

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

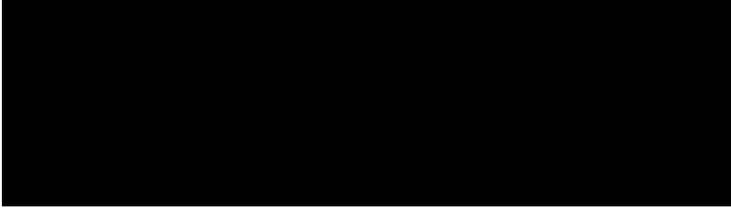
U.S. Department of Homeland Security
20 Mass. Ave. N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D1



FILE: EAC 06 182 52793 Office: VERMONT SERVICE CENTER Date: JAN 09 2008

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The 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.

The petitioner is a software consulting firm and seeks to employ the beneficiary as a programmer analyst. The petitioner, therefore, endeavors to classify the beneficiary 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 on August 7, 2006, concluding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's denial letter; (3) the director's request for evidence; (4) the petitioner's response to the request for evidence and supporting documentation; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

Section 214(i)(1) of the Immigration and Nationality Act (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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which 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 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, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular

position is so complex or unique that it can be performed only by an individual with a degree;

- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The term “employer” is defined at 8 C.F.R. § 214.2(h)(4)(ii):

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

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

Citizenship and Immigration Services (CIS) 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 proposed position.

According to the Form I-129, the petitioner indicated that in the position of programmer analyst, the beneficiary will “design and develop software applications.” In addition, in a letter of support dated May 24, 2006, the petitioner described the beneficiary's proposed position as the programmer analyst as follows:

- Perform Database installation, configuration, performance tuning, client/server connectivity, query optimization, and back-up recovery
- Design and develop Remote Database Monitoring and Performance Tuning tool
- Design and develop ETL (DTS) Tools for data migration and data analysis
- Design, develop and implement Disaster Recovery mechanism using Log Shipping
- Will be responsible for database recovery and backups
- Will be responsible for performance tuning, maintenance and support of Production Database Servers
- Design, develop and implement Reporting Services for SQL Server 2000 Database

The director determined that the petitioner had submitted insufficient evidence to process the petition and requested that the petitioner submit additional information and documentation in support of the petition. In part, the director requested a detailed description of the proffered position, including approximate percentages of time spent on each duty. The director also requested documentation regarding the nature, scope, and activity of the petitioner's business enterprise.

In the July 24, 2005 response to the director's request for evidence, counsel for the petitioner submitted the same job description previously submitted, and indicated that the beneficiary will be working on each duty 100 percent of the time. The petitioner also stated that it employed one individual in a similar position, and submitted the Form W-2 for that employee. The petitioner did not submit a copy of the employee's degree as requested by the director.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). As noted by the director, the petitioner failed to provide a detailed description of the proposed position as requested by the director. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The director denied the petition on August 7, 2006, concluding that the proposed position does not qualify as a specialty occupation position. The director also noted that the proffered position appears to qualify as a database administrator position in the Department of Labor's *Occupational Outlook Handbook (Handbook)*, and that the *Handbook* indicates that such positions do not require an individual to obtain a bachelor's degree in order to fill the position. The director also noted that the petitioner failed to provide evidence of whether the other programmer analyst employed by the petitioner has a bachelor's degree in a specific field of study or its equivalent.

On appeal, counsel states that the proffered position is a specialty occupation. Counsel reviews the *Handbook* entry for database administrators cited in the decision and contends that a bachelor's degree may not be required for some "low level computer-related positions;" however, he states that most software development jobs today do require a bachelor's degree. Counsel also submits job advertisements for computer-related jobs that require a bachelor's degree. Counsel also asserts that the other programmer analyst employed by the petitioner has obtained a bachelor's degree in engineering. Counsel contends that the director erred in denying the petition, and that the proposed position qualifies for classification as a specialty occupation.

Additionally, counsel refers to the Department of Labor's *Dictionary of Occupational Titles (DOT)* in support of his assertion that the proffered position is a specialty occupation because it states that the position of a software engineer and database administrator is listed with the SVP of 8, and the position of programmer analyst is listed with the SVP of 7. The *DOT* is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does

not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require. For this reason, the *DOT* does not support counsel's contention.

The evidence of record establishes that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary.¹ See 8 C.F.R. § 214.2(h)(4)(ii). The petition may not be approved, however, as the petition does not establish that the beneficiary will be employed in a specialty occupation.

According to the May 25, 2006 support letter, the petitioner states that it is a "software consulting firm that provides system solutions to meet the clients' full range of client/service requirements." The AAO notes that, at page 2 of the LCA, in the field entitled "Information relating to Work Location for the H-1B or H-1B1 Nonimmigrants," the petitioner stated the work location for the beneficiary as Dallas, Texas; however, the petitioner's address is Irving, Texas. Thus, it appears from the record that while the beneficiary will be employed by the petitioner, the petitioner will contract her services to a third party in Dallas, Texas where the beneficiary will provide services.

The evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at work locations to perform services established by contractual agreements for third-party companies.

The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proposed position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proposed position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services.

As the record does not contain any documentation that establishes the specific duties the beneficiary would perform under contract for any of the petitioner's clients, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies for classification as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(1).

In determining whether a proposed position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly

¹ See also Memorandum from Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, *Interpretation of the Term "Itinerary" Found in 8 C.F.R. 214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification*, HQ 70/6.2.8 (December 29, 1995).

specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

While the record does not establish the location where the beneficiary will provide services, or the services to be provided at that location, a review of the duties of the proposed position finds them closely aligned to the responsibilities of two occupational groupings discussed in the *Handbook*: (1) computer scientists and database administrators and (2) computer programmers.

In its discussion of the duties of computer scientists and database administrators, the 2006-2007 edition of the *Handbook* states the following:

Computer scientists work as theorists, researchers, or inventors. Their jobs are distinguished by the higher level of theoretical expertise and innovation they apply to complex problems and the creation or application of new technology. Those employed by academic institutions work in areas ranging from complexity theory to hardware to programming-language design. Some work on multidisciplinary projects, such as developing and advancing uses of virtual reality, extending human-computer interaction, or designing robots. Their counterparts in private industry work in areas such as applying theory; developing specialized languages or information technologies; or designing programming tools, knowledge-based systems, or even computer games.

With the Internet and electronic business generating large volumes of data, there is a growing need to be able to store, manage, and extract data effectively. *Database administrators* work with database management systems software and determine ways to organize and store data. They identify user requirements, set up computer databases, and test and coordinate modifications to the computer database systems. An organization's database administrator ensures the performance of the system, understands the platform on which the database runs, and adds new users to the system. Because they also may design and implement system security, database administrators often plan and coordinate security measures. With the volume of sensitive data generated every second growing rapidly, data integrity, backup systems, and database security have become increasingly important aspects of the job of database administrators.

Because networks are configured in many ways, *network systems and data communications analysts* are needed to design, test, and evaluate systems such as local area networks (LANs), wide area networks (WANs), the Internet, intranets, and other data communications systems. Systems can range from a connection between two offices in the same building to globally distributed networks, voice mail, and e-mail systems of a multinational organization. Network systems and data communications analysts perform network modeling, analysis, and planning; they also may research related products and make necessary hardware and software recommendations. *Telecommunications specialists* focus on the interaction between computer and communications equipment. These workers design voice and data communication systems, supervise the installation

of the systems, and provide maintenance and other services to clients after the systems are installed.

The *Handbook* reports the following educational requirement for individuals seeking employment in this field:

Rapidly changing technology requires an increasing level of skill and education on the part of employees. Companies look for professionals with an ever-broader background and range of skills, including not only technical knowledge, but also communication and other interpersonal skills. While there is no universally accepted way to prepare for a job as a network systems analyst, computer scientist, or database administrator, most employers place a premium on some formal college education. A bachelor's degree is a prerequisite for many jobs; however, some jobs may require only a 2-year degree. Relevant work experience also is very important. For more technically complex jobs, persons with graduate degrees are preferred.

The *Handbook* notes that there is no universally accepted way to prepare for a position in this occupational grouping, but that most employers place a premium on some formal college education. While a bachelor's degree is a prerequisite for many positions, others may require only a two-year degree. For more technically complex positions, persons with graduate degrees are preferred. Many employers seek applicants who have a bachelor's degree in computer science, information science or management information systems (MIS). MIS programs are usually part of a business school or college and differ considerably from computer science programs, emphasizing business and management-oriented course work and business computing courses. Employers are increasingly seeking individuals with a master's degree in business administration with a concentration in information systems as more firms move their business to the Internet. The educational requirements for these positions vary greatly, depending on the needs of a particular position. A bachelor's degree in a specific specialty, however, is not a minimum requirement for entry into the occupation. As the petitioner did not submit a job description from the location where the beneficiary will perform services, it cannot be determined that performance of those duties would require a bachelor's degree in a specific field.

In its discussion of the duties of computer programmers, the *Handbook* states the following:

Computer programmers write, test, and maintain the detailed instructions, called programs, that computers must follow to perform their functions. Programmers also conceive, design, and test logical structures for solving problems by computer. Many technical innovations in programming—advanced computing technologies and sophisticated new languages and programming tools—have redefined the role of a programmer and elevated much of the programming work done today. Job titles and descriptions may vary, depending on the organization. In this occupational statement, *computer programmers* are individuals whose main job function is programming; this group has a wide range of responsibilities and educational backgrounds.

Computer programs tell the computer what to do—which information to identify and access, how to process it, and what equipment to use. Programs vary widely depending on the type of information to be accessed or generated. For example, the instructions involved in updating financial records are very different from those required to duplicate conditions on an aircraft for pilots training in a flight simulator. Although simple programs can be written in a few hours, programs that use complex mathematical formulas whose solutions can only be approximated or that draw data from many existing systems may require more than a year of work. In most cases, several programmers work together as a team under a senior programmer’s supervision.

Programmers write programs according to the specifications determined primarily by computer software engineers and systems analysts. (Separate statements on computer software engineers and on computer systems analysts appear elsewhere in the *Handbook*.) After the design process is complete, it is the job of the programmer to convert that design into a logical series of instructions that the computer can follow. The programmer codes these instructions in a conventional programming language such as COBOL; an artificial intelligence language such as Prolog; or one of the most advanced object-oriented languages, such as Java, C++, or ACTOR. Different programming languages are used depending on the purpose of the program. COBOL, for example, is commonly used for business applications, whereas Fortran (short for “formula translation”) is used in science and engineering. C++ is widely used for both scientific and business applications. Extensible Markup Language (XML) has become a popular programming tool for Web programmers, along with J2EE (Java 2 Platform). Programmers generally know more than one programming language and, because many languages are similar, they often can learn new languages relatively easily. In practice, programmers often are referred to by the language they know, such as Java programmers, or by the type of function they perform or environment in which they work—for example, database programmers, mainframe programmers, or Web programmers.

Many programmers update, repair, modify, and expand existing programs. When making changes to a section of code, called a routine, programmers need to make other users aware of the task that the routine is to perform. They do this by inserting comments in the coded instructions so that others can understand the program. Many programmers use computer-assisted software engineering (CASE) tools to automate much of the coding process. These tools enable a programmer to concentrate on writing the unique parts of the program, because the tools automate various pieces of the program being built. CASE tools generate whole sections of code automatically, rather than line by line. Programmers also use libraries of basic code that can be modified or customized for a specific application. This approach yields more reliable and consistent programs and increases programmers’ productivity by eliminating some routine steps.

Programmers test a program by running it to ensure that the instructions are correct and that the program produces the desired outcome. If errors do occur, the programmer must make the appropriate change and recheck the program until it produces the correct

results. This process is called testing and debugging. Programmers may continue to fix these problems throughout the life of a program. Programmers working in a mainframe environment, which involves a large centralized computer, may prepare instructions for a computer operator who will run the program. (A separate statement on computer operators appears elsewhere in the *Handbook*.) Programmers also may contribute to a manual for persons who will be using the program.

The *Handbook* reports the following educational requirement for individuals seeking employment in this field:

Although there are many training paths available for programmers, mainly because employers' needs are so varied, the level of education and experience employers seek has been rising due to the growing number of qualified applicants and the specialization involved with most programming tasks. Bachelor's degrees are commonly required, although some programmers may qualify for certain jobs with 2-year degrees or certificates. The associate degree is a widely used entry-level credential for prospective computer programmers. Most community colleges and many independent technical institutes and proprietary schools offer an associate degree in computer science or a related information technology field.

These findings do not support a finding that a bachelor's degree is normally required for entry into this occupation. The *Handbook* states that educational requirements vary, and that a range of degrees may be acceptable for entry into the position. As noted previously, CIS interprets the term "degree" to mean not just any degree in any field, but one in a specific specialty that is directly related to the proposed position. A bachelor's degree in a specific specialty, however, is not a minimum requirement for entry into this occupation. As the petitioner did not submit a job description from the location where the beneficiary will perform services, it cannot be determined that performance of those duties would require a bachelor's degree in a specific field. Therefore, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Nor does the proposed position qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations.

The AAO has reviewed the eight job postings submitted by counsel. Counsel, however, has failed to consider the specific requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for establishing a baccalaureate degree or higher as an industry norm. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in parallel positions among similar organizations.

The record fails to establish that any of these job postings come from companies that are "similar" to the petitioner. Several of the job postings are for larger companies that do not compare to the petitioner's firm that has five employees, two of which are programmer analysts, and a gross annual income of \$400,000. Some advertisements do not give details of the companies and thus it is impossible to determine if the companies are similar to the petitioner. There is insufficient evidence to establish that the advertisers are

similar to the petitioner or to the third party location in size, scope, and scale of operations, business efforts, and expenditures. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Moreover, even if the AAO were to find that these companies were similar to the petitioner, the job postings are too few to establish an industry-wide standard.

Finally, the information regarding the duties and responsibilities of the advertised positions is general and does not support a meaningful comparison of their actual performance and specialty knowledge requirements to those of the proposed position. Further, the record does not establish the actual duties to be performed by the beneficiary. Thus, while relevant to this proceeding, the job postings submitted by counsel are insufficient to establish the petitioner's degree requirement as an industry norm in parallel positions among similar organizations. The petitioner has not satisfied the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO also concludes that the record does not establish that the proposed position is a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a showing that the position is so complex or unique that it can only be performed by an individual with at least a bachelor's degree in a specific specialty. The AAO finds no evidence that would support such a finding, as the position proposed in the petition is very similar to the positions discussed above as described in the *Handbook*. Although counsel for the petitioner asserts that the petitioner requires an employee with a bachelor's degree to fill the position of programmer analyst, the petitioner did not submit any documentation corroborating this statement. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Accordingly, the petitioner has not established its proposed position as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet this criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In response to the director's request for evidence, the petitioner stated that it employed one other programmer analyst. On appeal, the petitioner submitted a bachelor of engineering degree awarded to [REDACTED] from Kwempu University in India. The petitioner also submitted four employment letters on behalf of [REDACTED]. The documentation does not establish that the employee's foreign credentials are the equivalent of a bachelor of engineering obtained from a U.S. institution. Accordingly, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires a demonstration that 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.

To the extent that they are depicted in the record, the duties of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge usually associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Again, there is no information in the record to support a finding that the proposed position is more complex or unique than similar positions in other, similar organizations. As the *Handbook* reveals, such organizations do not normally impose a bachelor's degree requirement. The *Handbook* does not indicate any usual association between the type of position here in question and at least a bachelor's degree in a specific specialty. Further, the evidence of record does not demonstrate that specific duties to be performed by the beneficiary in the context of the petitioner's business operations or that of its clients, possess the requisite specialization and complexity. Therefore, the evidence does not establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO finds that the duties proposed by the petitioner involve primarily administrative functions rather than analytical or programming ones. To the extent that the beneficiary may be working in-house, the petitioner has not demonstrated that its local area network (LAN) is particularly complex. The software applications with which the beneficiary would work are primarily commercial, off-the-shelf programs and are not unique or complex. For example, the operating systems used on the petitioner's workstation is ETL Tools and SQL Server which are not particularly complex. Thus, the petitioner has not established that the proposed position requires an individual to have obtained a bachelor's degree in a computer-related field.

As previously noted, not all systems analyst positions require a bachelor's degree, as some require only a two-year degree. Neither the petitioner's job description, nor any other evidence of record develops the position or the nature of its duties in sufficient detail to establish either that the position is unique from or more complex than systems analysis positions not requiring at least a bachelor's degree in a specific specialty, or that its specific duties are more specialized and complex than systems analyst positions not requiring a degree in a specific specialty. The petitioner failed to submit a job description from the entity where the beneficiary will perform services. Thus, the proposed position does not qualify as a specialty occupation under the second prong of the second criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), nor does it qualify under the fourth criterion of that regulation.

Beyond the decision of the director, the petitioner has not submitted an itinerary of employment. Pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), employers must submit an itinerary with the dates and locations of employment in such situations. While the Aytes memorandum cited at footnote 1 broadly interprets the term "itinerary," it provides CIS the discretion to require that the petitioner submit the dates and locations of the proposed employment. As the evidence contained in the record at the time the petition was filed did not establish that the petitioner had three years of work for the beneficiary to perform, the director should have exercised his discretion to require an itinerary of employment.²

² As noted by Assistant Commissioner Aytes in the cited 1995 memorandum, "[t]he purpose of this particular regulation is to [e]nsure that alien beneficiaries accorded H status have an actual job offer and

The record contains no contracts between the petitioner and a third party located in Dallas, Texas, and no work orders with the beneficiary's itinerary. Absent such information, the petitioner has not established that it has three years' worth of H-1B-level work for the beneficiary to perform. The evidence contained in the record does not satisfy 8 C.F.R. § 214.2(h)(2)(i)(B) as it does not cover the entire period of the beneficiary's employment by the petitioner. Thus, the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B). For this additional reason, the petition may not be approved.

The proposed position does not qualify for classification as a specialty occupation under any of the four criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4), and the petition was properly denied. The position in this petition is not a specialty occupation, so the beneficiary's qualifications to perform the duties of a specialty occupation are inconsequential. The petitioner also failed to submit an itinerary of employment. Accordingly, the AAO will not disturb the director's denial of the petition.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO 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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. **The petitioner has not sustained that burden.**

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

are not coming to the United States for speculative employment.”