U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

D1

[redacted]

FILE: WAC 08 132 51538 Office: CALIFORNIA SERVICE CENTER Date: DEC 0 4 2009

IN RE: Petitioner: [redacted]
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:

[redacted]

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 software engineer, 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 denied the petition on three independent grounds, namely, her determinations that the petitioner failed to establish: (1) that it 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) that the Labor Condition Application (LCA) filed with the petition is "valid for all work locations"; and (3) that the proffered position is a specialty occupation.

At the outset, the AAO withdraws the director's determination with regard to the LCA, as the record of proceeding does not establish that the proffered position would involve services in locations outside the scope of the LCA filed with the petition. Accordingly, the LCA issue is resolved in favor of the petitioner and no longer exists as a ground for denial of this particular petition.

Based upon its consideration of the entire record of proceeding, as supplemented by the Form I-290B, the appellate brief, and the other documents submitted on appeal, the AAO concludes that the director's decision to deny the petition for its failure to establish the proffered position as a specialty occupation is correct. Accordingly, the appeal will be dismissed and the petition will be denied.

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)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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 (5th 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 record of proceeding is replete with descriptions of the proffered position in terms of the duties, responsibilities, or role of the proffered position that generally comport with the software engineer occupation as discussed in the "Computer Software Engineers" chapter of the Department of Labor's *Occupational Outlook Handbook (Handbook).*[1] However, as the *Handbook* indicates that that the computer software engineer occupation is not limited to positions that require or are associated with at least a bachelor's degree, or the equivalent, in a specific specialty, the proffered position's inclusion within the Computer Software Engineers occupational category is not sufficient to establish that it is or will be a specialty occupation.

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[1] The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations which 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/.*

The "Computer Software Engineers" chapter in the 2008-2009 edition of the *Handbook* reports that "most employers prefer applicants who have at least a bachelor's degree, and broad knowledge of, and experience with, a variety of computer systems and technologies." The *Handbook*, however, does not indicate that a baccalaureate degree is the minimum educational requirement for computer software engineers. The *Handbook* reports that for these positions "most employers prefer applicants who have at least a bachelor's degree and broad knowledge of, and experience with, a variety of computer systems and technologies." The *Handbook,* however, does not indicate that computer software engineers constitute an occupational class for which entry normally requires at least a bachelor's degree in a specific specialty. According to the *Handbook*, approximately 20% of computer software engineer positions are filled by individuals without bachelor's degrees. The *Handbook* also indicates that while computer-related majors are the usual academic concentration among the computer software engineers holding degrees, other majors are not excluded. Thus, in addition to the approximately 20% of systems engineers not holding baccalaureate or higher degrees, the computer software engineer occupation also includes an unspecified percentage of persons with bachelor's degrees in other than a computer or IT discipline. The following excerpts from the 2008-2009 *Handbook's* "Computer Software Engineers" chapter convey these points:

> [From the three introductory "Significant Points":]
>
> - Very good opportunities are expected for college graduates with at least a bachelor's degree in computer engineering or computer science and with practical work experience.
>
> [The "Training, Other Qualifications, and Advancement" section:]
>
> Most employers prefer applicants who have at least a bachelor's degree and experience with a variety of computer systems and technologies. In order to remain competitive, computer software engineers must continually strive to acquire the latest technical skills. Advancement opportunities are good for those with relevant experience.
>
> *Education and training*. Most employers prefer applicants who have at least a bachelor's degree and broad knowledge of, and experience with, a variety of computer systems and technologies. The usual college major for applications software engineers is computer science or software engineering. Systems software engineers often study computer science or computer information systems. Graduate degrees are preferred for some of the more complex jobs. In 2006, about 80 percent of workers had a bachelor's degree or higher.
>
> Academic programs in software engineering may offer the program as a degree option or in conjunction with computer science degrees. Because of increasing emphasis on computer security, software engineers with advanced degrees in areas

> such as mathematics and systems design will be sought after by software developers, government agencies, and consulting firms.
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> Students seeking software engineering jobs enhance their employment opportunities by participating in internships or co-ops. These experiences provide students with broad knowledge and experience, making them more attractive to employers. Inexperienced college graduates may be hired by large computer and consulting firms that train new employees in intensive, company-based programs.

In light of the information in the *Handbook's* "Computer Software Engineers" chapter, to establish the proffered position as among the software engineer positions requiring at least a bachelor's degree in a specific specialty, it is incumbent upon the petitioner to provide evidence establishing a nexus between the work to be performed in the proffered position and attainment of least at least a U.S. bachelor's degree, or its equivalent, in a specific specialty closely related to that work. The record does not contain such evidence.

In this occupational context, it is incumbent upon the petitioner to provide documentary evidence that establishes that its particular software engineering position is one whose performance requirements exceed those of software engineering positions not requiring both (1) the theoretical and practical application of a body of highly specialized knowledge, and (2) 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, as required by section 214(i)(l) of the Act and its implementing regulations. Computer and IT terms, acronyms, and terms of art abound in this record of proceeding, but the record does not document a correlation between them and a particular educational level in a specific specialty. 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). As the record lacks documentation establishing the educational requirements for the proffered position, it fails to establish a specialty occupation position under section 214(i)(l) of the Act and its implementing regulations at 8 C.F.R. 214.2(h)(4)(iii)(A). Accordingly, the appeal must be dismissed, and the petition must be denied.

Additionally, the AAO finds that the petition is not supported by credible evidence that it was filed on the basis of software engineer work that, at the petition's filing, was assured for the beneficiary for the period of employment specified in the petition. Speculative employment, that is, employment not demonstrated by the record to have been secured for the beneficiary at the petition's filing, does not support approval of an H-1B petition. 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 visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). For this reason also, the appeal will be dismissed.

The Form I-129 and the petitioner's March 31, 2008 letter filed with it indicate that the petitioner is an IT consulting and staffing firm that provides IT services to clients, and, that, as such, its business is generated by the specific IT needs of particular clients.[2] However, in this particular matter, the petitioner claims that the beneficiary will be assigned to only one project, which the petitioner asserts is aimed at developing an application exclusively for its own in-house use.

The AAO acknowledges that the petitioner's March 31, 2008 letter of support, filed with the Form I-129, states that the beneficiary will work at its Software Development Center on an "In House project" whose "duration is for 24 months with possible extension." However, it is noteworthy that neither the March 31, 2008 letter nor any other document filed with the Form I-129 names the in-house project or identifies its nature, scope, or purpose. Furthermore, in contrast to the support letter's statement that the beneficiary would be working on a single project, the AAO notes that the letter's list of duties proposed for the beneficiary suggests multiple projects, and that the substantive nature of the projects would be decided not by the petitioner's in-house needs but by clients generating them. Further, although the above duty descriptions generally comport with computer software engineer work, their generic character does not indicate any specific project. The letter lists the proposed duties as follows:

1. Design, develop, test, and implement, modify and maintain *software systems* and graphical User Interfaces *for various business and engineering applications* projects using object oriented analysis, Oracle applications, Developer 2000, C++, SQL*Forms, Novell Netware and PVC's in [a] Unix environment.

2. Analyze, design, develop, modify, and implement customized computer systems for Commercial *applications* based on user requirements using Client/server technology.

3. Evaluate *user requests for enhancements to existing programs or creation of new programs*[;] determine technical feasibility[;] estimate time and cost[;] ensure Compatibility with current application and systems and document performance criteria; [and] interact and consult with users to identify current operating procedures and program objectives.

4. Formulate a detail[ed] plan outlining steps to develop program, using structured analysis and design. Convert project specifications, using flowcharts and diagrams, into [a] sequence of detailed instructions and logical steps for coding into language process able [sic] by computer, applying knowledge of computer programming techniques and computer language.

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[2] The letter further states that the petitioner is also "injecting a fresh dose of engineering talent into its development arm as it expects to make a significant surge into the mobile applications development area with the opening of the U[.]S[.] wireless communication spectrum and the mobile applications market." However, the petitioner does not assert that the beneficiary will be working in this area.

5. Enter program codes into computer systems. Enter commands into computer to run and test programs; [r]ead computer printouts to observe display screen to detect syntax or logic errors during program test, or use diagnostic software to detect errors; [r]eplace, delete, or modify codes to fix errors and bugs.

6. Document the program development process, coding and corrections; contribute in the development of user manuals to describe installation and operating procedures. Design and implementation of the database, GUI, and analysis modules. Creating GUI appearance screens. Developing various [f]orms. Writing SQL scripts for creating tables, views, and sequences and synonyms. Creating stored procedures and database triggers. Developing complex [r]eports for inventory and sales.

7. Create tables, [m]anipulating tables, used [sic] operators [sic] like Arithmetic, Logical, and Comparison, joins like equi-joins, Non-equi joins, Nested queries & correlated queries. Create forms using Master Detail Applications, Canvas views, Alerts, Editors, Lovs, Record groups, Passing Parameters, Items (Text items, Display [I]tems, Image Items, Radio Groups[,] etc[.]), Triggers, Built-in Functions, Visual Attributes, Property Classes[,] etc.

8. Coding of core modules in VB 6.0. Develop application using HTML, VB Script and Active Server Pages having the back-end access database file located at the Server.

9. Develop ASP pages using VB Components. Design the HTML templates as per the specs provided. Coding Server side script and performing the client side validations using ASP and JavaScript.

10. Involve[ment] in the designing and implementation of the web site. HTML, Front Page, and VB Script to be used for Web Design and Implementation. Involve[ment] in the design and development of a 3-Tier application for Jo portal using ASP, SQL server, JavaScript, VB Script and HTML, DHTML, VB COM/DCOM components.

11. Client-side validation using JAVASCRIPT. Creating Active Server Pages using VB script and ADO for data retrieval. Create Web Application Objects and business objects using ASP and VBScript. Serverside scripting using VB Script and ASP.

(Italics added.)

Most suggestive of multiple projects are the letter's including among the beneficiary's duties design, development, testing, implementation, and modification, and maintenance, not for one, but "for

various business and engineering applications projects"; and analysis, design, modification and implementation of "customized computer application systems for Commercial applications."

The service center issued a request for additional evidence (RFE) which included a portion requesting evidence regarding the particular project that the petitioner referenced in its March 31, 2008 letter as the object of the beneficiary's services. The petitioner's response to this portion of the RFE includes four documents produced by the petitioner that address what the petitioner, for the first time, identifies as its Sense Expert Software development project.

The first of these documents (hereinafter referred to as the first CEO document) is introduced by the heading "Consultant and Staffing Agencies/Itinerary" and is signed by the petitioner's Chief Executive Officer (CEO). The duties described in this document mirror the duties stated in the March 31, 2008 letter, except for deletion of the duties at the letter's sixth and eighth paragraphs. The first CEO document provides a table "Percentage of Time to be spent on each duty" that divides the time allotted the beneficiary into five types of responsibilities, namely: (1) Requirements and [S]pecification Analysis; (2) Rational and UML (Use Case, Object Models, Component Design); (3) System Design and Development (Programming and Deployment); (4) Database Design and Deployment; and (5) Unit and Integration testing. The CEO does not explain how these responsibilities correlate with the ten paragraphs of duties listed in the petitioner's support letter.

The second RFE-reply document (hereinafter referred to as the second CEO document) bears the CEO's signature block but is not signed. This document divides into six sections, which contain, in order (1) a general description of the asserted in-house project; (2) a table on the estimated length of the project (with two columns: "Schedule (timeline)" and "Services"); (3) a table addressing the beneficiary's responsibilities in two columns, entitled "Responsibility" and "% of The Time Allowed"; (4) a table identifying 12 Senior Software Engineers, Software Engineers, and Software Systems Analysts "who will participate in the project" (along with the beneficiary); (5) a statement repeating that the beneficiary will be assigned to the petitioner's Software Development Center in Canoga Park, California; and (6) a "Proprietary Statement" indicating that the project to which the beneficiary will be assigned is for the development of "onsite Sense Expert Software for internal use only" and that the petitioner "will have Proprietary Rights on this software with restrictions on using, copying, and modifying." The AAO notes that the petitioner nowhere documents or explains the division of labor between the beneficiary and the other software engineers designated for the project. Further, in the overall evidentiary context of this particular matter, the generalized nature of the schedule/services table, which is not accompanied by any discussion of the analysis behind it, does not persuade the AAO that it is reliable. Also, neither this second CEO document nor any other evidence of record establishes how the petitioner calculated that the Sense Expert Software Project would generate at least 24 to 36 months of software engineer work for the beneficiary.

Under the heading "Description of the In-House Project," the second CEO document provides the first and only description of the Sense Expert software project, which is asserted to require the beneficiary's services as a software engineer for 24 to 36 months. The description reads:

> [The petitioner] is developing onsite Sense Expert Software for Internal use. All employees can use the software and they can enter their time in one place to reduce the amount of [paperwork]. An interface that everyone can access without logging into [the] system, but access to it by being on the Intranet (Not Internet). The Sense Expert Software will handle many concurrent requests, as dictated by the performance requirements. If the system ever go[es] down or experience[s] some glitch[,] there is a way to bring it or a backup version of the system online in a rapid, seamless manner and [it] will be functional on a 24/7 basis. The system will be constructed in a modular fashion, such that components may be reused in various scenarios. The system is secure, so that only [an] authenticate [sic] user can access the system and [it] is a hack proof [tool]. Sense Expert Software is very easy to maintain after deployment, including the application of security patches and new builds. Sense Expert is generally a software Program that helps business increase productivity. For more information please refer to the enclosed In-House project documentation.

The AAO notes that this description conveys no more than the overall function and general benefits of the Sense Expert Software.

The next section of the second CEO document, "Estimate Length of the Project (start Date and End Date)" provides a timeline, along a three-year continuum (January 1, 2008 to January 20, 2011), divided into dates assigned for each of the following successive aspects of the Sense Expert project: (1) review of design document and architecture, changes to initial draft; (2) Use case documentation and technical documentation; (3) Analysis and issues related to design and technologies; (4) Site Deployment (servers and clients) for both development and testing; (5) Assignment of modules to respective developers[;] any further issues will be addressed; (6) Code implementation and testing; (7) Bug fixes and technical documentation; (8) Working on user manuals, readme files and coordinate with testing and production for beta deployment; (9) work towards products release and issues; (10) Work towards Implementing of Product for End Users. The AAO finds that the reference to site deployment to clients is materially inconsistent with the petitioner's attestations that the Sense Expert Project would be developed for internal use only and counsel's statement on appeal that the Sense Expert Software "is exclusively in-house software." The AAO further notes the conflicts between (1) this document's 36-month timetable, (2) the 24-month "Itinerary of Services" timetable in Project Manager/Coordinator document, and (3) counsel's assertion on appeal and the petitioner's statement in its March 31, 2008 letter that the "In House project duration is for 24 months with possible extension." Additionally, as the variances and conflicts in the timetable information noted above are unexplained, they further undermine the credibility of assertions by counsel and the petitioner as to the amount of time that would likely be required for the Sense Expert Software Project.

The third RFE-reply document about the project upon which the beneficiary will work (hereinafter referred to as the Project Manager/Coordinator document) is dated July 28, 2008 and signed by the petitioner's Project Manager/Coordinator. This document (1) again states that the beneficiary's

assignment "will be executed" at the Software Development Center; (2) provides an "Itinerary of Services" table that generally divides the project work into nine time periods, commencing January 21, 2008 and ending December 14, 2010; (3) ascribes seven roles to the beneficiary; and (4) provides another copy of the entitled "Responsibility" and "% of The Time Allowed" provided in the second RFE-reply document.

To the duties list of the March 31, 2008 letter and the responsibilities list of the second CEO document, the Project Manager/Coordinator document adds a third list regarding the beneficiary's work, under the heading "Role." This list reads as follows:

- Will be involved in requirement gathering from the users and scientific board members for enhancements and future version release.
- Coordinate activities with other computer programmers/analyst[s] working as part of the project team.
- Analyze, Design, Develop, and Implement different Enterprise Applications using C#, C, C++, and Java.
- Develop, configure, and support License Manager Applications for software products.
- Test and maintain modules; provide technical support, troubleshooting and user training.
- Design and develop report system generating various reports in the process; prepare technical reports, user manual and instructional manual as required.
- Provide onsite maintenance support on various issues including, but not limited to, debugging, modification, fine-tuning, code organization and performance tuning.

The AAO finds that role of requirements gathering "from scientific board members" has no apparent correlation to any aspect of the Sense Expert Project presented in any document in the record of proceeding. Next, the "Analyze, Design, Develop, and Implement different Enterprise Applications using C#, C, C++, and Java" directly contradicts the petitioner's assertions that the beneficiary will only be engaged in the development of a single type of Software. Further, in the SED Draft, the AAO finds no mention of the use of C#, C, C++, and Java. Additionally, the "Develop, configure, and support License Manager Applications for Software products" exceeds, and therefore conflicts with, the scope of any other descriptions of the Sense Expert Software Project, which purportedly is limited to "developing onsite Sense Expert Software for Internal use."

The fourth RFE-reply document relevant to the Sense Expert Software Project is entitled "Sense Expert Design Document Version 1.0, January 08, 2008, Draft" (SED Draft). According to its introduction, this document will provide the details of the Sense Expert project and the "high level

architecture of Sense Expert." The AAO finds the SED Draft contains user instructions that are not indicative of a software development project, but are consistent with already developed software. Examples include, but are not limited to, section 2.2.1's step-by-step instructions for creating a Web Services in.Net environment and for developing a JAX-RPC client, and, at section 3.1.2, the instruction table at section 3.1.2 describing "Page Components." Also, while the document's observations regarding various IT tools and processes appear appropriate for an article about those tools and processes, they do not appear pertinent to the document's stated purposes of highlighting the details of the Sense Expert project and providing the "high level architecture" of Sense Expert.[3]

Neither the SED Draft nor, for that matter, any other document submitted into the record, reveals how the petitioner arrived at the need for a total of 15 systems analysts and software engineers for the Sense Expert project; and the AAO finds it noteworthy that none of the other documents that the petitioner presents to support the existence of its Sense Expert project reveals an analytical foundation for the petitioner's stated decision to use 15 systems analysts and software engineers to the Sense Expert project.

Additionally, the AAO notes that the petitioner's Offer Letter to the beneficiary contains no mention of any in-house project, and its language contemplates the beneficiary's assignment to client projects

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[3] In this regard, the AAO notes that its search of the Internet by some phrases it picked at random from the SE Draft revealed that the SE Draft contains sections that mirror sections in Internet Articles. Except for the addition of one sentence at its end, the SE Draft section "2.3.1 *Application Server*" is identical to the following statement at *http://www.ecommercedownload.com/contentmanagement/rt-sitebuilder.htm:*

> RT SITEBUILDER v5 (RTSB) is a unique J2EE Model-View-Controller (MVC) web content application framework (WCF) that enables rapid development of web-based applications that support a rich set of content management features such as template management and reuse, workflow, versioning, localization, personalization, internationalization, multi-layer security, distributed authoring, searching, and file management. RTSB's lightweight, flexible, easy-to-deploy, high-performance, standards-based, enterprise-quality design offers developers many advantages such as rapid time to market, low maintenance and training requirements, robust security, high scalability, and greater affordability over competing solutions.

The SE Draft also contains many comments from "Fail-Safe Interop for Your Enterprise," by [redacted] in October 2009 at *http://ar.groups.yahoo.com/group/DesarrolloDotNET/Message/417.* Most of the SED Draft's "Object Mangagement Group (OMG) protocols ((COBRA)" is a verbatim rendition of the Savarese article's second paragraph under the heading "Interoperability Protocols." All of the SE Draft's section 5, "Issues" consists entirely of paragraphs virtually identical to those in the Savarese Internet article, except for a few minor verbal variations and the insertion of the "Issue" and "Solution" headings. It appears that this article was published in *JavaPro,* vol. 7, issue 4 (April 2003). ***See*** **the article index at** *http://javapro.texterity.com/javapro/200411/?pg=42.*

and that he "would be paid . . . for [his] services during the prior month subject to approved time sheets by the client."

The contradictions, inconsistencies, and evidentiary deficiencies noted above so undermine the credibility of the petitioner's assertions about what the beneficiary would do and when he would do it that the AAO finds no credible basis for the petition's claim that the beneficiary would perform specialty occupation services for the employment period specified in the petition. For the same reason, the AAO finds that the petitioner has not established that the petition was filed for specialty occupation work then reserved for the beneficiary for the period specified in the petition.[4] Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The petitioner noted that USCIS approved the petition that had been previously filed on behalf of the beneficiary for the same position that is the subject of the present petition. The director's decision does not indicate whether she reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval 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 CIS 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).

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 the nonimmigrant petitions on behalf of the 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).

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[4] 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 visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248.

Finally, the AAO acknowledges that the petitioner requests the opportunity to present an "oral representation" before the AAO, "in the interest of justice." The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, pursuant to 8 C.F.R. § 103.3(b), USCIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. In this instance, the petitioner identified no unique factors or issues of law to be resolved. Moreover, the written record of proceeding fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.