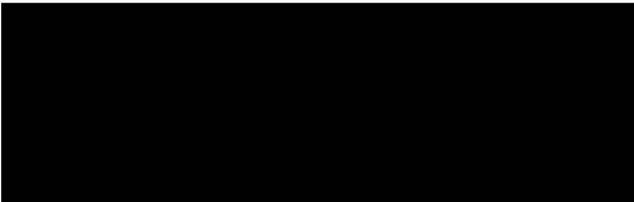




U.S. Citizenship  
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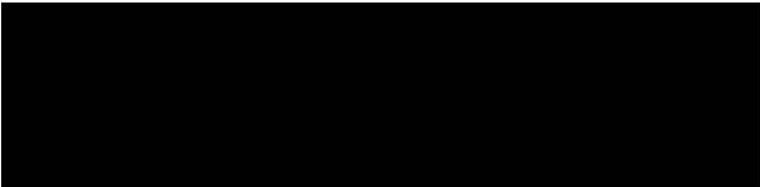


FILE: WAC 08 147 53208 Office: CALIFORNIA SERVICE CENTER Date: **DEC 04 2009**

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center 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 corporation that provides consulting, technical support, and services to the Information Technology (IT) industry. To employ the beneficiary as a computer systems analyst, the petitioner endeavors to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director's decision indicates that she denied the petition based upon her adverse determinations on three issues, namely: (1) whether the petitioner is qualified to file an H-1B petition, that is, as either (a) a U.S. employer as defined at 8 C.F.R. § 214.2(h)(4)(ii), or (b) a U.S. agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F); (2) whether the evidence of record is sufficient to establish that the computer systems analyst position for which the petition is filed is a specialty occupation position; and (c) "whether or not a material change has occurred since the petition was filed."

Based upon its review of the entire record of proceedings, as supplemented by this appeal, the AAO finds that the director was correct to deny the petition on each of the first two grounds that she cited in her decision, namely, the petitioner's failures to establish (1) its qualification to file this H-1B petition as either a U.S. employer or agent, and (2) the proffered position's qualification as a specialty occupation. The AAO finds that the director's discussion with regard to "material change" does not articulate a separate ground for denial. Rather, it presents aspects of the record that reinforce the correctness of the director's determination that the petitioner has not established that the proffered position is a specialty occupation.

While fully affirming the director's determination on the petitioner's standing to file this petition, the AAO will further address only the specialty occupation basis of the director's decision, as specialty occupation status is ultimately paramount to establishing eligibility for H-1B nonimmigrant classification, regardless of which entity should have filed the petition.

The AAO analyzes the specialty occupation issue according to the statutory and regulatory framework below.

**Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)**, provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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

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

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a 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, the position must meet also one of the following criteria:

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R.

§ 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5<sup>th</sup> Cir. 2000) (hereinafter referred to as *Defensor*). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

Based upon its review of the entire record including the matters submitted on appeal, the AAO concludes that the petitioner failed to establish that the beneficiary would perform specialty occupation services for the period sought in the petition. As will be discussed below, the AAO bases this conclusion on its evaluation of the evidence of record related to the proposed duties and the knowledge required to perform them. The AAO finds this evidence insufficient to satisfy any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), that is, as either (a) a particular position for which the normal minimum requirement for entry would be at least a bachelor’s degree, or its equivalent, in a specific specialty (criterion 1); (b) one parallel to those for which organizations in the petitioner’s industry that are similar to the petitioner commonly require at least a bachelor’s degree, or its equivalent, in a specific specialty (the first alternative prong of criterion 2); (c) a particular position shown to be so complex or unique that it can be performed only by an individual with a degree (the second alternative prong of criterion 2); (d) one for which the employer normally requires at least a bachelor’s degree, or its equivalent, in a specific specialty (criterion 3); or (e) one with specific duties so specialized and complex that their performance requires knowledge usually associated with the attainment at least a bachelor’s degree in a specific specialty (criterion 4).

The AAO notes that neither on appeal nor anywhere else in the record of proceeding does the petitioner specifically address the regulation at 8 C.F.R. 214.2(h)(4)(iii)(A) or any of its constituent criterion. However, the petitioner tacitly asserts that the proffered position meets the first criterion of 8 C.F.R. 214.2(h)(4)(iii)(A), as a position for which a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry. For example, the petitioner’s letter in response to the service center’s request for additional evidence (RFE) includes the following statements:

We unequivocally state that the position of a System Analyst is a professional one and that the performance of [its] duties require an individual with education or experience in the field of Computer Science, Engineering or related field. . . .

The [proffered] position parallels the position described in the Dictionary of Occupational Titles under code number 030.167-014 with a standard vocational

preparation of 7, thereby justifying our requirement for a Bachelor's Degree. The Occupational Outlook Handbook describes a bachelor's degree as a minimum requirement for this position. Therefore, our requirement for a bachelor's degree in Science, Computer Science, Engineering or related field is well justified.

The AAO finds that the *Dictionary of Occupational Titles (DOT)* does not support the assertion that assignment of an SVP rating of 7 is indicative of a specialty occupation. This is obvious upon reading Section II of the *DOT's* Appendix C, Components of the Definition Trailer, which addresses the Specialized Vocational Preparation (SVP) rating system.<sup>1</sup> The section reads:

## II. SPECIFIC VOCATIONAL PREPARATION (SVP)

Specific Vocational Preparation is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.

This training may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.

Specific vocational training includes training given in any of the following circumstances:

- a. Vocational education (high school; commercial or shop training; technical school; art school; and that part of college training which is organized around a specific vocational objective);
- b. Apprenticeship training (for apprenticeable jobs only);
- c. In-plant training (organized classroom study provided by an employer);
- d. On-the-job training (serving as learner or trainee on the job under the instruction of a qualified worker);
- e. Essential experience in other jobs (serving in less responsible jobs which lead to the higher grade job or serving in other jobs which qualify).

The following is an explanation of the various levels of specific vocational preparation:

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<sup>1</sup> The Appendix's Internet site is <http://www.oalj.dol.gov/PUBLIC/DOT/REFERENCES/DOTAPPC.HTM>.

Level	Time
1	Short demonstration only
2	Anything beyond short demonstration up to and including 1 month
3	Over 1 month up to and including 3 months
4	Over 3 months up to and including 6 months
5	Over 6 months up to and including 1 year
6	Over 1 year up to and including 2 years
7	Over 2 years up to and including 4 years
8	Over 4 years up to and including 10 years
9	Over 10 years

Note: The levels of this scale are mutually exclusive and do not overlap.

In addition, contrary to the petitioner's statement, the Department of Labor's *Occupational Outlook Handbook (Handbook)* does not "describe a bachelor's degree as a minimum requirement for this position."<sup>2</sup> The 2008-2009 edition of the *Handbook* devotes a chapter exclusively to Computer Systems Analysts.

The information on educational requirements in the *Handbook's* "Computer Systems Analysts" chapter indicates a bachelor's or higher degree in computer science, information systems, or management information systems is a general preference, but not an occupational requirement, among employers of computer systems analysts. That this occupational category accommodates a wide spectrum of educational credentials is reflected in the following paragraph that opens the "Training, Other Qualifications, and Advancement" section of the *Handbook's* "Computer Systems Analysts" chapter:

Training requirements for computer systems analysts vary depending on the job, but many employers prefer applicants who have a bachelor's degree. Relevant work experience also is very important. Advancement opportunities are good for those with the necessary skills and experience.

The AAO notes that the paragraph's statement that "many employers prefer applicant's who have a bachelor's degree" is not indicative of a pervasive requirement for a specific major or academic concentration. The *Handbook's* observation of a preference of "many employers" is not evidence that systems analysts positions normally require a bachelor's degree level of knowledge in a specific

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<sup>2</sup> The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. All references are to the 2008-2009 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

specialty. The “Education and Training” subsection of the *Handbook’s* “Computer Systems Analyst” chapter confirms this fact, as it states:

*Education and Training.* When hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor’s degree. For more technically complex jobs, people with graduate degrees are preferred.

The level and type of education that employers require reflects changes in technology. Employers often scramble to find workers capable of implementing the newest technologies. Workers with formal education or experience in information security, for example, are currently in demand because of the growing use of computer networks, which must be protected from threats.

For jobs in a technical or scientific environment, employers often seek applicants who have at least a bachelor’s degree in a technical field, such as computer science, information science, applied mathematics, engineering, or the physical sciences. For jobs in a business environment, employers often seek applicants with at least a bachelor’s degree in a business-related field such as management information systems (MIS). Increasingly, employers are seeking individuals who have a master’s degree in business administration (MBA) with a concentration in information systems.

Despite the preference for technical degrees, however, people who have degrees in other majors may find employment as systems analysts if they also have technical skills. Courses in computer science or related subjects combined with practical experience can qualify people for some jobs in the occupation.

Employers generally look for people with expertise relevant to the job. For example, systems analysts who wish to work for a bank should have some expertise in finance, and systems analysts who wish to work for a hospital should have some knowledge of health management.

Technological advances come so rapidly in the computer field that continuous study is necessary to remain competitive. Employers, hardware and software vendors, colleges and universities, and private training institutions offer continuing education to help workers attain the latest skills. Additional training may come from professional development seminars offered by professional computing societies.

The *Handbook’s* “Computer Systems Analysts” chapter’s comments with regard to educational requirements - that employers prefer applicants with a bachelor’s degree and often seek applicants who have at least a bachelor’s degree in a technical field – is authoritative evidence that a bachelor’s degree or higher in a specific specialty is not the norm for hiring systems analysts. In light of this occupational context, it is incumbent on the petitioner to provide sufficient evidence to establish that

the particular position that it proffers here would necessitate systems analyst services at a level requiring the theoretical and practical application of at least a bachelor's degree level of knowledge in a computer-related specialty. This the petitioner has failed to do. In this regard, the AAO acknowledges that the petitioner's submissions contain a multitude of technical terms and acronyms. However, they indicate no more than that the position so described would involve the application of specialized IT and computer-related knowledge. However, the type and level of education required to attain such knowledge is not self-evident, and it is not conveyed by the submissions' technical language or any other aspect of the record.

The record's descriptions of the proposed duties and responsibilities and the documents submitted regarding the Sense Expert project asserted as the beneficiary's work assignment are replete with IT technical terms and terms-of-art indicating that systems analyst work on the project would generally require the application of some degree of specialized knowledge of the IT and computer industry. However, neither those portions of the record nor any other evidence of record establishes a nexus between the proffered position and the necessity for any particular level of education in any particular specialty, or its equivalent, at an accredited United States college or university. While the petitioner and counsel assert that the proffered position requires at least a bachelor's degree in Computer Science, Engineering, or a related field, they provide no documentary evidence to support that claim. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The evidence of record does not distinguish the proffered position from systems analyst positions that do not require at least a bachelor's degree, or the equivalent, in a specific specialty. Therefore, as the petitioner has not established that the particular position proffered here is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit

only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Also, there are no submissions from professional associations, individuals, or firms in the petitioner's industry.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." First, the evidence of record does not refute the indication in the *Handbook's* "Computer Systems Analysts" chapter that there is a wide spectrum of educational credentials acceptable for systems analyst positions, including degrees not in a specific specialty closely related to computer systems analysis. Second, the record of proceeding does not contain evidence distinguishing the proffered position as unique from or more complex than systems analysts positions that can be performed by persons without a specialty degree or its equivalent.

As the record has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).<sup>3</sup>

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The evidence of record does not convey that the duties of the proffered

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<sup>3</sup> To satisfy this criterion, the record must establish that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty 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.

position are more specialized and complex than those of systems analyst positions not usually associated with the attainment of a baccalaureate or higher degree.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed. As this adverse determination of the specialty occupation issue is dispositive of the appeal, the AAO will not further address its affirmance of the director's denial of the petition for the petitioner's failure to establish its standing to file this petition as either a United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii), or (b) a U.S. agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F).

Beyond the decision of the director, and aside from the petitioner's failure to establish the proffered position as a specialty occupation, the AAO finds that the petitioner has failed to establish that the beneficiary has the requisite credentials to qualify to perform the duties of a specialty occupation requiring the degree or degree equivalency asserted by the petitioner, namely, at least a bachelor's degree in Computer Science, Engineering, or a related field. For this reason also, the petition must be denied.

The petitioner erroneously relies on the "Academic Equivalency Evaluation" provided by Excel Educational Evaluators, which opines, without competence to do so, that the beneficiary has attained "the equivalent of a Bachelor of Science Degree in Computer Information Systems from an accredited US Institution of higher education." For the computer coursework basis of his evaluation, the author cites to the beneficiary's Post Graduate Diplomas in Computer Applications and in Software Technology, both from Qmax Technologies (QT) in India. However, the evaluator neither asserts nor provides documentary evidence that QT is accredited in India as an academic institution of higher learning. Therefore, there is no evidentiary basis for his suggestion that the beneficiary's coursework is equivalent to coursework at an accredited U.S. institution of higher learning. Based upon the wording of the evaluation (which identifies Osmania University but not QT as an accredited institution of higher learning, and which, artfully, describes the QT course work as "analogous," but not equivalent to, coursework at an accredited U.S. institution of higher learning), and the lack of evidence that the QT coursework consisted of more than vocational training, the record of proceeding indicates that the QT component of the beneficiary's computer information systems background is training. The controlling regulations on beneficiary qualifications are at 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D). Because the record does not establish that the author of the so-called educational evaluation is, in the language of 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), "an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience," he is not competent to render an educational-equivalency of training for the purposes of establishing a beneficiary's credentials under the H-1B program. Aside from the competency issue, the content of the evaluation merits no weight, because the evaluator failed to explain and document the basis for his conclusion that QT coursework is the academic equivalent of coursework at an accredited institution of higher learning.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Further, USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

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 appeal will be dismissed, and the petition will be denied. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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