



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: APR 09 2014

OFFICE: CALIFORNIA SERVICE CENTER

IN RE:

Petitioner:

Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg

Chief, Administrative Appeals Office

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

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a "Management Consulting" company established in 2005, with 8 employees. In order to employ the beneficiary in what it designates as a "Software Developer, Applications" position, the petitioner seeks 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 record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's notice of decision; and (5) the petitioner's Form I-290B, Notice of Appeal or Motion, and a brief. The AAO reviewed the record in its entirety before issuing its decision.¹

The director denied the petition determining that the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation in accordance with the applicable statutory and regulatory provisions.²

For the reasons that will be discussed below, the AAO agrees with the director's decision that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

As a preliminary matter, the AAO will also address an additional, independent ground, not identified in the director's decision, that the AAO finds also precludes approval of this petition. Specifically, the AAO finds that, beyond the decision of the director, the evidence in the record of proceeding does not establish that the petition was filed for non-speculative work for the beneficiary that existed as of the time of the petition's filing and for the entire period requested.

I. STANDARD OF REVIEW

In the exercise of its administrative review in this matter, as in all matters that come within its purview, the AAO follows the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010), unless the law specifically provides that a different standard applies. In pertinent part, that decision states the following:

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

² The director also observed that the petitioner had not submitted sufficient evidence to establish the availability of work for the beneficiary throughout the requested validity period; however, the director did not discuss this finding as an issue separate from the specialty occupation issue.

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. See *INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Id. at 375-76.

Again, the AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, the AAO applies the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon its review of the present matter pursuant to that standard, however, the AAO finds that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, the AAO finds that the director's determinations in this matter were correct. Upon its review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, the AAO finds that the petitioner has not established that its claims are "more likely than not" or "probably" true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads the AAO to believe that the petitioner's claims are "more likely than not" or "probably" true.

II. PROCEDURAL AND FACTUAL BACKGROUND

In this matter, the petitioner indicated on the Form I-129 and in the supporting documentation that it seeks the beneficiary's services in a position that it designates as a software developer, applications,

to work on a full-time basis at a salary of \$70,000 per year. In addition, the petitioner indicated that the beneficiary would be employed at [REDACTED]. The petitioner stated that the dates of intended employment are from October 1, 2013 to September 1, 2016.

The petitioner attested on the required Labor Condition Application (LCA) that the proffered position is a full-time position and that the occupational classification for the position is "Software Developers, Applications," SOC (ONET/OES) Code 15-1132, at a Level I (entry-level) wage.³ The LCA was certified on March 13, 2013, for a validity period from September 1, 2013 to September 1, 2016. The petitioner also listed the North American Industry Classification System (NAICS) Code on the Form I-129 H-1B Data Collection Supplement, Part A, Question 6 as 54161, "Management Consulting Services." The NAICS entry for "Management Consulting Services" states:

This industry comprises establishments primarily engaged in providing advice and assistance to businesses and other organizations on management issues, such as strategic and organizational planning; financial planning and budgeting; marketing objectives and policies; human resource policies, practices, and planning; production scheduling; and control planning.

The NAICS provides illustrative examples of the management consulting services industry including: actuarial, benefit and compensation consulting services; marketing consulting services; administrative and general management consulting services; process, physical distribution, and logistics consulting services; and human resources consulting services.

U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "54161 Management Consulting Services," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=54161&search=2012> (accessed April 9, 2014).

In a letter of support, dated March 18, 2013, the petitioner stated that it "partners" with state and local agencies in the "strategic analysis, design, development and deployment of enterprise-level applications." The petitioner explained that its software developer will be responsible for communicating directly with clients to determine requirements, developing web solutions, and providing clients with demonstrations, training, and documentation. The petitioner claimed that the software developer will perform the following duties:

- Work with the web team to develop multiple web based applications and components in enterprise ColdFusion/Oracle business environment;
- Develop web based applications using ColdFusion 9, ColBox 3.0, JQuery, AJAX, PL/SQL;

³ See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

- Prioritize, coordinate and facilitate the development of scheduled software components;
- Develop and consistently run Unit Testing on changed software components;
- Correct defects in software as they are found.

The petitioner did not identify the educational requirements it required for the beneficiary to perform the above-described duties; rather the petitioner simply noted the beneficiary's educational and experience background qualified him to perform the stated duties.⁴

The director issued an RFE on May 1, 2013. The petitioner was asked to submit evidence to establish, among other things, (1) that the proffered position qualifies as a specialty occupation, and (2) that there is sufficient specialty occupation work for the beneficiary to perform for the duration of the requested H-1B validity period. The director provided a list of the types of evidence that could be submitted.

In response to the director's RFE, the petitioner provided additional supporting evidence, including, among other things, the following:

- An employment offer letter from the petitioner to the beneficiary. The offer is for employment that begins on January 1, 2012. The offer indicated that the beneficiary will be working in our organization on the [REDACTED]. The beneficiary was offered health benefits, life insurance, and vacation days, and allowances as part of his employment package. The letter was signed on December 27, 2011 by both parties.
- An employment agreement dated December 22, 2011 signed and initialed by both parties.
- An organizational chart showing the beneficiary reporting to the Project Manager. The chart also shows that the beneficiary is the only software developer on staff.
- A lease for the petitioner's office space commencing February 1, 2013 and expiring June 30, 2013. The office space consists of two 15'7" x 11'9" rooms.

⁴ It is not the beneficiary's qualifications, however, that determine whether a particular job is a specialty occupation. A beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. United States Citizenship and Immigration Services is required to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. at 560 ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

- The petitioner also included the following revised description of duties specifically for the beneficiary and the percentage of time allocated to each duty:
 - Work with team to develop multiple web based applications and components in enterprise Cold Fusion/Oracle business environment. 15%
 - Communicate directly with client to determine requirements, develop web solutions, then upon execution, provide client with demonstrations, training, and technical documentation. 10%
 - Develop web-based application using ColdFusion 9, ColBox 3.0, JQuery, AJAX, PL/SQL. 30%
 - Prioritize, coordinate, and facilitate the development of schedule software components. 5%
 - Develop and consistently run Unit Testing on changed software components. 10%
 - Management of Code Reviews. 5%
 - Correction of defects as they are found. 5%
 - Regular status reporting. 10%
 - Corrections of Specification as documentation defects are found. 5%
 - Create help guide and support documentation as well as knowledge transfer. 5%
- A copy of a letter dated May 28, 2013 and signed by the petitioner stating that the beneficiary is a full-time employee of the company and employed directly at the petitioner's offices.
- Print-outs from the petitioner's website.
- A copy of a letter, dated May 28, 2013, from [REDACTED] Mathematics and Computer Science, University of [REDACTED] Professor [REDACTED] repeated the petitioner's description of duties submitted in response to the director's RFE and offered his opinion that the job description provided "constitutes job duties that would require an advanced background in computer science." According to Professor [REDACTED] "[c]ompletion of a course of study at the bachelor's degree level would provide the minimum preparation in terms of the analytical skills required to successfully perform these duties."
- Copies of statements of work and work contracts as follows:
 - Document entitled "ITPS HOURLY/PROJECT WORK ORDER CONTRACT/AMENDMENT." The work order contract is between the State of Oregon Health Authority and [REDACTED] Technologies. The work order contract expires June 30, 2013 or when Contractor has completed 1040 hours of Work. There is no reference to

- the petitioner in the contract.
- A letter to [REDACTED] from the contract officer at the State of Oregon Employment Department authorizing a work order contract amendment for Contract #12-283 including copy of amendment. The work order contract expires on June 30, 2013. The letter mentions the petitioner in the regarding line, but the work order does not.
 - A services contract between the [REDACTED] Corporation and the petitioner effective March 5, 2013 and expiring August 31, 2013.
 - A consulting agreement between the petitioner and [REDACTED] commencing June 6, 2011 and ending November 1, 2011.
 - A notice to proceed with work order contract #11-177 dated January 3, 2011 addressed to [REDACTED]. A copy of the work order contract is included and it is between the State of Oregon Employment Department and [REDACTED]. The work order contract expires on June 30, 2012. The petitioner is not mentioned in the work order contract. The work order contract related to the [REDACTED]

Based on the record, the director denied the petition for the reasons referenced above.

On appeal, counsel for the petitioner asserts that the director erred in concluding that the petitioner is a staffing company. Counsel claims that the petitioner "is hired as a contractor to provide services to its customers, such as developing a piece of software," and that the petitioner "then develops that software itself." Counsel also asserts that the proffered position qualifies as a specialty occupation. Counsel references the U.S Department of Labor's *Occupational Outlook Handbook (Handbook)*, as well as the letter from [REDACTED] Mathematics and Computer Science, [REDACTED] in support of the petitioner's claim that the duties associated with the position require a minimum attainment of a bachelor's degree in computer science or a closely related field. Furthermore, counsel contends that the work orders from government clients are examples of the work received by the petitioner on an ongoing basis and that the absence of longer-term work orders does not indicate a lack of work. Counsel claims that the petitioner received an extension to a current project on which the beneficiary works. The record on appeal, however, does not include evidence supporting this claim.

Counsel also indicates that copies of tax returns, payroll records, a description of mobile apps developed by the petitioner, and photos of the company premises are included with the appeal. However, the record on appeal does not include this evidence.

III. LAW AND ANALYSIS

A. Speculative Employment and Failure to Establish Eligibility at the Time of Filing

Preliminarily, beyond the decision of the director, the evidence submitted fails to establish non-speculative employment for the beneficiary for the entire period requested. Although the

petitioner requested, on the Form I-129, that the beneficiary be granted H-1B classification from October 1, 2013 to September 1, 2016, there is a lack of substantive documentation regarding work for the beneficiary for the duration of the requested period. Specifically, the petitioner has failed to provide any contracts for work that extend beyond the requested start date for the petition.

In the March 26, 2013 letter of support, the petitioner stated that the beneficiary is being hired to work as a software developer, but does not specify a particular project or client with which the beneficiary will work. In the beneficiary's employment contract dated December 27, 2011, the petitioner indicated that the beneficiary will be working on the [REDACTED].

The petitioner submitted five work contracts, with only two of those contracts directly relating to the petitioner. All of the contracts had a termination date prior to the filing date of the instant petition. Accordingly, the documentation submitted does not demonstrate that, at the time of filing the petition, the petitioner had work that it had taken on or agreed to develop at its office for clients that would entail the need for the beneficiary's services to perform the duties of the position as described in the petition. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). The record does not contain evidence such as invoices, purchase orders, work orders, statements of work, and contracts which outline in sufficient detail the nature and scope of the beneficiary's intended employment with the petitioner (or any potential end-user) which would establish that the beneficiary will be employed by the petitioner in the capacity specified in the petition. The petitioner's statements regarding work projects is not corroborated by documentation substantiating that the projects exist and that the project(s) will generate employment for the beneficiary as a software developer.

The AAO finds that, while the petitioner may have some contracts that are renewable, the petitioner has not provided documentary evidence to establish the existence of work available to the beneficiary as a software developer, applications, for the requested H-1B validity period.⁵ The

⁵ The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is

AAO observes, for example, that counsel references "mobile apps" developed by the petitioner, apparently to establish that the petitioner has developed or is developing software. However, the record does not include evidence of this software and moreover, the petitioner has not submitted evidence that it has other ongoing development projects. Again, without supporting documentary evidence, the petitioner has not met its burden of proof. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

Thus, the petitioner has failed to establish that the petition was filed for non-speculative work for the beneficiary that existed *as of the time of the petition's filing*, for the entire period requested. United States Citizenship and Immigration Services' (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'r 1978). For this reason, the petition may not be approved.

B. Specialty Occupation

The AAO will now address the director's basis for denying the petition, namely that the petitioner has not established that there exists a credible offer of employment in a specialty occupation. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that there exists a credible offer of employment in a specialty occupation.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Again, 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). 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).

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

unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act 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).

To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

The petitioner stated on the Form I-129 that the beneficiary would be employed in a "Software Developer, Applications" position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, the specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the evidence in the record of proceeding establishes that performance of the particular proffered 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 a specific specialty as the minimum for entry into the occupation, as required by the Act.

When determining whether a position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. 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."

One consideration that is necessarily preliminary to, and logically even more foundational and fundamental than the issue of whether a proffered position qualifies as a specialty occupation, is whether the petitioner has provided substantive information and supportive documentation sufficient to establish that, in fact, the beneficiary would be performing services for the type of position for which the petition was filed (here, a software developer). Another such fundamental preliminary consideration is whether the petitioner has established that, at the time of the petition's filing, it had secured non-speculative work for the beneficiary that accords with the petitioner's claims about the nature of the work that the beneficiary would perform in the proffered position.

The AAO finds that the petitioner has failed in each of these regards. First, although the petitioner claims that the beneficiary will work in-house, the record is devoid of any documentation indicating and/or corroborating that the beneficiary would be assigned to work on any specific software development or other IT project. Although the employment offer to the beneficiary indicated he would be working on the "[REDACTED]" the record does not include probative evidence that the "[REDACTED]" continued to exist when the petition was filed on April 13, 2013. Moreover, the record does not include evidence that the petitioner is the contractor on the "[REDACTED]" in the contracts and work orders submitted by the petitioner is in the expired work order between the State of Oregon Employment Department and [REDACTED].

In addition to the lack of documentary evidence establishing that the petitioner is in the business of developing software or any customized IT products on its own, the petitioner identified itself on the Form I-129 H-1B Data Collection Supplement, Part A, Question 6 as 54161, "Management Consulting Services." As referenced above, the NAICS data regarding the management consulting services industry does not include software development. If the petitioner claims that it is in the software developing industry, the more appropriate NAICS code would be "541511 Custom Computer Programming Services," which is defined as a U.S. industry comprised of establishments primarily engaged in writing, modifying, testing, and supporting software to meet the needs of a particular customer.⁶

U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "541511 Custom Computer Programming Services," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (accessed April 9, 2014).

Thus, the petitioner's own self-identification does not comport with that of a company which develops "pieces of software." It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Moreover, the petitioner's organizational chart does not identify any personnel engaged in programming.

⁶ The NAICS definition for industries identifying as "541511 Custom Computer Programming Services" cross references two additional industries "511210 Software Publishers" and "541512 Computer Systems Design Services" that may also be appropriate for a software developing company.

Accordingly, it is not clear who in the petitioner's organization would actually program any designed software.

Second, as discussed above, the record does not establish that the petitioner had work orders, statements of work, or contracts to fulfill when the petition was filed. The petitioner did not provide any documentary evidence establishing that it routinely develops software applications either on its own behalf or for other companies.

Finally, upon review of the petitioner's description of the position as quoted earlier in this decision, the petitioner describes the proposed duties in terms of generalized and generic functions that fail to convey sufficient substantive information to establish the relative complexity, uniqueness and/or specialization of the proffered position or its duties. Duties such as "management of code reviews," "communicate directly with client to determine requirements," and "prioritize, coordinate and facilitate the development of schedule software components" do not explain the beneficiary's specific role and how these duties will be conducted and/or applied within the scope of the specific project to which the beneficiary will be assigned. Although the petitioner ascribes 30 percent of the beneficiary's time to developing web-based applications, the petitioner has provided no evidence that it develops web-based applications either for itself or others. Thus, it is not possible to analyze the scope and nature of this particular duty or the beneficiary's role in developing the alleged application(s). Upon review of the description and the totality of the record, the description is so generally described, that it does not illuminate the substantive application of knowledge involved or any particular educational attainment associated with such application⁷

Accordingly, without further information, the petitioner has failed to credibly convey how it would be able to sustain an employee performing these duties at the level required for the H-1B petition to be granted for the entire period requested. That is, the overall responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's business operations.

Such generalized information does not establish a necessary correlation between any dimension of the proffered position and a need for a particular level of education, or educational equivalency, in a body of highly specialized knowledge in a specific specialty. The AAO also observes, therefore,

⁷ The AAO also reviewed the opinion prepared by Professor [REDACTED] in support of a finding that the proffered position is a specialty occupation. The opinion is based on the same job description submitted in response to the RFE. As discussed, the job description provided is generalized and conveys generic functions that fail to provide sufficient details regarding the nature of the beneficiary's day-to-day duties. Moreover, Professor [REDACTED] does not discuss whether he visited the petitioner's business premises or communicated with anyone affiliated with the petitioner as to what the performance of the general list of duties cited by the petitioner would actually require. Nor does the professor's letter articulate whatever familiarity he may have obtained regarding the particular content of the actual work products that the petitioner would require of the beneficiary. Thus, the degree to which Professor [REDACTED] actually analyzed the duties and the beneficiary's actual assignment prior to formulating his letter is not evident. The opinion, therefore, is not probative in establishing the proffered position is a specialty occupation.

that it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they are described by the petitioner, the AAO finds, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire three-year period requested, so as to persuasively support the claim that the proffered position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the demands of the proffered position.

The petitioner has not provided a credible supported description of the actual duties the beneficiary will perform or a credible characterization of the nature of its business. Based upon a complete review of the record of proceeding, the AAO finds that the petitioner has failed to establish (1) the substantive nature and scope of the beneficiary's employment; (2) the actual work that the beneficiary would perform; (3) the complexity, uniqueness and/or specialization of the tasks; and/or (4) the correlation between that work and a need for a particular educational level of highly specialized knowledge in a specific specialty. Consequently, this precludes a determination that the petitioner's proffered position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions.

That is, the petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for entry into the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Thus, the petitioner has failed to establish that the proffered position is a specialty occupation under the applicable provisions.

For the reasons related in the preceding discussion, the AAO finds that the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. Accordingly, the petition cannot be approved.

IV. CONCLUSION

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

The petition must be denied for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *see e.g., Matter of Otiende*, 26 I&N Dec. at 128. Here, that burden has not been met.

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