & Bachelor’s Degree in Computer Science, (or) Computer Applications (or) Mathematics (or) a related field.” No explanation for the variances was provided.⁴

Furthermore, 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.

⁴ The Petitioner has provided inconsistent information regarding the minimum educational requirement for the proffered position. It is incumbent upon the Petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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In the instant case, the record of proceeding is devoid of substantive information from the end-client regarding not only the specific job duties to be performed by the Beneficiary, but also information regarding whatever the client may or may not have specified with regard to the educational credentials of persons to be assigned to its projects. The record of proceeding does not contain sufficient corroborating documentation on this issue from, or endorsed by, the end-client, the company that will actually be utilizing the Beneficiary's services (according to the Petitioner).⁵

The failure to establish the substantive nature of the work to be performed by the Beneficiary precludes a finding that the proffered position satisfies 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 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.

Nevertheless, assuming that the proffered duties as described in the record would in fact be the duties to be performed by the Beneficiary, we will analyze them and the evidence of record to determine whether the proffered position as described would qualify as a specialty occupation. To that end and to make a determination as to whether the employment described above qualifies as a specialty occupation, we turn 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 review the record of proceeding in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

USCIS recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁶ In the LCA, the Petitioner asserted that the proffered position corresponds to the occupational classification "Computer Occupations, All Other" - SOC (ONET/OES) code 15-1199, at a Level II (qualified) wage.⁷

⁵ As will be discussed in further detail below, it appears that the end-client is [REDACTED]

⁶ All references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

⁷ The occupational category designated by a petitioner is considered as an aspect in establishing the general tasks and responsibilities of a proffered position, and USCIS regularly reviews the *Handbook* on the duties and educational requirements of the wide variety of occupations that it addresses. However, to satisfy the first criterion, the burden of

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

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

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

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

Thus, the narrative of the *Handbook* indicates that there are many occupations for which only brief summaries are presented and that detailed occupational profiles for these occupations are not

proof remains on the petitioner to submit sufficient evidence to support a finding that its particular position would normally have a minimum, specialty degree requirement, or its equivalent, for entry.

Further, the “Prevailing Wage Determination Policy Guidance” issued by DOL provides a description of the wage levels. A Level II wage rate is described by DOL as follows:

Level II (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

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.

developed.⁸ The *Handbook* suggests that for at least some of the occupations, little meaningful information could be developed.

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

Upon review of the record, the Petitioner has not done so in the instant case. That is, the Petitioner has not submitted probative evidence that normally the minimum requirement for positions falling under the "Computer Occupations, All Other" occupational category is at least a bachelor's degree in a specific specialty, or its equivalent. Even if it did, the record lacks sufficient evidence to support a finding that the particular position proffered here would normally have such a minimum, specialty degree requirement, or its equivalent.

In the instant case, 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)(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.

⁸ We note that occupational categories for which the *Handbook* only includes summary data includes a range of occupations, including for example, postmasters and mail superintendents; agents and business managers of artists, performers, and athletes; farm and home management advisors; audio visual and multimedia collections specialists; clergy; merchandise displayers and window trimmers; radio operators; first-line supervisors of police and detectives; crossing guards; travel guides; agricultural inspectors, as well as others.

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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 for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement.

In response to the RFE, the Petitioner submitted a letter from [REDACTED] of [REDACTED]. The letter is dated December 21, 2014. In the letter, [REDACTED] provided a summary of his education and experience. We note that while he may, in fact, be a recognized authority on various topics, he does not provide sufficient information regarding the basis of his claimed expertise on this particular issue. [REDACTED] claims that he is qualified to comment on the position of software quality assurance tester because of his years of experience evaluating professionals and working as a professor at various universities. However, without further clarification, it is unclear how his experience would translate to expertise or specialized knowledge on the issue here.

[REDACTED] opinion letter does not cite specific instances in which his past opinions have been accepted or recognized as authoritative on this particular issue. There is no indication that he has published any work or conducted any research or studies pertinent to the educational requirements for *software quality assurance testers* (or parallel positions) in the Petitioner's industry for similar organizations, and no indication of recognition by professional organizations that he is an authority on those specific requirements. The opinion letter contains no evidence that it was based on scholarly research conducted by [REDACTED] in the specific area upon which he is opining. For instance, in reaching his determination, [REDACTED] provides no documentary support for his ultimate conclusion regarding the education required for the position (e.g., statistical surveys, authoritative industry or government publications, or professional studies). [REDACTED] asserts a general industry educational standard for organizations similar to the Petitioner, without referencing any supporting authority or any empirical basis for the pronouncement.

Upon review of the opinion letter, we find no indication that [REDACTED] possesses any knowledge of the Petitioner's proffered position beyond the job description. The fact that he attributes a degree requirement to such a generalized treatment of the proffered position undermines the credibility of his opinion. [REDACTED] does not demonstrate or assert in-depth knowledge of the Petitioner's specific business operations or how the duties of the position would actually be performed in the context of the Petitioner's business enterprise. His opinion does not relate his conclusion to specific, concrete aspects of this Petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position

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here at issue. For example, there is no evidence that [REDACTED] has visited the Petitioner's business, observed the Petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. [REDACTED] provides general conclusory statements regarding the proffered position, but he does not provide a substantive, analytical basis for his opinion and ultimate conclusions.

Further, there is no indication that the Petitioner advised [REDACTED] that it characterized the proffered position in the LCA as a Level II position under the occupational category "Computer Occupations, All Other." As noted above, DOL wage-level guidance specifies that a Level II designation is reserved for positions involving only moderately complex tasks requiring limited judgment. We consider this a significant omission, as it appears that [REDACTED] would have found this information relevant for his opinion letter. Moreover, without this information, the Petitioner has not demonstrated that [REDACTED] possessed the requisite information necessary to adequately assess the nature of the Petitioner's position and appropriately determine similar positions based upon job duties and responsibilities.

In summary, and for each and all of the reasons discussed above, we conclude that the advisory opinion rendered by [REDACTED] is not probative evidence to establish the proffered position qualifies as a specialty occupation. The conclusions reached by [REDACTED] lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which he reached such conclusions. There is an inadequate factual foundation established to support the opinion and we find that the opinion is not in accord with other information in the record.

We may, in our discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). As a reasonable exercise of its discretion we discount the advisory opinion letter as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, we hereby incorporate the above discussion and analysis regarding the opinion letter into each of the bases in this decision for dismissing the appeal.

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

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

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

In support of its assertion that the proffered position qualifies as a specialty occupation, the Petitioner described the proffered position and its business operations. Upon review, we find that the Petitioner has not sufficiently developed relative complexity or uniqueness as an aspect of the proffered position. 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 it may believe are so complex and unique. While a few related courses may be beneficial 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 does not establish which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment.⁹

The Petitioner claims that the Beneficiary is well-qualified for the position, and references his qualifications. However, the test to establish a position as a specialty occupation is not the education or experience of a proposed beneficiary, but whether the position itself requires at least a bachelor's degree in a specific specialty, or its equivalent. The Petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, we review the Petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position, and any other documentation submitted by a petitioner in support of this criterion of the regulations.

⁹ Again, the Petitioner designated the proffered position on the LCA at a Level II wage level. This designation indicates that the proffered position is a position for an employee who will only perform moderately complex tasks that require limited judgment relative to others within the occupation. Such a designation is inconsistent with a claim that the duties of the position are complex and unique as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems." For additional information regarding wage levels as defined by DOL, 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.

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To merit approval of the petition under this criterion, the record must establish that the imposition of a degree requirement by the Petitioner (or, in this case, by the client) is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. While a petitioner (or client) may believe or otherwise assert that a proffered position requires a specific 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 petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a Petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if 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").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A Petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: 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.* at 388.

In response to the RFE, the Petitioner submitted a copy of its job posting for the proffered position, posted on August 5, 2014, three weeks before the instant petition was filed. Thus, it appears that the requirements in the posting depict the Petitioner's preference rather than an established practice. That is, the Petitioner has not submitted documentary evidence to establish that it has ever employed an individual in the proffered position, let alone that it required individuals serving in such positions to possess a bachelor's degree in a specific specialty, or the equivalent. Without more, a single job posting placed by a company in business since [REDACTED] does not satisfy this criterion.

The Petitioner has not provided sufficient evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, the Petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent

The 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 Petitioner claims that the nature of the specific duties of the position in the context of its business operations 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. We reviewed the Petitioner's statements regarding the proffered position and its business operations. However, relative specialization and complexity have not been sufficiently developed by the Petitioner as an aspect of the proffered position. That is, the proposed duties have not been described with sufficient specificity to establish that they are more specialized and complex than other positions in the occupational category that are not usually associated with at least a bachelor's degree in a specific specialty, or its equivalent.

Furthermore, we 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 II (the second lowest of four assignable levels). Without further evidence, it is not credible that the Petitioner's proffered position is one with specialized and complex duties as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. As previously noted, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems." The Petitioner has submitted inadequate probative evidence to satisfy the criterion of the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

II. LCA

Next, we will discuss the Director's decision that the Petitioner does not comply with the LCA requirement.

A. The LCA and H-1B Visa Petition Process

In pertinent part, the Act defines an H-1B nonimmigrant worker as:

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

Section 101(a)(15)(H)(i)(b) of the Act (emphasis added).¹⁰

In turn, section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A), requires an employer to pay an H-1B worker the higher of either the prevailing wage for the occupational classification in the “area of employment” or the actual wage paid by the employer to other employees with similar experience and qualifications who are performing the same services.¹¹ *See* 20 C.F.R. § 655.731(a); *Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 422 & n.3 (4th Cir. 2005); *Michal Vojtisek-Lom & Adm’r Wage & Hour Div. v. Clean Air Tech. Int’l, Inc.*, No. 07-97, 2009 WL 2371236, at *8 (Dep’t of Labor Admin. Rev. Bd. July 30, 2009).

Implemented through the LCA certification process, section 212(n)(1) is intended to protect U.S. workers’ wages by eliminating economic incentives or advantages in hiring temporary foreign workers. *See, e.g.*, 65 Fed. Reg. 80,110, 80,110-111, 80,202 (2000). The LCA currently requires Petitioners to describe, *inter alia*, the number of workers sought, the pertinent visa classification for such workers, their job title and occupational classification, the prevailing wage, the actual rate of pay, and the place(s) of employment.

To promote the U.S. worker protection goals of a statutory and regulatory scheme that allocates responsibilities sequentially between the U.S. Department of Labor (DOL) and the U.S. Department of Homeland Security (DHS), a prospective employer must file an LCA and receive certification from DOL before an H-1B petition may be submitted to the U.S. Citizenship and Immigration Services (USCIS). 8 C.F.R. § 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.700(b)(2).¹² If an employer does

¹⁰ In accordance with section 1517 of title XV of the Homeland Security Act of 2002 (HSA), Pub. L. No. 107-296, 116 Stat. 2135, any reference to the Attorney General in a provision of the Act describing functions which were transferred from the Attorney General or other U.S. Department of Justice official to U.S. Department of Homeland Security (DHS) by the HSA “shall be deemed to refer to the Secretary” of Homeland Security. *See* 6 U.S.C. § 557 (2003) (codifying HSA, tit. XV, § 1517); 6 U.S.C. § 542 note; 8 U.S.C. § 1551 note.

¹¹ The prevailing wage may be determined based on the arithmetic mean of the wages of workers similarly employed in the area of intended employment. 20 C.F.R. § 655.731(a)(2)(ii).

¹² Upon receiving DOL’s certification, the prospective employer then submits the certified LCA to USCIS with an H-1B petition on behalf of a specific worker. 8 C.F.R. § 214.2(h)(2)(i)(A), (2)(i)(E), (4)(iii)(B)(1). DOL reviews LCAs “for completeness and obvious inaccuracies,” and will certify the LCA absent a determination that the application is

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not submit the LCA to USCIS in support of a new or amended H-1B petition, the process is incomplete and the LCA is not certified to the Secretary of Homeland Security. See section 101(a)(15)(H)(i)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.700(b); see also 56 Fed. Reg. 37,175, 37,177 (1991); 57 Fed. Reg. 1316, 1318 (1992) (discussing filing sequence).

In the event of a material change to the terms and conditions of employment specified in the original petition, the Petitioner must file an amended or new petition with USCIS with a corresponding LCA. 8 C.F.R. § 214.2(h)(2)(i)(E). Furthermore, Petitioners must “immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility” for H-1B status and, if they will continue to employ the beneficiary, file an amended petition. 8 C.F.R. § 214.2(h)(11)(i)(A).

A change in the place of employment of a beneficiary to a geographical area requiring a corresponding LCA be certified to DHS with respect to that beneficiary may affect eligibility for H-1B status and is, therefore, a material change for purposes of 8 C.F.R. § 214.2(h)(2)(i)(E) and (11)(i)(A). When there is a material change in the terms and conditions of employment, the petitioner must file an amended or new H-1B petition with the corresponding LCA. 8 C.F.R. § 214.2(h)(2)(i)(E). See also *Matter of Simeio Solutions*, 26 I&N Dec. 542 (AAO 2015).

B. Analysis

In this matter, the Petitioner claimed in both the Form I-129 and the certified LCA that the Beneficiary’s place of employment was located in [redacted] California [redacted] California Metropolitan Statistical Area).¹³ The Petitioner did not request other worksites and did not submit an itinerary.¹⁴ See 8 C.F.R. § 214.2(h)(2)(i)(B) (requiring an itinerary for services performed in more than one location).

incomplete or obviously inaccurate. Section 212(n)(1)(G)(ii) of the Act. In contrast, USCIS must determine whether the attestations and content of an LCA correspond to and support the H-1B visa petition, including the specific place of employment. 20 C.F.R. § 655.705(b); see generally 8 C.F.R. § 214.2(h)(4)(i)(B).

¹³ With certain limited exceptions, the applicable DOL regulations define the term “place of employment” as the worksite or physical location where the work actually is performed by the H-1B nonimmigrant. See 20 C.F.R. § 655.715. The Office of Management and Budget established Metropolitan Statistical Areas to provide nationally consistent geographic delineations for collecting, tabulating and publishing statistics. See 44 U.S.C. § 3504(e)(3); 31 U.S.C. § 1104(d); Exec. Order No. 10,253, 16 Fed. Reg. 5605 (June 11, 1951); 75 Fed. Reg. 37,246, 37,246-252 (2010) (discussing and defining, *inter alia*, Metropolitan Statistical Areas).

¹⁴ It must be noted for the record that the Petitioner has provided inconsistent information regarding the Beneficiary’s work site. For instance, on the Form I-129 (page 4), the Petitioner provided the following information:

Will the beneficiary work off-site? X No Yes

However, on the Form I-129 (page 19), the Petitioner indicated the following:

Part D. Off-Site Assignment of H-1B Beneficiaries

No X Yes a. The beneficiary of this petition will be assigned to work at an off-site location for all or part of the period for which H-1B classification is sought.

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Thereafter, in response to the RFE, the Petitioner claimed that it has a contract with [REDACTED] who in turn has a contract with [REDACTED] to complete a project located at [REDACTED] Wisconsin.¹⁵ With the response, the Petitioner submitted a new LCA that provided a new worksite – in [REDACTED] Wisconsin (WI Metropolitan Statistical Area) – as the Beneficiary’s place of employment.¹⁶ The worksite is located in a metropolitan statistical area differing from the worksite listed on the original petition.

A change in the terms and conditions of employment of a beneficiary which may affect eligibility under section 101(a)(15)(H) of the Act is a material change. *See* 8 C.F.R. § 214.2(h)(2)(i)(E); *see also id.* § 214.2(h)(11)(i)(A) (requiring that a Petitioner file an amended petition to notify USCIS of any material changes affecting eligibility of continued employment); *Matter of Simeio Solutions*, 26 I&N Dec. at 542.

Because section 212(n) of the Act ties the prevailing wage to the “area of employment,” a change in the Beneficiary’s place of employment to a geographical area not covered in the original LCA would be material for both the LCA and the Form I-129 visa petition, as such a change may affect eligibility under section 101(a)(15)(H) of the Act. *See, e.g.*, 20 C.F.R. § 655.735(f). If, for example, the prevailing wage is higher at the new place of employment, the Beneficiary’s eligibility for continued employment in H-1B status will depend on whether his or her wage for the work performed at the new location will be sufficient. As such, for an LCA to be effective and correspond to an H-1B petition, it must specify the Beneficiary’s place(s) of employment.¹⁷

Having materially changed the Beneficiary’s authorized place of employment to a geographical area not covered by the original LCA, the Petitioner was required to immediately notify USCIS and file an amended or new H-1B petition, along with a corresponding LCA certified by DOL, with both documents indicating the relevant change.¹⁸ 8 C.F.R. § 214.2(h)(2)(i)(E), (h)(11)(i)(A). By not

No explanation for this variance was provided. It is incumbent upon the Petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 592.

¹⁵ Notably, public records indicate that this address is the office address of [REDACTED]. Thus, it appears that [REDACTED] is the end-client.

¹⁶ The record here indicates that the new place of employment was not a short-term placement. *See generally* 20 C.F.R. §§ 655.715, 655.735. The Petitioner did not claim, and we do not find, that this new work location falls under a “non-worksites” location as described at 20 C.F.R. § 655.715 or a short-term placement or assignment as described at 20 C.F.R. § 655.7355.

¹⁷ A change in the beneficiary’s place of employment may impact other eligibility criteria, as well. For example, at the time of filing, the petitioner must have complied with the DOL posting requirements at 20 C.F.R. § 655.734. Additionally, if the beneficiary will be performing services in more than one location, the petitioner must submit an itinerary with the petition listing the dates and locations. 8 C.F.R. § 214.2(h)(2)(i)(B); *see also id.* § 103.2(b)(1).

¹⁸ Here the Petitioner submitted a new LCA certified for the Beneficiary’s place of employment in [REDACTED] WI in response to the RFE. This LCA was not previously certified to USCIS with respect to the Beneficiary and, therefore, it had to be submitted to USCIS as part of an amended or new petition before the Beneficiary would be permitted to begin

filing an amended petition with a new LCA, or by attempting to submit a preexisting LCA that has never been certified to USCIS with respect to a specific worker, a petitioner may impede efforts to verify wages and working conditions. Full compliance with the LCA and H-1B petition process, including adhering to the proper sequence of submissions to DOL and USCIS, is critical to the U.S. worker protection scheme established in the Act and necessary for H-1B visa petition approval.

III. EMPLOYER-EMPLOYEE

Finally, we will briefly address the issue of whether or not the Petitioner qualifies as a United States employer with standing to file the H-1B petition. As discussed above, the Petitioner has provided inconsistent information regarding the Beneficiary's work site. The record of proceeding lacks sufficient documentation evidencing what exactly the Beneficiary would do for the period of time requested or where exactly and for whom the Beneficiary would be providing services. Given this specific lack of evidence, the Petitioner has not established who has or will have actual control over the Beneficiary's work or duties, or the condition and scope of the Beneficiary's services. In other words, the Petitioner has not established whether it has made a bona fide offer of employment to the Beneficiary based on the evidence of record or that the Petitioner, or any other company which it may represent, will have and maintain an employer-employee relationship with the Beneficiary for the duration of the requested employment period. *See* 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer" and requiring the petitioner to engage the beneficiary to work such that it will have and maintain an employer-employee relationship with respect to the sponsored H-1B nonimmigrant worker). There is insufficient evidence detailing where the Beneficiary will work, the specific projects to be performed by the Beneficiary, or for which company the Beneficiary will ultimately perform these services. Therefore, the Director's decision is affirmed, and the appeal is dismissed for this additional reason.

IV. CONCLUSION AND ORDER

We may deny an application or petition that does not comply with the technical requirements of the law even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 145 (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of the enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1037, *aff'd*, 345 F.3d 683; *see also BDPCS, Inc. v. Fed. Communications Comm'n*, 351 F.3d 1177, 1183 (D.C. Cir. 2003) ("When an agency offers multiple grounds for a decision, we will affirm the agency so long as any

working in this place of employment. *See* 8 C.F.R. § 214.2(h)(2)(i)(E).

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one of the grounds is valid, unless it is demonstrated that the agency would not have acted on that basis if the alternative grounds were unavailable.”).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision.¹⁹ In visa petition proceedings, it is the petitioner’s burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 128. Here, that burden has not been met.

ORDER: The appeal is dismissed.

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¹⁹ Because these issues preclude approval of the petition, we will not address any of the additional deficiencies we have observed on appeal.