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FILE: WAC 07 080 53609 Office: CALIFORNIA SERVICE CENTER Date: NOV 12 2009

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

To continue to employ the beneficiary in what the petitioner designates as a Programmer Analyst position, the petitioner seeks to continue his classification and extend his stay 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 two grounds, namely, her findings that the evidence of record failed to establish: (1) that the petitioner is qualified to file an H-1B petition, that is, as either (a) a U.S. employer as defined at 8 C.F.R. § 214.2(h)(4)(ii), or (b) a U.S. agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F); and (2) that the proffered position is a specialty occupation.

As will be discussed below, the AAO finds that the director's determination to deny the petition for failure to establish a specialty occupation is correct. As this finding is dispositive of the appeal, the AAO will not address and therefore not disturb the director's negative determination regarding the petitioner's status as a U.S. employer or agent.

On appeal, along with the Form I-290B and a brief, the petitioner submits copies of: (1) a May 23, 2000 decision of the Administrative Appeals Unit (AAU), as the AAO was previously known, bearing receipt number LIN-99-243-50365; (2) an AILA<sup>1</sup> InfoNet transmission of a document from the Office of Adjudications of the legacy Immigration and Naturalization Service (INS), namely: a 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 referred to as the Aytes memo); (3) four letters from the Business and Trade Services section of the INS Office of the Adjudications (three authored by Efren Hernandez III, and one by Yvonne M. LaFleur); (4) a memorandum from Louis Crocetti Jr., Associate Commissioner, INS Office of Examinations, *Supporting Documentation for H-1B Petitions*, HQ 214h-C (November 13, 1995) (hereinafter referred to as the Crocetti memo); (5) a previously submitted memorandum from the Senior IS Manager at the headquarters of Staples, Incorporated, dated July 11, 2007 (hereinafter referred to as the Staples memo); (6) a previously submitted statement from the beneficiary, dated August 31, 2007 (hereinafter referred to as the beneficiary's statement); (7) a four-page Internet printout recognizing the petitioner as number 1 on the list of Deloitte & Touche's "Fast 50" in New England technology companies for the year 2007, with a 5-year Percent Growth of 39,392 %.; (8) a brochure regarding Deloitte & Touche's "Technology Fast 500" listing the petitioner as the Number 3 technology company in North America, based on "percentage fiscal year growth over five years (2002-2006)"; (9) a certificate and explanatory page regarding Inc. 500's ranking the petitioner 113 overall, and 11 among top information technology companies, for rate of growth in 2007; (10) a press release regarding the Vermont governor's honoring the petitioner for being one of the fastest

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<sup>1</sup> AILA is the acronym of the American Immigration Lawyers Association.

growing technology companies in America; (11) charts from the petitioner regarding its utilization of the H-1B program; (12) a printout of the section of the petitioner's Internet site that describes its application development services; (13) certification of the petitioner's liability insurance; (14) ADP Earning Statements for the beneficiary's pay periods ending December 31, 2007 and March 22, 2008; and (14) the appellate court decision in *Defensor v. Meissner*, 201 F. 3d 384, 387-388 (5<sup>th</sup> Cir. 2000) (hereinafter referred to as *Defensor*), a case cited both herein and in the director's decision.

### **Preliminary Findings**

To narrow the focus of the appeal, the AAO will first address the AAU and legacy INS documents that the petitioner references on appeal, namely: (1) the AAU decision LIN-99-243-50365, referenced for its bearing on requests for contracts and for its comment regarding speculative employment; (2) the Crocetti memo, also referenced for its comments regarding requests for contracts; (3) the Aytes memo, referenced for its comments about the itinerary requirement of the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B); and (4) letters from the Business and Trade Services section of the INS Office of Adjudications. As will be discussed below, these documents have no impact upon the outcome of the appeal.

The AAU decision cited on appeal refers to the Crocetti memo's comments about requesting contracts from petitioners. While the Crocetti memo states that requests for contracts between the employer and the alien worksite should not be a normal requirement for the approval of an H-1B petition from an employment contractor, the memo does not prohibit such RFE requests. Read as a whole, the memo counsels against issuing RFEs for contracts from employment contractors without a specific need that the requesting officer can articulate for requesting the documents. The memo, the AAO notes, does not require the requesting officer to actually articulate the need. Nor does the memo purport to bar agency officers from issuing RFEs as a matter of policy on any category of H-1B petitioners. Further, this internal memo must be read in the context of the current regulations that vest USCIS officers with broad authority to pursue such evidence as they determine necessary in the exercise of their responsibility to adjudicate H-1B petitions in accordance with the applicable statutes and regulations.

Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." Moreover, the regulations at 8 C.F.R. §§ 103.2(b)(8) and 214.2(h)(9)(i) provide the director broad discretionary authority to require such evidence as contracts to establish that the services to be performed by the beneficiary will be in a specialty occupation. A service center director may issue an RFE for evidence that he or she may independently require to assist in adjudicating an H-1B petition, and his or her decision to approve a petition must be based upon consideration of all of the evidence as submitted by the petitioner, both initially and in response to any RFE that the director may issue. See 8 C.F.R. § 214.2(h)(9). The purpose of an

RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(1), (b)(8), and (b)(12).

The AAO finds that, in the context of the record of proceedings as it existed at the time the RFE was issued, the scope of the RFE was appropriate, in that it addressed the petitioner's failure to submit documentary evidence substantiating the petitioner's claim that it had H-1B caliber work for the beneficiary for the period of employment requested in the petition.

Further, as the AAU decision cited on appeal was not published as a precedent for future proceedings, it has no precedential value. *See* 8 C.F.R. § 103.3(c). Also, the AAO does not find the decision helpful to the consideration of the matter here before it, the outcome of which the AAO is determining by application of the relevant regulations to the particular facts of the present case. The AAO also notes that the cited, unpublished AAU decision is erroneous to the extent that it suggests that the apparently speculative nature of the proposed employment is not a proper subject for USCIS inquiry or a proper reason to deny a petition. 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). Further, the petitioner submits no precedential decisions or statutory or regulatory authority for the proposition that the internal agency memorandum cited in the referenced AAU decision prohibits USCIS adjudicating officers from requesting the contractual documents sought by the RFE issued in the present matter.

Next, the AAO finds that the petitioner errs in relying on the Aytes memo as establishing that an itinerary covering the locations and dates known at the time that the petition is filed is sufficient to satisfy itinerary requirement for H-1B petition involving employment at multiple locations, even if that itinerary does not include all the locations and dates of eventual employment. The Aytes memo was drafted to provide internal guidance to legacy INS officers regarding the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B), which expressly requires an itinerary when, as here, a record of proceeding indicates that the beneficiary's services will likely be performed in more than one location. The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) 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, with its use of the mandatory "must," indicates that an itinerary is a material and necessary document 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 least the employment dates and locations. An agency guidance document, such as the Aytes memo, does not have the force and effect to preempt or countermand the clear mandate of an agency regulation. The

AAO notes first that the memorandum has no precedential value and, therefore, no binding effect as a matter of law upon USCIS. 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 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"). Further, the AAO submits that an agency memo cannot override clear directives of a regulation, such as the one at 8 C.F.R. § 214.2(h)(2)(i)(B), that has been properly promulgated in accordance with the Administrative Procedures Act (APA). Further, the AAO notes that the Aytes memo does not purport to curtail a USCIS officer's responsibility to enforce the clear mandate of 8 C.F.R. § 214.2(h)(2)(i)(B) that where, as here, a petition "requires services to be performed in more than one location [it] must include an itinerary with the dates and locations of the services or training."

Based upon comments in the appeal, it appears that the petitioner subscribes to the erroneous proposition that the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B) applies only to employment locations and dates known to the petitioner when the petition is filed.

The petitioner's view on the itinerary requirement is not supported by the language of 8 C.F.R. § 214.2(h)(2)(i)(B). The regulation requires that the itinerary be filed with the petition and that, at petition filing, it specify the dates and locations where the beneficiary is to perform his or her services. Contrary to the petitioner's view, the regulation does not qualify the itinerary as covering only such locations as known at the time of the petition's filing. Also, as the regulation states that the itinerary "must" be filed and provides no exception, the itinerary requirement is not conditional or contingent. Likewise, the Form I-129 Instructions (Revised April 1, 2006) which were current at the time this petition was filed in January 2007 dovetail with the regulation. Page 2 of the Instructions includes this direction:

**Multiple locations.** A position for aliens to perform services or labor or receive training in more than one location must include an itinerary with the dates and locations where the services or training will take place.

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. § 103.2(a)(1) as follows:

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission.

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1) which states in part the following :

*Demonstrating eligibility at time of filing.* 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 matters where evidence related to filing eligibility is provided in response to a director's request for evidence, 8 C.F.R. § 103.2(b)(12) further states in part the following:

An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed.

Contrary to the petitioner's view, the clear import of the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) and the instructions incorporated into the regulation is that an H-1B petition involving employment at multiple locations may not be approved for any part of the employment period specified in the petition for which the location and employment dates are not provided.

The AAO further observes that the attestations from the petitioner and its counsel that H-1B caliber work will always be available for the beneficiary do not satisfy the H-1B itinerary requirement. These assurances are not supported by documentary evidence of definite H-1B caliber work having been specifically reserved for the beneficiary. As such, they have no evidentiary value. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

With regard to the letters from the Business and Trade Services section of the INS Office of Adjudications, it is important to note that correspondence issued by the Office of Adjudications is not binding on the AAO. Letters written by the Office of Adjudications do not constitute official USCIS policy and will not be considered as such in the adjudication of petitions or applications.

Although they may be useful as an aid in interpreting the law, such letters are not binding on any USCIS officer as they merely indicate the writer's analysis of an issue. See Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000). Aside from their lack of precedential value, the AAO notes that the Business and Trade Services letters submitted by the petitioner are not relevant to the issue at hand, as they were not written to address any aspect of the issue of a proffered position qualifying as a specialty occupation.

Moreover, because they do not indicate that the director erred in her decision to deny the petition, the AAU and legacy INS documents referenced by the petitioner on appeal will not be further discussed.

### **H-1B Analytical Framework**

In deciding whether a proffered position qualifies as a specialty occupation, the AAO analyzes the evidence of record according to the statutory and regulatory framework below.

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

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

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

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

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which [1] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [2] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States."

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5<sup>th</sup> Cir. 2000) (hereinafter referred to as *Defensor*.) To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

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

### **Discussion of the Merits**

The AAO acknowledges the petitioner’s viability, remarkable pace of growth, and standing in its industry, as reflected in the petitioner’s submissions, particularly the Deloitte & Touche and Inc. 500 rankings. However, neither the petitioner’s vitality nor financial standing is at issue. Further, the

petitioner's ability to attract clients, which is reflected in the evidence of its growth, is not probative on the issue of whether the beneficiary will be employed in a specialty occupation position.

The petition was filed on January 22, 2007. It seeks to continue the beneficiary's classification as an H-1B temporary worker for the period from February 3, 2007 to February 2, 2010. The related Labor Condition Application (LCA) was certified for the same employment period. Both the Form I-129 and the LCA identify the beneficiary's job title as Programmer Analyst. According to item 5, Part 5 of the Form I-129, the beneficiary will work at the petitioner's address in South Burlington, Vermont and the Staples, Inc. address in Framingham, Massachusetts. This information accords with the LCA statements about work locations.

The documents submitted with the Form I-129 include a January 18, 2007 letter from the petitioner in support of this extension petition. Here the petitioner described itself as "a well-established software services company located in South Burlington, VT and Sterling, VA," with over 250 employees and a gross revenue of approximately \$23,000,000 in 2005. This letter also includes the following comments on the petitioner's business:

[The petitioner] provides solutions to sophisticated companies with specific custom software needs. Often, these needs arise from projects that strain the existing technologies. In such cases, [the petitioner] supplies the software/systems solutions and programming knowledge to tailor existing resources enabling clients to meet new challenges efficiently and cost effectively. . . .

Thus, it is clear that the specific projects to which the petitioner's personnel are assigned are client generated.

The "Terms of Proposed Employment" section of this January 18, 2007 letter states that the beneficiary "will work on projects in Cambridge, Massachusetts and may provide onsite professional services to [the petitioner's] clients at additional locations, always in accordance with a Department of Labor certified Labor Condition Application." However, the letter provides no information about any particular project upon which the beneficiary would work. The documents filed with the Form I-129 did not include any documentary evidence from any business entity relating to work the beneficiary would perform for it.

The petitioner contends, erroneously, that programmer analyst jobs categorically qualify as specialty occupation positions. In support of this contention, its January 18, 2007 letter filed with the Form I-129 partially quotes two paragraphs in the "Computer Systems Design and Related Services" chapter of the 2006-2007 *Career Guide for Industries (CGI)*, published by the Department of Labor's Bureau of Labor Statistics (BLS), from which the petitioner submits two pages. In the interest of completeness and accuracy, the AAO here quotes the paragraphs in full, as they appear in the *GGI* pages submitted by the petitioner:

Computer programmers commonly hold a bachelor's degree; however, there are no universal educational requirements. Some hold a degree in computer science, mathematics, or information systems, while others have taken special courses in computer programming to supplement their study in fields such as accounting, inventory control, or other areas of business. Because employers' needs are so varied, a 2-year degree or certificate may be sufficient for some positions, so long as applicants possess the right technical skills.

Most computer systems analysts and computer engineers, on the other hand, usually have a bachelor's or higher degree and work experience. Many hold advanced degrees in technical fields or a master's degree in business administration (MBA) with a concentration in information systems, and are specialists in their fields. For systems analyst, programmer-analyst or even database administrator positions, many employers seek applicants who have a bachelor's degree in computer science, information science, or management information systems. . . .

The *CGI* reference does no more than establish a preference among “many” programmer analyst employers for applicant's with a bachelor's degree in computer science, information science, or management information systems. As such, the quoted *CGI* comments do not support the proposition for which they were submitted.

The *CGI* describes itself as a companion to the Department of Labor's *Occupational Outlook Handbook (Handbook)*, which is also a BLS publication. 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 discussed in the *Handbook* chapters entitled “Computer Programmers” and “Computer Systems Analysts.”<sup>2</sup> As will now be discussed, these chapters do not support the petitioner's contention that programmer analyst positions categorically qualify as specialty occupation positions.

The “Computer Programmers” chapter states, “In some organizations, workers known as *programmer-analysts* are responsible for both the systems analysis and programming.” This chapter describes the programmer component of the occupation as follows:

Computer programmers often are grouped into two broad types—applications programmers and systems programmers. *Applications programmers* write programs to handle a specific job, such as a program to track inventory within an organization. They also may revise existing packaged software or customize generic applications purchased from vendors. *Systems programmers*, in contrast, write programs to maintain and control computer systems software for operating systems, networked systems, and database systems. These workers make changes in the instructions that

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<sup>2</sup> All references are to the 2008-2009 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

determine how the network, workstations, and central processing unit of a system handle the various jobs they have been given, and how they communicate with peripheral equipment such as terminals, printers, and disk drives. Because of their knowledge of the entire computer system, systems programmers often help applications programmers determine the source of problems that may occur with their programs.

The “Training, Other Qualifications, and Advancement” section of the *Handbook’s* chapter on computer programmers opens with statements that “a bachelor’s commonly is required for computer programming jobs, although a two-year degree or certificate may be adequate for some positions”; that employers “favor applicants who already have relevant programming skills and experience”; and that “skilled workers who keep up to date with the latest technology usually have good opportunities for advancement.” The AAO here quotes the “Education and Training” section of the *Handbook’s* “Computer Programmers” chapter in full in order to show that this occupation accommodates a wide variety of educational credentials short of a U.S. bachelor’s degree, or its equivalent, in a specific specialty closely related to programming:

***Education and training.*** Most programmers have a bachelor’s degree, but a two-year degree or certificate may be adequate for some jobs. 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. In 2006, more than 68 percent of computer programmers had a bachelor’s degree or higher, but as the level of education and training required by employers continues to rise, this proportion is expected to increase.

Employers who use computers for scientific or engineering applications usually prefer college graduates who have a degree in computer or information science, mathematics, engineering, or the physical sciences. Employers who use computers for business applications prefer to hire people who have had college courses in management information systems and business, and who possess strong programming skills. A graduate degree in a related field is required for some jobs.

Most systems programmers hold a four-year degree in computer science. Extensive knowledge of a variety of operating systems is essential for such workers. This includes being able to configure an operating system to work with different types of hardware and being able to adapt the operating system to best meet the needs of a particular organization. Systems programmers also must be able to work with database systems, such as DB2, Oracle, or Sybase.

In addition to educational attainment, employers highly value relevant programming skills, as well as experience. Although knowledge of traditional programming languages still is important, employers are placing an emphasis on newer, object-oriented languages and tools such as C++ and Java. Additionally, employers seek

people familiar with fourth- and fifth-generation languages that involve graphic user interface and systems programming. College graduates who are interested in changing careers or developing an area of expertise may return to a two-year community college or technical school for specialized training. In the absence of a degree, substantial specialized experience or expertise may be needed.

Entry-level or junior programmers may work alone on simple assignments after some initial instruction, or they may be assigned to work on a team with more experienced programmers. Either way, beginning programmers generally must work under close supervision.

Because technology changes so rapidly, programmers must continuously update their knowledge and skills by taking courses sponsored by their employer or by software vendors, or offered through local community colleges and universities.

The AAO notes that the employer preferences noted above do not equate to a normal hiring requirement. The AAO also notes that the wide range of educational attainment shared by computer programmers is reflected in the following two bullet statements from the “Significant Points” section which opens the *Handbook’s* chapter on computer programmers:

- Almost 8 out of 10 computer programmers held an associate’s degree or higher in 2006; nearly half held a bachelor’s degree, and 2 out of 10 held a graduate degree.
- Job prospects will be best for applicants with a bachelor’s degree and experience with a variety of programming languages and tools.

The AAO notes not only the wide range of degrees indicated above, but also that the best prospects are not limited to holders of bachelor’s degrees in a specific specialty or range of closely related specialties.

The *Handbook’s* “Computer Systems Analysts” chapter describes the programmer analyst occupation as follows:

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. . . . 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.

The “Nature of the Work” segment of the *Handbook’s* “Computer Systems Analysts” chapter includes this information, which is relevant to the systems analyst component of the programmer analyst occupation:

Computer systems analysts solve computer problems and use computer technology to meet the needs of an organization. They may design and develop new computer systems by choosing and configuring hardware and software. They may also devise ways to apply existing systems' resources to additional tasks. Most systems analysts work with specific types of computer systems—for example, business, accounting, or financial systems or scientific and engineering systems—that vary with the kind of organization. . . .

To begin an assignment, systems analysts consult managers and users to define the goals of the system. Analysts then design a system to meet those goals. They specify the inputs that the system will access, decide how the inputs will be processed, and format the output to meet users' needs. Analysts use techniques such as structured analysis, data modeling, information engineering, mathematical model building, sampling, and cost accounting to make sure their plans are efficient and complete. They also may prepare cost-benefit and return-on-investment analyses to help management decide whether implementing the proposed technology would be financially feasible.

When a system is approved, systems analysts determine what computer hardware and software will be needed to set it up. They coordinate tests and observe the initial use of the system to ensure that it performs as planned. They prepare specifications, flow charts, and process diagrams for computer programmers to follow; then they work with programmers to “debug,” or eliminate errors, from the system. . . .

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. . . .

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

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

The AAO notes that the paragraph's statement that "many employers prefer applicant's who have a bachelor's degree" is not indicative of a pervasive requirement for a specific major or academic concentration. As such, the preference noted by the *Handbook* is not an endorsement of the occupation as one for which all of its included jobs qualify as specialty occupation positions. The "Education and Training" subsection of the *Handbook's* "Computer Systems Analyst" chapter continues this theme. It states:

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

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

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

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

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

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

With regard to educational requirements, the *Handbook's* "Computer Systems Analyst" chapter indicates that, while employers prefer applicants with a bachelor's degree and often seek applicants who have at least a bachelor's degree in a technical field, their employment practices have not established a bachelor's degree in a specific specialty as the norm for hiring.

While the "Computer Programmers" and "Computer Systems Analysts" chapters both discuss Programmer Analysts as a composite occupation, neither state or otherwise indicate that it constitutes an occupational category characterized by a requirement for at least a bachelor's degree, or the equivalent, in a specific specialty.

The earlier-quoted *CGI* comments are consistent with the *Handbook's* comments indicating that programmer analysts do not comprise an occupation that categorically requires, or is usually associated with, at least a U.S. bachelor's degree, or the equivalent, in a specific specialty.<sup>3</sup> The *CGI* observation that "many" employers seek applicant's who have a bachelor's degree in computer science, information science, or management information systems is evidence of a hiring preference shared by many employers, but it is also evidence that programmer analyst positions do not normally require at least a bachelor's degree, or the equivalent, in a specific specialty.

In light of the educational requirements information in the *Handbook* and the *CGI*, it is incumbent on the petitioner to provide sufficient evidence to establish not only that the beneficiary would perform the services of a programmer analyst, but that he would do so at a level that requires the theoretical and practical application of at least a bachelor's degree level of knowledge in a computer-related specialty. This the petitioner has failed to do.

Qualification as a specialty occupation is not determined by the position's title or how closely a petitioner's descriptions of the position approximate the narrative about an occupational category in the *Handbook*, the *CGI*, or any other reference material. Rather, specialty occupation classification is dependent upon the extent and quality of the evidence of record about the actual work to be performed, the associated performance requirements, and the nature and educational level of specialized knowledge in a specific specialty necessary for or usually associated with such performance requirements.

The record of proceeding indicates that the substantive nature of the beneficiary's services, and hence the educational attainment required to perform them, will be determined by the specific performance requirements of the particular client projects to which the beneficiary will be assigned. These project requirements will be determined by each business entity defining the particular project or project parts upon which the beneficiary will be employed. The best evidence of such requirements are the related contractual documents and contract-related correspondence generated in the ordinary course of business between or among the parties involved in the project. Accordingly,

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<sup>3</sup> This is not surprising, as the *CGI* describes itself as a companion to the *Handbook*, which is also a BLS publication.

it is reasonable for USCIS to request such documents so that it can assess the actual scope and substantive nature of the services that the beneficiary will perform.

In this proceeding, the petitioner has declined to provide any contracts or contract-related documents developed in the ordinary course of business. In their place, it submits two documents of little evidentiary value: the statements of the beneficiary and the Senior IS Manager at Staples.

The director's decision correctly notes that the service center's RFE, issued on June 11, 2007, provided the petitioner the opportunity to submit "contracts, statements of work, work orders, service agreements, or letters from end-clients requiring computer related services of the beneficiary." In response, the petitioner submitted a memorandum from the Senior IS Manager at the headquarters of Staples, Incorporated, and a statement from the beneficiary. As will now be discussed, the AAO is not persuaded by these two documents.

The Staples memorandum is dated July 11, 2007, and it is addressed to the petitioner. It reads as follows:

I confirm that [the client] is working full-time in a contractor capacity at [REDACTED]

He is working as a Consultant Analyst/Programmer.

His on-site supervisor is [the author of the memorandum]. We understand [that] he also reports to persons at iTech as [an] iTech employee.

As we are not his employer, we do not pay him his salary nor do we provide him benefits.

Please feel free to contact me if you need more information about this position.

The beneficiary's statement is dated August 31, 2007, and it is addressed "To Whom It May Concern."<sup>4</sup> The portion of the statement that is relevant to the nature of the beneficiary's work for the period of employment specified in the petition reads:

This affidavit is to certify that I am currently working as an Itech US Inc. employee at the worksite of [REDACTED]

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<sup>4</sup> Contrary to the petitioner's characterization, the beneficiary's statement is not an affidavit, as it bears no indication that it was made under oath or affirmed under the penalty of perjury. The AAO further notes that the notary's signature and stamp add no weight to the beneficiary's statement, as they do not accompany any statement by the notary as to the import of his signature.

I am working full-time, from 9AM to 5PM, as a consultant Analyst/Programmer, and my job duties are:

- Analysis, design, development and implementation of the software applications
- Maintenance of the existing software systems
- Leading the technical teams, and participating in the estimation, planning, management & reporting of the IT projects

On appeal, the petitioner contends that the combination of the Staples memorandum and the beneficiary's "affidavit" are sufficient to establish the beneficiary's employment in a specialty occupation. The AAO disagrees, and finds that they have no probative value.

In the appellate brief's "Position is a Specialty Occupation" section, the petitioner states, in pertinent part:

The Decision of denial was, again, based on the fact that the petitioner did not provide a contract with the end[-]client. Its states, "Without valid contracts between the petitioner and the actual end-client firm . . . the evidence did not establish the work to be completed[.] . . . This is incorrect and ingenuous [sic], as [the] petitioner provided a letter signed by an authorized person at the end client work site showing the beneficiary to be working in the intended professional occupation as specified in the petition and supporting letter. While letter did not provide the job duties, it did provide the title, which should have been enough to determine the position is the same specialty occupation for which [the] petitioner was petitioning. Furthermore, the beneficiary's notarized affidavit did list definite job duties, consistent with the H-1B petition and the end[-]client letter. The beneficiary is working as a Programmer Analyst at a high level, including the leading of technical teams and participation in project management.

The AAO notes that the Staples memorandum attests to no more than that, on July 11, 2007, the beneficiary was working full-time, in a contractor capacity, at Staples, Inc.'s headquarters as a Consultant Analyst/Programmer. The memorandum does not specify the beneficiary's duties or describe any particular project to which he is assigned. Further, the memorandum provides neither the beginning nor the end-date of the beneficiary's assignment to Staples; and it does not state whether the beneficiary is assigned intermittently to Staples or for one continuous period without interruption.

The AAO finds that the beneficiary's statement does not merit any significant weight. The beneficiary is a self-interested witness, as he stands to gain materially by approval of this extension petition, and to lose materially if the extension is denied. Furthermore, the interests of the beneficiary and the petitioner are to an extent inseparable, as the beneficiary is employed by the petitioner and dependent upon the petitioner's employment for pay and H-1B status. In these

circumstances, the AAO will accord weight to the beneficiary's statement only to the extent that its details are corroborated by documentary evidence, such as contracts, contract-related business documents, and affidavits or letters from the end-client entity generating the beneficiary's work. In this regard, the AAO notes that the Staples memorandum corroborates only general aspects of the beneficiary's statement with regard to his work, namely, that he has been assigned to Staples, Inc., "full-time, 9AM to 5PM, as a consultant Analyst/Programmer." As already noted, the Staples memorandum does not provide any information as to the duration or the beneficiary's assignment or the actual work that he performs in his capacity as a consultant Analyst Programmer.

Further, the AAO finds little substantive content in the beneficiary's comment about his duties, which is that they consist of "[a]nalysis, design, development and implementation of the software applications," "[m]aintenance of the existing software systems," and "[l]eading the technical teams, and participating in the estimation, planning, management & reporting of the IT projects." The duties are described in generalized terms that do not relate any substantive information as to the actual work that they would involve and the educational credentials required to perform it. The beneficiary provides no concrete information about the software application analysis, design, and implementation in which he will engage or about any of the other duties he mentions. Therefore, even if taken at face value, the beneficiary's statement does no more than establish that he will be working as a programmer analyst. The statement does not distinguish the proffered position from the range of programmer analyst positions not requiring or usually associated with a level of computer-related technical knowledge attained by at least a bachelor's degree in a specific specialty.

To the extent that the substantive nature of the services to be performed by a beneficiary is determined by requirements set by the petitioner's clients, the AAO focuses on whatever relevant documents the client entities generating the work have issued or endorsed, such as contracts, specifications, performance timelines, contract amendments, work orders, and correspondence about performance expectations, to name a few examples.

In support of this approach, USCIS routinely cites *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000), in which an examination of the ultimate employment of the beneficiary was deemed necessary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources (Vintage), was a medical contract service agency that brought foreign nurses into the United States and located jobs for them at hospitals as registered nurses. The court in *Defensor* found that Vintage had "token degree requirements," to "mask the fact that nursing in general is not a specialty occupation." *Id.* at 387.

The court in *Defensor* held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." *Id.* at 388. The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The *Defensor* court held that legacy INS [Immigration and Naturalization Service (INS)] 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. *Id.* In *Defensor*, the court found that that evidence of the client companies' job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

As recognized by the court in *Defensor*, where, as here, the beneficiary's work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The *Defensor* court observed that the legacy INS 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. It is important to note that the substantive nature of the work actually to be performed by the beneficiary of this petition would be determined by the specific requirements generated by entities contracting, directly or indirectly, for the beneficiary's services. In this situation, the outcome of USCIS adjudication of the specialty occupation issue depends upon the extent and quality of documentary evidence that the petitioner submits from the end-clients that would receive the fruits of the beneficiary's services. The end-clients ultimately determine what the beneficiary would do, and, by extension, whatever practical and theoretical knowledge the beneficiary would have to apply. As will be discussed, the evidence of record is insufficient to establish the specific work that the beneficiary would perform, and, consequently, that the position proffered (him) (her) is a specialty occupation.

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.

As already discussed, the pertinent chapters of the *Handbook* indicate that programmer analyst positions do not normally require at least a bachelor's degree in a specific specialty. This fact does not preclude the petitioner from establishing that its particular position is one that normally requires such an educational minimum. However, as reflected in this decision's earlier discussions about the deficiencies of the statements of the beneficiary and the Staples official, and about the lack of documentary evidence regarding the substantive requirements of the client projects to be assigned to the beneficiary, the petitioner has failed to establish the substantive nature of the proffered position and also the educational level of specialized computer-related knowledge that this particular position requires. Consequently, the petitioner fails to establish the proffered position as one that normally requires at least a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

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).

The first alternative prong assigns specialty occupation status to a proffered position whose asserted requirement for at least a bachelor's degree in a specific specialty is common to positions in the

petitioner's industry that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a specific specialty that is directly related to the specialty occupation claimed in the petition.

As reflected in this decision's earlier comments, the *Handbook* does not indicate that a programmer analyst position as so generally described in this petition would require at least a bachelor's degree in a specific specialty. Thus, the *Handbook* does not support a favorable finding under this criterion. The AAO also notes that the record does not include submissions from a professional association or from individuals or other firms in the petitioner's industry attesting to routine employment and recruiting practices.

The petitioner also has not satisfied 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 record does not contain substantive evidence about the proffered position and its duties that distinguish the position as unique from or more complex than the range of programmer analyst positions for which the *Handbook* indicates that there is no requirement for a bachelor's or higher degree in a specific specialty.

Next, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), by establishing that the employer normally requires a degree or its equivalent for the position. To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. This record fails in this regard also. The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. See generally *Defensor*, 201 F. 3d at 387-388. The critical element is not the title of the position or 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. To interpret the regulations any other way would lead to absurd results: if USCIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, 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. In this record of proceeding, the proposed duties are described exclusively in terms of generalized functions that do not develop the level of whatever specialization and complexity may reside in the duties. As reflected in this decision's earlier comments on the *Handbook's* information about programmer analysts, the educational requirements for positions in this occupation are so varied as to indicate that requisite knowledge for them is not usually associated with a baccalaureate or higher degree in a specific specialty. In this regard, the AAO again notes that the record indicates that the substantive nature of the specific duties, and consequently the knowledge required to perform them, would be determined by particular client projects to which the beneficiary would be assigned, and that the record contains no contracts, work orders, or other documentation generated by such clients that would indicate the substantive nature of the beneficiary's work. In the absence of such evidence, the record lacks a sufficient evidentiary foundation for USCIS to reasonably determine the level of knowledge in any specific specialty that would be required by or associated with the proffered position.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision to deny the petition shall not be disturbed.

At this point, the AAO will address some additional contentions of the petitioner that the AAO finds unpersuasive.

First, the AAO will address the petitioner's mistaken contention that *Defensor* is not relevant to the present matter.

The petitioner has not established a basis for its argument that, for purposes of the application of the specialty occupation standards, there is a material difference between the nurse position proffered in *Defensor* and the programmer analyst position proffered here. The petitioner mistakenly states that the *Handbook* identifies Programmer Analysts, but not Nurses, as "a professional occupation." To the contrary, the *Handbook* places all nursing and all computer-related occupational categories under the same general occupational heading, namely, "Professional and Related Occupations." The *Handbook* notes, at page 5, that the grouping encompasses "a wide variety of skilled occupations." Review of the broad variety of occupations included in the *Handbook* under this occupational heading reveals that inclusion is not limited to occupations requiring or usually associated with at

least a U.S. bachelor's degree, or the equivalent, in any specific specialty. Further, the AAO disregards the petitioner's assertion on appeal that a programmer analyst is "inherently a 'professional occupation' (as defined by the USCIS regulations)." The petitioner provides no citation for this assertion. Furthermore, as membership in a profession is neither a statutory nor regulatory criterion for qualifying a position as a specialty occupation, the petitioner's assertion is irrelevant.

The AAO finds no basis in the record for the petitioner's suggestion that the director premised her decision on a determination that the beneficiary is not working in a professional occupation.<sup>5</sup> The director did not express such a conclusion. Further, the petitioner is mistaken in equating a denial on the specialty occupation issue with a determination that the proffered position is not professional, for again neither regulation nor statute equate a professional occupation with a specialty occupation as defined at section 101(a)(15)(H)(i)(b) the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), and its implementing regulations at 8 CFR 214.2.

Next, as a cautionary note, the AAO will comment on the petitioner's statement on appeal that two of the letters from the Business and Trade Services section of the INS Office of Adjudications, "confirm that an H-1B [beneficiary] is not even required to be physically working at all times – the employee may take leave from work or be "benched," i.e.,] be in an inactive working status . . . and the employer-employee relationship may be seen as continuing to exist." The AAO makes this comment in light of the petitioner's use of the word "benching," which is commonly used in the H-1B context to refer to the illegal practice of reducing or not paying the required wage in response to downturns in available work. As one of the Business and Trade Services letters cited by the petitioner states, "in the 'benching' context, an employer must either continue to pay the alien the required wage or, if not, then terminate the alien." Under the INA's "no benching" provisions, the employer is obligated to pay the required wage even if the H-1B nonimmigrant is in "nonproductive status" (i.e., not performing work) "due to a decision by the employer" (e.g., because of the lack of work to assign). See 8 U.S.C.A. § 1182(n)(2)(C)(vii)(I); 20 C.F.R. §§ 655.731(c)(7)(i).

The AAO recognizes that this is an extension petition. The director's decision does not indicate whether he reviewed the prior approvals of the previous nonimmigrant petitions filed on behalf of the beneficiary. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals 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).

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<sup>5</sup> The suggestion resides in this statement in the brief on appeal: "What petitioner is going to pay an H-1B beneficiary, after all the costs of petitioning, over \$67,000 a year (2006 income) for painting a house or whatever non-professional work it is that USCIS may think the beneficiary is doing?"

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). The prior approvals do not preclude USCIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

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 petition will be denied and the appeal dismissed for the above stated reasons. 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.