

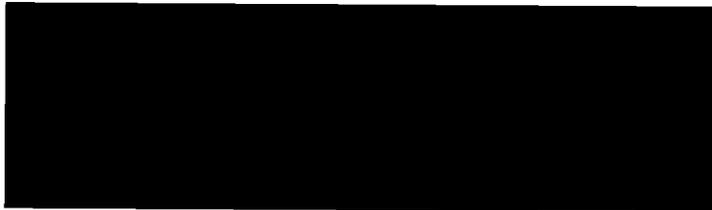
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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FILE: EAC 08 180 50533 Office: VERMONT SERVICE CENTER

Date: **APR 30 2010**

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS: This is the decision 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 or reopen, 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. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a software design and development company. It seeks to employ the beneficiary as a programmer analyst and to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the following grounds: (1) the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation; and (2) the petitioner failed to submit a credible itinerary.

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

In the petition submitted on June 16, 2008, the petitioner stated it has over 450 employees and a gross annual income of \$48 million. The petitioner indicated that it wished to employ the beneficiary as a programmer analyst from November 1, 2008 to October 31, 2011 at an annual salary of \$51,000.

The support letter states that the person in the proffered position will be responsible for performing the following duties under the supervision of the Team Leader:

- Analyze, design, develop, implement, integrate and maintain client server and web related eCommerce applications including Internet, Intranet, extranet and internal business applications including automation of back end systems using knowledge of eCommerce principles involving business models, Internet marketing, online transactions, ethics and security, Entity-Relationship Model and Business Rules; Object-Oriented Modeling; Logical and Physical Database Design & Relational Models; Multiple-Table Queries, Functional Dependencies and Normalization, client/Server and Middleware Architecture, Transaction Processing: Concurrency Control and Recovery Database Security and Authorization, Data Warehousing and Data Mining;
- Create programming to monitor and report statistics utilizing automatic data capture technologies and control structures; Sequence, Repetition, and Selection, algorithms, Program Components: Variables, Constants, assignment statements, and arithmetic operations, Built-In functions and random number generation, Value-Returning functions and program-defined functions, Void functions and passing variables, Pseudo code and flowcharts, Character and string manipulation, Object-Oriented programming and the class definition, Sequential access files: writing and reading, Arrays: One and two dimensional;
- Research web technologies and analyze business requirements and ensure that underlying application technology meets both short-term and long-term business needs and that system designs can adapt to emerging business and technology demands;
- Manage the development infrastructure, change control and application security utilizing knowledge of Information Resource Management;

- Testing and documenting all code changes;
- Communicating with project managers regarding progress and working with other developers, suppliers, contractors or other infrastructure resources;
- Working with assigned development team to write and maintain software life-cycle documentation such as user guides, systems administration manuals, maintenance manuals, and other related materials; and
- Perform and provide end-user support, systems and business analysis, documenting business processes and systems requirements, systems configuration and systems testing.

The petitioner describes the minimum degree requirements for the proffered position as follows:

To perform the above mentioned duties, a strong background in courses taught in Computers, Electronics, Science, Mathematics, Financial, Engineering or equivalent is required because the software professional must understand the system in order to analyze the problem, and convert into its logical mathematical models before writing it in programming languages taught in computer courses. Beside [sic], the software professional is also required to create test plans and test data both for unit or system testing, debug programs and applications, and assist in training end users upon satisfactory completion of design and development work. *For this position of Programmer Analyst, we require, at minimum, a Bachelor['s] Degree in Computer Science or equivalent combination of education and experience in closely related field and training and proficiency in software programming languages.*

The Form I-129 indicates that the beneficiary will work at the petitioner's offices in Newark, DE. The submitted Labor Condition Application (LCA) was filed for a programmer analyst to work in Newark, DE from November 1, 2008 to October 31, 2011. The LCA lists a prevailing wage of \$50,939 for Newark, DE. According to the Form I-129 and his earnings statements submitted with the petition, the beneficiary currently resides in Gaithersburg, MD and has been working for the petitioner based on a previously approved H-1B petition, with validity dates of November 1, 2005 to October 31, 2008.

The petitioner submitted the beneficiary's education documents, resume, and reference letters, indicating that he has a foreign degree. The education evaluation submitted indicates that the beneficiary's education is equivalent to a U.S. bachelor's degree in computer information systems.

On March 9, 2009, the director issued an RFE stating, in part, that the evidence of record is not sufficient to demonstrate that a specialty occupation exists. The petitioner was advised to submit additional evidence establishing that the beneficiary will perform the proffered duties, an itinerary of where the beneficiary will work, copies of contracts between the petitioner and the end client(s), and a clarification of the beneficiary's assignment with any end user client(s).

The petitioner responded, in pertinent part, as follows:

[A]ttached, as discussed below in response to item 4, is proof that the beneficiary is currently employed in qualifying work at an end client location. That not only justifies

an approval for the duration of this assignment, plus at least one year for likely extension, but also for the full three years requested based on the reasonable expectation that we will follow agency guidance and file new LCAs before moving to other qualifying work, as we have done consistently. . . .

* * *

Apart from the current assignment, which we have documented per item 4 below, *we do not know where the beneficiary will go next*. As stated, extensions are quite common, so we cannot begin to place the worker in the following assignment until we receive clearer confirmation from the current end user that the assignment will not be extended. . . . Again, we will file a new LCA before moving the worker to a new assignment. . . .

* * *

[W]e submit a detailed end client letter as requested for the consultant's current assignment, signed by someone in management who can be contacted for confirmation, with currently scheduled end date and mention of the likelihood of extension. . . .

We have supplied the contract with our immediate client, but not our client's contract with its client or further down any chain of contracting to the end client. Our clients consider these contracts confidential and generally will not share them with us. We do not believe those documents are important to your analysis, as the end client letters are complete concerning the duties and location, and you can confirm this information as necessary with the end client contact identified. . . .

[F]or consultants for whom we filed to extend existing H-1B with our company, we filed this LCA with the petition but are supplying another copy now, and we are supplying for those consultants an LCA also for any location to which we have moved them since filing the I-129. For consultants who at time of I-129 filing were in OPT status . . . we filed with the I-129 an LCA for our Delaware headquarters (not knowing for sure where they would be by October 1, 2008 when H-1B requirements would take effect and planning to follow our normal past practice of filing an LCA for their current location immediately upon H-1B approval), and we are in this response supplying an LCA for the current location, now that we understand that you are newly insisting on a specific location.

* * *

[T]he end client identifies and manages the specific technology project to which our consultant is assigned at the end client location.

* * *

[T]he end client identifies and manages the specific technology project and assigns specific tasks to the consultant. We provide support through computers, training, backup expertise, benefits, pay, administration, etc. . . .

[Emphasis added.]

In response to the RFE, the petitioner included a signed letter from [REDACTED]. It is not clear for which company [REDACTED] works as the letter is not on letterhead, however, as stated above, the petitioner alleges that this letter is from the petitioner's end client. The undated letter is addressed "To Whom It May Concern" and indicates that the beneficiary is currently working for yet another company called HP Financial Services in Murray Hill, NJ. [REDACTED] states, "[the beneficiary] is an employee of [the petitioner] working as a contractor for our direct client at this location." Therefore, it appears that the petitioner has contracted the beneficiary out to the company that employs [REDACTED] which in turn has contracted the beneficiary out to HP Financial Services in Murray Hill, NJ. In other words, the petitioner is a contractor. The letter further states that the beneficiary will work on a BizCast Invoice Management Project and that the project's duration is from February 1, 2009 to the September 30, 2009, or eight months. This conflicts with the information provided in the Form I-129 and the LCA that the beneficiary would be employed at the petitioner's offices in Newark, DE for the duration of the petition. 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). No contracts were provided to support the information provided in the undated letter. Moreover, the information provided in this letter does not indicate where the beneficiary would be employed for the duration of the petition. 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)).

In response to the RFE, the petitioner also included a new certified LCA for a programmer analyst to work in New Providence, NJ. This LCA was certified on March 26, 2009, after the date the petition was filed.

The director denied the petition on May 12, 2009.

On appeal, counsel argues that:

Historically, according to the H-1b regulations, amended petitions only need to be filed to reflect a [sic] "...material changes in the terms and conditions of employment..." Traditionally, [U.S. Citizenship and Immigration Services (USCIS)] policy interprets that passage to exclude mere changes in geography. In other words, if the original petition was for an accountant and now the foreign national is working as a programmer analyst that would require an amended petition. If, however, the accountant is moving from sunny Miami to snowy Anchorage, and a new LCA is filed, certified etc., before the move, then that's enough to keep the employer compliant.

* * *

Of important note, there is no written USCIS policy on this issue. . . .

Counsel is incorrect that a change in employment location for an H-1B worker does not constitute a material change. In pertinent part, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B) states:

The petitioner shall submit the following with an H-1B petition involving a specialty occupation: (1) A certification from the Secretary of Labor that the petitioner has filed a labor condition application

The regulation at 8 C.F.R. § 103.2(b)(1) states, in pertinent part:

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions.

In addition, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1), states, as part of the general requirements for petitions involving a specialty occupation, that:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor [(DOL)] that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

With regard to Labor Condition Applications, section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A), requires in pertinent part the following (with emphasis added):

The employer—

(i) is offering and will offer . . . nonimmigrant wages that are at least—

* * *

(II) the prevailing wage level for the occupational classification *in the area of employment*

Further, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(E) states:

Amended or new petition. The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A,

or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

Based on a review of the statutory and regulatory provisions cited above, it is self-evident that a change in the location of a beneficiary's work to a geographical area not covered by the LCA filed with the Form I-129 is a material change in the terms and conditions of employment. Because work location is critical to the petitioner's wage rate obligations, the change deprives the petition of a corresponding LCA supporting the period of work to be performed at the new location.

Moreover, while DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

[Emphasis added].

Therefore, if the petitioner files a new LCA to cover a new location of employment for the beneficiary, but does not file a corresponding amended H-1B petition, the petitioner is not in compliance with 8 C.F.R. § 214.2(h)(2)(i)(E).

Counsel does not submit any contracts on appeal, stating that "[T]he mere fact that a petitioner is an employment contractor is not a reason to request such contracts." Counsel further argues that the petitioner is not required to provide contractual evidence under *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000), because the position at issue in *Defensor*, a nurse, is non-professional, whereas computer programmers and software engineers are professional occupations. Counsel has mischaracterized the proffered position as the present petition is for a programmer analyst, not a computer programmer or software engineer. However, regardless, the application of *Defensor* is not determined by whether the proffered position is professional. Instead, an analysis of whether the proffered position is a specialty occupation under *Defensor* is appropriate whenever the petitioner intends to have the beneficiary work on a project for another entity.

The AAO notes that, as recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. 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 proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. 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. The record of

proceedings lacks such substantive evidence from any end-user entities that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis.

Counsel further asserts that the standard of proof to be met by the petitioner is a preponderance of the evidence standard, which means that it only has to demonstrate that the matter asserted is more likely than not true. The AAO agrees that the petitioner's standard of proof is based on a preponderance of the evidence standard, however the petitioner did not meet its burden with regard to this standard. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

The burden of proof is on the petitioner to either demonstrate that the petitioner does not intend to contract the beneficiary to another entity or, if, as in this case, the petitioner intends for the beneficiary to perform work on behalf of another entity, to demonstrate that the petitioner will directly control the beneficiary's work and conditions of employment. By not submitting a copy of the petitioner's employment contract with the beneficiary and/or copies of contracts, with corresponding work orders or statements of work, with the petitioner's client(s) for the project(s) on which the beneficiary would allegedly work, the petitioner has precluded USCIS from following a line of material inquiry to determine where and for which entity the beneficiary would actually work.

Under a preponderance of the evidence standard, given the inconsistencies in the petitioner's statements and the lack of any contractual documentation to support the petitioner's assertions regarding where the beneficiary would work and on which project the beneficiary would be assigned, the petitioner has not demonstrated that the beneficiary would more likely than not work at the petitioner's offices performing the job duties as outlined in the documents submitted with the petition. Moreover, the documentation presented in response to the RFE indicates that the petitioner intends to contract the beneficiary for approximately eight months to a third party client location (beyond which time the petitioner is not yet sure where the beneficiary will be employed). However, the petitioner did not present any documentation, such as contracts, to show that it will control the beneficiary's work and conditions of employment. In fact, the petitioner's statement, "[T]he end client identifies and manages the specific technology project to which our consultant is assigned at the end client location," indicates that it is the third party client, and not the petitioner, which controls the beneficiary's work and conditions of employment. Therefore, the petitioner did not satisfy its burden of proof under a preponderance of the evidence standard.

Having discussed the primary evidentiary deficiencies in the record, the AAO will first consider whether the proffered position is a specialty occupation. 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 regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means 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, a proposed position must also meet one of the following criteria:

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 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 at 387. 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), 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. 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 professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the

occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations, or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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 discussed above, the petitioner initially indicated in the forms that the beneficiary will work at the petitioner's facilities in Newark, DE for the duration of the petition. The evidence submitted in response to the RFE indicates that the beneficiary will be contracted to another entity and will be assigned or contracted thereafter, either by that entity or some other entity, to work at unspecified worksites in other locations. Therefore, under *Defensor v. Meissner*, 201 F.3d at 387, the failure to provide copies of contracts establishing the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines: (1) the normal minimum educational requirement for 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's 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.

However, even if the petitioner had credibly demonstrated that the beneficiary would work at the petitioner's offices in Newark, DE for the duration of the petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which assigns specialty-occupation status to a position 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 AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. The Programmer Analyst occupational category is encompassed in two sections of the *Handbook* (2010-11 online edition) – "Computer Software Engineers and Computer Programmers" and "Computer Systems Analysts."

The Computer Software Engineers and Computer Programmers section describes computer programmers as follows:

[C]omputer programmers write programs. After computer software engineers and systems analysts design software programs, the programmer converts that design into a logical series of instructions that the computer can follow (A section on computer systems analysts appears elsewhere in the Handbook.). The programmer codes these instructions in any of a number of programming languages, depending on the need. The most common languages are C++ and Python.

Computer programmers also update, repair, modify, and expand existing programs. Some, especially those working on large projects that involve 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 a program. Programmers working on smaller projects often use “programmer environments,” applications that increase productivity by combining compiling, code walk-through, code generation, test data generation, and debugging functions. 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.

As software design has continued to advance, and some programming functions have become automated, programmers have begun to assume some of the responsibilities that were once performed only by software engineers. As a result, some computer programmers now assist software engineers in identifying user needs and designing certain parts of computer programs, as well as other functions. . . .

* * *

[M]any programmers require a bachelor's degree, but a 2-year degree or certificate may be adequate for some positions. Some computer programmers hold a college degree in computer science, mathematics, or information systems, whereas others have taken special courses in computer programming to supplement their degree in a field such as accounting, finance, or another area of business. . . .

The *Handbook's* section on computer systems analysts reads, in pertinent part:

In some organizations, programmer-analysts design and update the software that runs a computer. They also create custom applications tailored to their organization's tasks. Because they are responsible for both programming and systems analysis, these workers must be proficient in both areas. (A separate section on computer software engineers and computer programmers appears elsewhere in the Handbook.) As this dual proficiency becomes more common, analysts are increasingly working with databases, object-

oriented programming languages, client–server applications, and multimedia and Internet technology.

* * *

[W]hen 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. 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 areas 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. . . .

Therefore, the *Handbook's* information on educational requirements in the programmer-analyst occupation indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement for this occupational category. Rather, the occupation accommodates a wide spectrum of educational credentials.

As evident above, the information in the *Handbook* does not indicate that programmer-analyst positions normally require at least a bachelor's degree in a specific specialty. While the *Handbook* indicates that a bachelor's degree level of education in a specific specialty may be preferred for particular positions, the evidence of record on the particular position here proffered does not demonstrate requirements for the theoretical and practical application of such a level of highly specialized computer-related knowledge.

The record's descriptions of the petitioner's duties do not elevate the proffered position above that of a programmer analyst for which no particular educational requirements are demonstrated. The AAO rejects as unsubstantiated the petitioner's declaration that the proffered position requires an individual with a bachelor's degree in computer science or equivalent combination of education and experience in a closely related field. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

As the evidence of record does not indicate that this petition's particular position is one that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the first 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 (a) parallel to the proffered position and (b) located in organizations that are similar to the petitioner.

Again, 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 at 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

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." The evidence of record does not develop relative complexity or uniqueness as an aspect of the position.

Next, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). The record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty.¹ The petitioner did not provide any information about the credentials of its other programmer analysts similarly employed to the beneficiary.

¹ 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.

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 would indicate no specialization and complexity beyond that of a programmer-analyst, and as reflected in this decision's discussion of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), the *Handbook* does not indicate that the attainment of at least a bachelor's degree in a specific specialty is usually associated with programmer analysts in general.

For the reasons discussed above, the AAO finds that the petitioner has not established that the proffered position qualifies as specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO therefore affirms the director's finding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation and denies the petition for this reason.

Second, as the petitioner stated in response to the RFE that the beneficiary will work at a third party client site in Murray Hill, NJ for approximately eight months when the requested petition duration is for three years, the AAO affirms the director's finding that the petitioner failed to submit an itinerary, as required under 8 C.F.R. § 214.2(h)(2)(i)(B), which states, in pertinent part:

Service or training in more than one location. A petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with the Service office which has jurisdiction over I-129H petitions in the area where the petitioner is located. The address which the petitioner specifies as its location on the I-129H petition shall be where the petitioner is located for purposes of this paragraph.

The language of the regulation, which appears under the subheading "Filing of petitions" and uses the mandatory "must," indicates that an itinerary is material and required initial evidence for a petition involving employment at multiple locations, and that such a petition may not be approved for any employment for which there is not submitted, at the time of the petition's filing, at least the employment dates and locations. USCIS may in its discretion deny an application or petition for lack of initial evidence. 8 C.F.R. § 103.2(b)(8)(ii).

Counsel cites to a Michael L. Aytes internal memorandum to support its assertion that the itinerary requirement can be met by providing a general statement of the proposed or possible employment. *See* INS Central Office 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) (hereinafter Aytes memo).

With respect to the Aytes memo, unpublished and internal opinions can not be cited as legal authority and they are not precedent or binding on USCIS as a matter of law. *See* 8 C.F.R. § 103.3(c) (types of decisions that are precedent decisions binding on all USCIS officers). Courts have consistently supported this position. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (holding that legacy Immigration and Naturalization Serviced (INS) memoranda merely articulate internal guidelines for the agency's personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer

upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely"); *see also Noel v. Chapman*, 508 F.2d 1023 (2nd Cir. 1975) (finding that policy memoranda to legacy INS district directors regarding voluntary extended departure determinations to be "general statements of policy"); *Prokopenko v. Ashcroft*, 372 F.3d 941, 944 (8th Cir. 2004) (describing a legacy INS Operating Policies and Procedures Memorandum (OPPM) as an "internal agency memorandum," "doubtful" of conferring substantive legal benefits upon aliens or binding the INS); *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985) (describing an INS Operations Instruction (OI) as an "internal directive not having the force and effect of law"). Regardless, the Aytes memo qualifies its guidance as being subject to the exercise of the adjudicating officer's discretion. This is evident in the memo's statements that the itinerary requirement has been met "[a]s long as the officer is convinced of the bona fides of the petitioner's intentions with respect to the alien's employment," and that "[s]ervice officers are encouraged to use discretion in determining whether the petitioner has met the burden of establishing that it has an actual employment opportunity for the alien."

In addition, the Aytes memo was written to provide guidance to USCIS in situations where the documentation submitted by the petitioner indicates that the petitioner is the actual employer and not a contractor or agent. Regardless, the Aytes memo must not be interpreted as countermanding or contradicting the regulations authorizing USCIS to request additional documentation. Under 8 C.F.R. § 103.2(b)(8)(ii), "if all required initial evidence is not submitted with the application or petition *or does not demonstrate eligibility*, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified time as determined by USCIS." (Emphasis added). Title 8 C.F.R. § 214.2(h)(9)(i) also states, "The director shall consider all the evidence submitted and such other evidence as he or she may independently require to assist his or her adjudication."

Therefore, under the regulations, USCIS has broad discretionary authority to require additional documentation, especially in a case, like this, where the petitioner has not demonstrated eligibility at the time of filing the petition or where it is needed for a material line of inquiry. The fact that the petitioner's business is established is not sufficient in and of itself to demonstrate a bona fide offer of employment. In a situation where the beneficiary is likely to be contracted out to a third party worksite, the petitioner must provide detailed evidence with respect to the contractual relationship between the petitioner, its clients, and any other third party end users, in order to establish which entity will actually control the work to be performed by the beneficiary. Such documentation was not provided. As discussed above, the petitioner appears to be a contractor and has not provided sufficient evidence to demonstrate that it will employ the beneficiary at the petitioner's offices for the duration of the petition. For the reasons discussed above, the AAO therefore affirms the director's denial of the petition for this additional reason.

Beyond the decision of the director, the AAO finds that the petitioner failed to establish that it had three years worth of H-1B level work for the beneficiary to perform when the petition was filed. As discussed above, by not submitting any contracts or other evidence demonstrating where and for which entity the beneficiary would be employed, the petitioner precluded the director from establishing whether the petitioner has made a bona fide offer of employment to the beneficiary and that it has sufficient work for the beneficiary to perform for the duration of the petition. Moreover, the conflicting evidence provided by the petitioner, which indicated, on the one hand, that the beneficiary would be working at the petitioner's offices for the duration of the petition and, on the other, that the beneficiary would be working as a contractor at a third party client site for approximately eight months, further indicates that the petitioner did not know to which project the beneficiary would be assigned at

the time the petition was filed.

Counsel argues on appeal that the petitioner is not required to submit contracts. However, it is the petitioner's burden of proof to demonstrate that it has sufficient work and resources for the beneficiary at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1) (requiring that eligibility be established at the time of filing). 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). Moreover, without such documentation, the AAO cannot establish whether the petitioner has made a bona fide offer of employment to the beneficiary such that it could be found that it will fully comply with the terms and conditions of employment as attested to in the instant petition. *See generally* 8 C.F.R. § 214.2(h)(4). The AAO thereby finds that the petitioner does not qualify as a United States employer as it has failed to establish that it has sufficient work and resources for the beneficiary such that it has demonstrated that it will have and maintain an employer-employee relationship on a full-time basis as claimed in the petition and as required by 8 C.F.R. § 214.2(h)(4)(ii). The AAO therefore denies the petition on this additional ground.

Finally, the AAO notes that the record indicates that prior H-1B petitions have been approved for the beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. However, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). If any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, it would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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 denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.