U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUN 2 1 2013 OFFICE: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director initially approved the nonimmigrant visa petition, and the approval was later revoked after proper notice. The petitioner submitted an appeal, and the Administrative Appeals Office (AAO) dismissed the appeal. The petitioner filed a joint motion to reopen and reconsider. The motion will be granted. The AAO's prior decision dismissing the appeal shall be affirmed and approval of the petition will remain revoked.

The petitioner submitted a Form I-129 (Petition for Nonimmigrant Worker) to Vermont Service Center on July 31, 2009. On the Form I-129 visa petition, the petitioner describes itself as a retail store established in 2002. In order to continue to employ the beneficiary in what it designates as a computer specialist position, the petitioner seeks 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 approved the petition on September 18, 2009. On October 20, 2009, a site visit was conducted to verify the beneficiary's employment as a computer specialist. Thereafter, the director issued a notice of intent to revoke (NOIR), stating that the beneficiary appears to be performing the duties of a web administrator rather than a computer specialist. Counsel responded to the NOIR, contending that "because of [the beneficiary]'s versatility, he is able to also perform **those duties of a Web Administrator that are interrelated with that of a Computer Specialist**" (emphasis in the original). Counsel further claimed that the position of web administrator is a specialty occupation.

The director revoked approval of the petition on August 25, 2010, finding that the petitioner failed to establish that the beneficiary is performing the duties of a computer specialist. The director further determined that the position of a web administrator is not a specialty occupation. The director also stated that the petitioner failed to establish that a sneaker store with three employees requires a part-time computer specialist.

Counsel for the petitioner submitted an appeal. On appeal, counsel contended that the beneficiary is performing the duties of a computer specialist, and that the size and nature of the petitioner "should not be an issue if there is a need for a particularly skillful employee in a specialty occupation." The AAO dismissed the appeal on September 10, 2012. In the decision, the AAO stated that the duties of the proffered position "primarily reflect the duties of a computer specialist"; however, the AAO found that the petitioner failed to establish that the position qualifies as a specialty occupation. Specifically, the AAO stated that the duties of the proffered position closely resemble the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)*'s description of "Computer Support Specialists." The AAO noted that "the *Handbook* indicates that a general associate's degree or even just post-secondary classes are sufficient for entry into this occupation," and concluded that the *Handbook* does not support the proffered position as being a specialty occupation. Counsel now files a joint motion to reopen and reconsider.

On this motion, counsel claims that the AAO "abandoned the issues upon which [the] petitioner appealed" by focusing on "whether the position of 'computer support specialist' rather than the position of a 'computer specialist' is a specialty occupation." Counsel further asserted that "the AAO's decision to deviate from the issues that arose on appeal and formulated issues which the AAO decided should

have been the real issues between the parties, without affording either the petitioner or the beneficiary an opportunity to respond before making a decision revoking an approved H1b visa, constitutes violation of the Fifth Amendment rights of both the petitioner and [the] beneficiary." Further, counsel also claimed that the proffered position of "computer specialist" is also a "computer scientist," which is a specialty occupation position.

The petitioner through counsel submitted the following documents with this motion: (1) the Form I-290B; (2) counsel's brief for the motion; (3) the petitioner's letter describing the beneficiary's duties; (4) an excerpt from the *Handbook* on "Systems Analysts, Computer Scientists, and Database Administrators"; (5) an article entitled " by (6) job postings from the Internet; and (7) a copy of the AAO decision. The AAO reviewed the record in its entirety before issuing its decision.[1]

Upon review, the AAO finds that the evidence submitted with this motion fails to overcome the basis of the director's revocation of the petition's approval, namely that the proffered position does not qualify as a specialty occupation.

In the present motion, counsel, for the first time, claims that the proffered position of "computer specialist" is really a "computer scientist." Counsel asserts that it is "interesting to note a 'computer scientist' is a 'computer specialist'" and that it "is just a matter of semantics." In support, counsel submitted an undated article entitled " by and an excerpt from the *Handbook* on "Systems Analysts, Computer Scientists, and Database Administrators." Counsel also submitted job postings for computer specialists from various sources on the Internet and claimed that "all the attached advertisements expressly detail the specific duties of a computer specialist and the duties associated with this position is specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree."[2]

The article by lists various job titles that "are the most popular choices for computer science grads" such as software developer, senior software engineer, programmer analyst, information technology manager, project manager, systems engineer, information technology consultant, web developer, business analyst, and software architect. The article lists additional positions that graduates from a computer science degree program may work in.

However, to determine whether a particular job qualifies as a specialty occupation, U.S. Citizenship and Immigration Services (USCIS) does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are

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[1] The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

[2] Counsel does not further discuss how the advertisements support that the specific duties of the proffered position are specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. Thus, the AAO will not further discuss the advertisements.

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

Counsel further claims that the *Handbook* "relied heavily upon by the AAO also admits that a 'computer scientist' is a 'computer specialist'" and references the section from the AAO's decision which states the following, in pertinent part:

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

The AAO's assertion that computer science is one of several occupations that Congress contemplated when it created the H-1B category is not an admission that a particular computer-related position would be a specialty occupation based upon title alone. As previously noted, USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384.

Further, the petitioner submitted a letter on appeal that does not support counsel's assertion that the proffered position is a "computer scientist." For example, the petitioner states the following regarding the beneficiary's duties:

> When the H[-]1B petition was approved, [the beneficiary] started working as a Computer Specialist with the company, which made its first step by purchasing equipment[sic] (desk top computer, laptop, printer, scanner, copier, fax machine and Quickbooks Point of Scale (POS) Software). He installed the POS server work station by registering the POS user licenses, connecting hardware, setting up inventory and integrating Quickbooks financial software. Sales are now recorded using Quickbooks Point of Sale software, which helps the company, manages its retail store (sales, customers and inventory). To date, the beneficiary still maintains and oversees the daily performance of computer systems; maintains record of daily data communication transactions, problems and remedial action taken, and installation activities; manages, maintains, troubleshoots and/or upgrade Desktop, Laptop, Fax Machine, Scanner, Copier and Printer.
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> Subsequently, the company added an online component in order to increase its sales revenue. In line with the company's plan, [the beneficiary] was instructed by

> management to **develop** and maintain a fully functional website in addition to his Computer Specialist duties (since he was the only computer literate **personnel** in the company)(emphasis in the original).

However, the *Handbook*'s description of "Computer Scientists" is inconsistent with the petitioner's description of the beneficiary's job duties. The *Handbook* describes computer scientists as follows:

> 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, in human-computer interaction, or in robotics. 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.

The *Handbook*'s description of computer scientist does not resemble the description of the proffered position, which primarily consists of developing and maintaining a web site for the petitioner's business, and installing and overseeing various aspects of a computer software system. There is no evidence that the beneficiary is working as a theorist, researcher or inventor or that the proffered position is "distinguished by the higher level of theoretical expertise and innovation [computer scientists] apply to complex problems and the creation or application of new technology" as described in the *Handbook*. Thus, the evidence submitted on motion does not support counsel's assertion that the proffered position is a computer scientist.

Further, the AAO notes that there are numerous inconsistencies and discrepancies in the petition and supporting documents, which undermine the petitioner's assertions with regard to the services the beneficiary will perform, as well as the actual nature and requirements of the proffered position. When a petition includes numerous discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's claims.

For example, the petitioner provided additional details and duties to the list of previously submitted duties, which is inconsistent with duties of a computer specialist. Specifically, the petitioner stated:

> Moreover, some of his main responsibilities include assisting the outside accountant with daily function and smooth operation of company. This includes handling the account payable, managing the account receivable, performing bank reconciliation and making sure that everything is properly recorded. The account payable function collects bills and enters them to be paid. Managing account receivable would be sending out invoices to clients to be paid. Being a small company, he periodically meets with accountant to do tax planning and compiles all company numbers for tax preparation.

On motion, the petitioner adds payroll and bookkeeping responsibilities to the list of duties that the petitioner previously provided would be executed by the beneficiary. Not only are these payroll and bookkeeping tasks indicative of a position that does not require at least a baccalaureate degree in a specific specialty, but also USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1).). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

The petitioner has not sufficiently established that it would employ the beneficiary in the capacity specified in the petition and it has not established that the statement of facts contained in the petition is accurate. It appears that the beneficiary may be employed in a lesser capacity or serving in a different position, based upon the petitioner's addition of bookkeeping duties. The record of proceeding lacks evidence that the beneficiary's duties ascribed would actually require the theoretical and practical application of at least a baccalaureate level of a body of highly specialized knowledge in a specific specialty, as required by the Act.

In addition, the AAO finds that counsel's claim that the proffered position is "computer scientist" is not supported by the prevailing wage designated in the Labor Condition Application (LCA) filed with the Form I-129. The AAO notes that the LCA was certified and signed by the petitioner on June 12, 2009. The LCA indicates that the prevailing wage for the proffered position as a computer specialist is $20.20 per hour in New York, New York. A search of the Foreign Labor Certification Data Center Online Wage Library reveals that this prevailing wage corresponds to "Computer Specialists-All Other" – SOC (O*NET/OES) Code 15-1099 for NY-NJ Metropolitan Division.[3] However, the prevailing wage for "Computer and Information Scientists, Research"-SOC (O*NET/OES) Code 15-1011 for NY-NY Metropolitan Division is $35.09 per hour.[4]

With respect to the LCA, the Department of Labor (DOL) provides clear guidance for selecting the most relevant Occupational Information Network (O*NET) classification code. The "Prevailing Wage Determination Policy Guidance" states the following:

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[3] For more information regarding the prevailing wage for Computer Specialists, All Other in NY-NJ Metropolitan Division, *see* the All Industries Database for 7/2008 - 6/2009 for Computer Specialists, All Other at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at http://www.flcdatacenter.com/OesQuickResults.aspx?code=15-1099&area=35644&year=9&source=1 (visited May 24, 2013).

[4] For more information regarding the prevailing wage for Computer and Information Scientists, Research in NY-NJ Metropolitan Division, see the All Industries Database for 7/2008 - 6/2009 for Computer and Information Scientists, Research at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at http://www.flcdatacenter.com/OesQuickResults.aspx?code=15-1011&area=35644&year=9&source=1 (visited May 24, 2013).

> In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification . . . . If the employer's job opportunity has worker requirements described in a combination of O*NET occupations, the SWA should default directly to the relevant O*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the SWA shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

Thus, if the petitioner believed its position was a combination of occupations, then according to DOL guidance the petitioner should have chosen the relevant occupational code for *the highest paying* occupational category, in this case "Computer and Information Scientist, Research." Instead, the petitioner chose the occupational code for *the lowest paying* occupational category.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. *See* section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A). The petitioner's offered wage to the beneficiary of $25 per hour (working 25 hours per week) (as stated on the LCA) is below the prevailing wage for the occupational classification of "Computer and Information Scientist, Research" in the area of intended employment at $35.09 per hour.

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct occupational classification in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different occupational category at a lower prevailing wage than the one that it claims it is offering to the beneficiary. As such, the petitioner has failed to establish that it would pay the beneficiary an adequate salary for his work, as required under the Act, if the petition were granted.

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 its burden of establishing that the beneficiary's proposed position is a specialty occupation. Accordingly, the decisions of the director and the AAO will remain undisturbed.

Finally, it should be noted for the record that, unless USCIS directs otherwise, the filing of a motion to reopen or reconsider does not stay the execution of any decision in a case or extend a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

ORDER: The motion is granted. The previous decision of the AAO, dated November 21, 2012, is affirmed. Approval of the petition remains revoked.