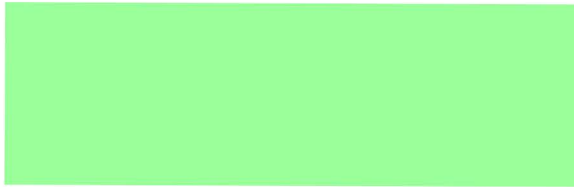


(b)(6)

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



U.S. Citizenship
and Immigration
Services




DATE: JAN 09 2014

OFFICE: VERMONT SERVICE CENTER

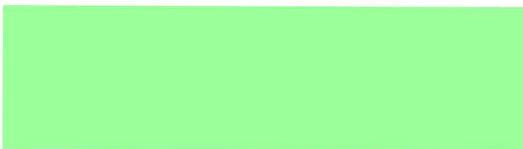
FILE: 

IN RE: Petitioner: 

Beneficiary: 

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

ON BEHALF OF PETITIONER:

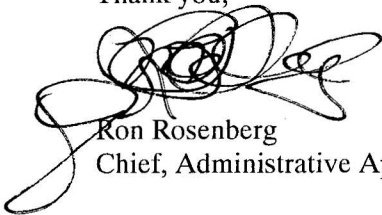


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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.

The petitioner filed a Petition for a Nonimmigrant Worker (Form I-129) with the Vermont Service Center on June 1, 2012. In the Form I-129 visa petition, the petitioner describes itself as a software development and technology company established in 2003. In order to employ the beneficiary in what it designates as a software developer 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 director denied the petition on January 14, 2013, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, the petitioner and its counsel assert that the director's basis for denial of the petition was erroneous and contend that the petitioner satisfied all evidentiary requirements. In support of this assertion, counsel submitted a brief.

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 denial letter; (5) the Form I-290B and supporting documentation; (6) the AAO's RFE; and (7) counsel's response to the AAO's RFE. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director 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. The petition will be denied.

In this matter, the petitioner states in the Form I-129 that it seeks the beneficiary's services as a full-time software developer. On the Form I-129 petition (pages 5 and 17), the petitioner reported that the beneficiary would be paid \$50,000 per year.

With the Form I-129 petition, the petitioner provided a letter of support dated May 31, 2012. The petitioner states that it "need[s] a Software Developer who can assist [the petitioner] with the design and development of software applications." The petitioner provided the following duties for the proffered position:

- Develop web based applications using .NET, Java, J2EE, JSP, Servlets, and EJBs.
- Create middleware for the application using stateless session beans and entity beans.
- Test all modules and fixing the bugs involving in the run-time environment.
- Use JDBC interface to store, extract and manipulate the data in the back-end database (Oracle and SQL server).

- Implement J2EE patterns like Data Access Object, Session Façade, Business Delegate and Value Object.
- Involve in JavaScript coding for validations, and passing attributes [from] one screen to another.
- Responsible for complete testing of the application using J-Unit, based on the Unit-Test plan.

The petitioner did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform these functions and tasks. Thus, the petitioner failed to specify which tasks were major functions of the proffered position, and it did not establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at irregular intervals).

In the letter of support, the petitioner continued by stating that "the position requires the individual to have a degree in Computer Science, Information Technology, or [the] equivalent with related experience in software development." The petitioner provided copies of the beneficiary's academic credentials and an educational evaluation. The evaluation states that the beneficiary has attained the equivalent to a Bachelor of Science in information technology from a regionally accredited university in the United States.

Further, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The petitioner designated the proffered position as falling under the occupational category "Software Developers, Applications" – SOC (ONET/OES Code) 15-1132, at a Level I (entry) position. The petitioner indicated that the rate of pay for the proffered position would be \$50,000 per year for full-time employment.

Further, on a document entitled "MEMO on Project," it is indicated that the beneficiary "has been assigned to work on an [redacted] project for [the petitioner] In-house." The petitioner submitted the following documentation in support of the H-1B petition:

- A document entitled "[redacted]" The document indicates that the petitioner "need[s] at least 2 Programmers for every 5 clients" and "2 DBA's for managing the entire database for at least 20 clients." The petitioner continues by stating that "[a]s a first step we would like to sponsor 4 Programmers and 2 Database Developers/DBAs for supporting, Implementing and enhancing [redacted]" The document does not indicate that the proffered position of software developer is the same position as a programmer or a database developer for the project. The document does not identify the beneficiary as a member or potential candidate for the project.
- An offer letter dated May 30, 2012 for the beneficiary to serve as a software developer. The letter references an employment agreement, however, this

document was not provided with the H-1B petition. Further, the letter indicates that the beneficiary will be paid a salary of \$50,000 per year.

- Employee Handbook (unsigned). The Handbook states that the petitioner is an "IT staffing organization" and that it provides "consultants" with various benefits as "they advance up the ladder to accept new roles and additional responsibilities at leading organizations." It also states that the "core of [the petitioner's] success is [its] ability to place candidates in the right environments that are exciting, challenging and offer a clear path to advancement. . . . to ensure fulfilling rewarding relationships that last."
- A sample "Performance Evaluation and Professional Development Plan."
- A one-page bill, dated January 18, 2012, from [REDACTED] for the petitioner.
- Form 1065, U.S. Return of Partnership Income, for 2010 and 2011. The tax returns have not been signed. Further, the documents do not indicate that any salaries and wages (line 9) were paid. On Form 1125-A, Costs of Goods Sold, the petitioner reported "[c]ost of labor" (line 3).
- An excerpt from the petitioner's lease agreement.
- Printouts from the petitioner's website from November 3, 2010 (although the H-1B petition was filed on June 1, 2012).

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on September 27, 2012. The RFE included a request that the petitioner provide a detailed statement regarding the duties of the proffered position to include (1) an explanation of the beneficiary's proposed duties and responsibilities, as they relate to the project assignment; (2) an indication of the percentage of time devoted to each duty; (3) an explanation of the educational requirements for the duties; and (4) a description of how the beneficiary's education relates to the position. In addition, the director requested additional evidence to establish eligibility for the benefit sought. The director outlined the evidence to be submitted.

The petitioner and its counsel responded to the RFE by providing additional evidence. In a letter dated December 12, 2012, the petitioner indicated that "[REDACTED] product has three core components: [REDACTED]. The petitioner claimed that the beneficiary "will be working for [the petitioner] in implementing the [REDACTED]." The response included the following documents:

- A letter from the petitioner that provided the same job description as previously submitted, but with the addition of the percentages of time that the beneficiary would spend performing each duty. The petitioner provided the following job description:

- Develop web based applications using .NET, Java, J2EE, JSP, Servlets, and EJBs. (30%)
 - Create middleware for the application using stateless session beans and entity beans. (10%)
 - Test all modules and fixing the bugs involving in the run-time environment. (10%)
 - Use JDBC interface to store, extract and manipulate the data in the back-end database (Oracle and SQL server). (10%)
 - Implement J2EE patterns like Data Access Object, Session Façade, Business Delegate and Value Object. (15%)
 - Involve in JavaScript coding for validations, and passing attributes [from] one screen to another. (10%)
 - Responsible for complete testing of the application using J-Unit, based on the Unit-Test plan. (15%)
- A document entitled "[REDACTED]" The document includes a section describing the 12 team members for the project. It is noted that the beneficiary is not listed as a member of the team. Further, the document indicates that the project "needs 2 Java Developers and 1 DBA for this product [b]y end of this year to implemented [REDACTED] without any problems." While the document identifies a candidate for the DBA position, it does not identify candidates for the Java developer positions. Further, there is no indication that the Java developer positions are the same or similar to the proffered position. The document does not contain information regarding the specific duties and requirements (if any) for the Java developers.

The section of the document entitled "Location of Implementation" states, "Since [REDACTED] product all the implementation is down at [the name of the petitioner] [REDACTED]" The address provided for implementation is not the same address as provided on the Form I-129 and LCA as the beneficiary's work site.

- A document entitled "[REDACTED] Software Requirements Specifications," dated September 8, 2011
- A document entitled "[REDACTED] High Level Design," dated December 8, 2011.

- An untitled chart/table that lists tasks with start and end dates. The tasks include an entry "Requirements Analysis" that began on January 9, 2012, as well as "Application Design," "Database Design and Development," "Application Development," and more. The document states that the "Release to Market" is scheduled to occur on November 17, 2014. The document does not identify the name of the project and there is no evidence that the beneficiary will be assigned to this particular project.
- A document entitled "[REDACTED] Business Plan."
- A document entitled "[REDACTED]" dated December 4, 2012. It appears to be a proposal in response to an Information For Bid (IFB).¹ The document specifically indicates that it is a proposal, that the petitioner "[has not been] selected to go ahead with this project," and there is no agreement or contract between the parties. According to section 4.6 Project Plan, the project is "estimated to complete by 28th Jan 2013 considering that the project start date would be 26th Dec 2012." Section 11 lists the team members for the project, but the beneficiary is not listed as a member of the team.
- A document entitled "Microsoft Open License Agreement."
- The petitioner's office lease agreement and related materials.

Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director denied the petition on January 14, 2013.

Thereafter, the petitioner submitted an appeal of the denial of the H-1B petition. Upon preliminary review of the record of proceeding, the AAO found the evidence of record was insufficient to establish eligibility for the benefit sought and issued an RFE on September 12, 2013.² In the RFE, the AAO noted that the petitioner provided an LCA for the occupational category "Software Developers, Applications" - SOC (ONET/OES) Code 15-1132 for a Level I position in support of the Form I-129. On the LCA, the petitioner stated that the prevailing wage was \$49,358 per year in

¹ An Invitation for Bid (IFB) is an invitation for vendors or contractors, through a bidding process, to submit a proposal on a specifically requested product or service. The bidders return a proposal by a set date and time, and are then evaluated based primarily upon cost.

² The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

the area of intended employment. Further, the petitioner indicated in the LCA, the Form I-129, and in its offer of employment letter (dated May 30, 2012) that the rate of pay for the proffered position would be \$50,000 per year for full-time employment. However, a search of the Office of Foreign Labor Certification (OFLC) Online Data Center revealed that the prevailing wage level for the occupational classification "Software Developers, Applications" in the area of intended employment was \$69,930 per year at the time the LCA was submitted in this matter, which is \$19,930 more per year than the petitioner's proffered wage of \$50,000.³

Counsel for the petitioner responded to the RFE on October 4, 2013. Counsel stated the following (emphasis in the original):

We admit the possibility we have used the wrong survey. A Computer Programmer survey was used for the case. The issue here is DOL [U.S. Department of Labor] has surveys for Computer Programmers, Computer Systems Analysts, and Software Developers, and sometimes it is unclear that in a given position, which survey is the correct survey. The job descriptions of the surveys are similar and subject to interpretation. . . . The LCA submitted is the right LA for the correspond [sic] Petition.

Furthermore, the present LCA was certified by the US Department of Labor. 20 C.F.R. § 655.705(b) provides:

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

In the present case, the issues are not "specialty occupation" or whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification. The issue is **whether the petition is supported by an LCA which corresponds to the petition**, as provided in 20 C.F.R. § 655.705(b). The argument here is that, in the present case, the petition is supported by the LCA which corresponds with the petition. The LCA submitted is the right LCA for the correspond [sic] Petition.

³ For additional information regarding prevailing wage for "Software Developers, Applications" in [REDACTED] see the All Industries Database for 7/2011-06/2012 for "Software Developers, Applications" at the Office of Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatacenter.com/OesQuickResults.aspx?code=15-1132&area=19124&year=12&source=1> (last visited January 8, 2014).

Even if the LCA is deficient through us inadvertently using the wrong DOL survey, the substance of the LCA is for the DOL to adjudicate. DHS has no jurisdiction to overturn the LCA that has been certified by the DOL.

Counsel claims that the H-1B "petition is supported by the LCA which corresponds with the petition," and that the "LCA submitted is the right LCA for the correspond[ing] [p]etition." However, no further explanation was provided to support counsel's statements.

In pertinent part, the Act defines an H-1B nonimmigrant worker as:

[A]n alien . . . who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . who meets the requirements for the occupation specified in section 214(i)(2) . . . and with respect to whom *the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1) . . .*

Section 101(a)(15)(H)(i)(b) of the Act (emphasis added).⁴

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

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

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.

⁴ In accordance with section 1517 of title XV of the Homeland Security Act of 2002 (HSA), Pub. L. No. 107-296, 116 Stat. 2135, any reference to the Attorney General in a provision of the Act describing functions which were transferred from the Attorney General or other Department of Justice official to DHS by the HSA "shall be deemed to refer to the Secretary" of Homeland Security. See 6 U.S.C. § 557 (2003) (codifying HSA, tit. XV, § 1517); 6 U.S.C. § 542 note; 8 U.S.C. § 1551 note.

In determining the nature of the job offer, DOL guidance indicates that the first step is to review the requirements of the job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the job offer is used to identify the appropriate occupational classification. If the petitioner believes that its position is described as a combination of O*NET occupations, then according to DOL guidance the petitioner should select the relevant occupational code for the highest paying occupation.

It must be noted that under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. See section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A).

Implemented through the LCA certification process, section 212(n)(1) is intended to protect U.S. workers' wages by eliminating economic incentives or advantages in hiring temporary foreign workers. See, e.g., 65 Fed. Reg. 80,110, 80,110-111, 80,202 (2000). The LCA currently requires petitioners to describe, *inter alia*, the number of workers sought, the pertinent visa classification for such workers, their job title and occupational classification, the prevailing wage, the actual rate of pay, and the place(s) of employment.

To promote the U.S. worker protection goals of a statutory and regulatory scheme that allocates responsibilities sequentially between DOL and the U.S. Department of Homeland Security (DHS), a prospective employer must file an LCA and receive certification from DOL before an H-1B petition may be submitted to the U.S. Citizenship and Immigration Services (USCIS). 8 C.F.R. § 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.700(b)(2). Upon receiving DOL's certification, the prospective employer then submits the certified LCA to USCIS with an H-1B petition on behalf of a specific worker. 8 C.F.R. § 214.2(h)(2)(i)(A), (2)(i)(E), (4)(iii)(B)(1). DOL reviews LCAs "for completeness and obvious inaccuracies," and will certify the LCA absent a determination that the application is incomplete or obviously inaccurate. Section 212(n)(1)(G)(ii) of the Act. In contrast, USCIS must determine whether the attestations and content of an LCA correspond to and support the H-1B visa petition. 20 C.F.R. § 655.705(b); see generally 8 C.F.R. § 214.2(h)(4)(i)(B).

On the Form I-129 and supporting documents, the petitioner claims that it will employ the beneficiary in a position it designates as a "Software Developer" position. In response to the AAO's RFE, counsel claims that "DOL has surveys for Computer Programmers, Computer Systems Analysts, and Software Developers, and sometimes it is unclear that in a given position, which survey is the correct survey." Counsel further asserts that the "job descriptions of the surveys are similar and subject to interpretation."⁵ However, it must be noted that both DOL's *Occupational*

⁵ Counsel mentions several occupational categories as relevant. However, in the instant case, the petitioner identified the proffered position as falling under the occupational category "Software Developers, Applications," but did not provide the correct corresponding prevailing wage for this occupational category on the LCA. Rather, the petitioner provided a prevailing wage (and offered wage) that are over \$19,930 per year less than the prevailing wage for the occupational category "Software Developers, Applications."

Outlook Handbook (Handbook) and O*NET OnLine classify "Computer Programmers," "Computer Systems Analysts" and "Software Developers, Applications" as separate and distinct occupational categories. Moreover, DOL guidance indicates that if a proffered position is described as a combination of occupations, then the petitioner should select the relevant occupational code for the highest paying occupation.

The Online Wage Library (OWL) lists the prevailing wage for "Computer Programmers" as \$49,358 per year at the time the petition was filed in this matter, for a Level I position in the area of intended employment. The prevailing wage for "Computer Systems Analysts" for a Level I position is listed as \$51,854 per year. As mentioned, the correct prevailing wage for "Software Developers, Applications" for a Level I position is \$69,930 per year. Thus, the prevailing wage for "Software Developers, Applications" is significantly higher than the wages for "Computer Programmers" and "Computer Systems Analysts."

In accordance with DOL guidance, if the petitioner believed its proffered position was a combination of the occupations "Computer Systems Analyst," "Computer Programmers," and "Software Developers, Applications," then it should have chosen the relevant occupational code and wage for the highest paying occupation – in this case "Software Developers, Applications." However, the petitioner claimed the proffered position fell under the occupational category "Software Developers, Applications," but selected the prevailing wage for "Computer Programmers" on the LCA. Thus, upon review, the petitioner has not established that it would pay the beneficiary the required wage for his work as required under the applicable statutory and regulatory provisions. Moreover, the petitioner and its counsel have not submitted an LCA that corresponds to the level of work, responsibilities and requirements that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work, responsibilities and requirements in accordance with the pertinent LCA regulations.

The petitioner has not stated that it would adjust the offered wage to correspond with required wage for the occupational category "Software Developers, Applications." Nevertheless, even assuming *arguendo* that the petitioner made such an assertion, the petition could not be approved. 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). A petitioner may of course change a material term and condition of employment. However, such a change cannot be made to a petition after it has already been filed with USCIS. Instead, the change must be documented through the filing of an amended or new petition, with fee and a valid LCA, for USCIS to consider. See 8 C.F.R. § 214.2(h)(2)(i)(E).

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

corresponds to the claimed occupation and duties of the proffered position and that it would pay an adequate salary for the beneficiary's work, as required under the Act, if the petition were granted. As a result, even if it were determined that the petitioner overcame the other independent reason for the director's denial, the petition could still not be approved for these reasons.

The AAO will now address the director's basis for denial of the petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. 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 the position as described constitutes 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. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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.

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.

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 illogical and absurd 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.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the particular position qualifies as a specialty occupation. *See generally* *Defensor v. Meissner*, 201 F.3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a baccalaureate or higher degree in the specific specialty or its equivalent as the minimum for entry into the occupation, as required by the Act.

Upon review of the Form I-129, LCA and supporting documents, the AAO finds that the petitioner has failed to establish the substantive nature of the work to be performed by the beneficiary. For instance, while the LCA was filed classifying the proffered position under the occupational category "Software Developers, Applications," the petitioner provided a prevailing wage that corresponds to a Level I (entry-level) position under the occupational category "Computer Programmers."⁶ Additionally, in response to the AAO's RFE, counsel claims that the description regarding the occupational category "Computer Systems Analysts" is also relevant to the instant petition.

Further, the record lacks sufficient information about the work to be performed and the beneficiary's specific role in the project. The petitioner indicated that the beneficiary will spend 30% of his time "[d]evelop[ing] web-based applications using .NET, Java, J2EE, JSP, Servlets, and EJBs." The statement does not include information regarding the day-to-day tasks of the position, and it does not delineate the actual work that the beneficiary will perform. The petitioner's statements – as so generally described – do not illuminate the substantive application of knowledge involved or any particular educational attainment associated with such application. The petitioner also states that the beneficiary will spend 10% of his time "[i]nvolve[d] in JavaScript coding for validations, and

⁶ The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

passing attributes form [sic] one screen to another." The petitioner fails to sufficiently define the task of "involve[d]" and how this task entails the need for a particular level of education, or educational equivalency, in a body of highly specialized knowledge in a specific specialty. Further, the petitioner claims that the beneficiary will "[i]mplement J2EE patterns like Data Access Object, Session Facade, Business Delegate and Value Object." The duty as stated fails to provide any particular details regarding the demands, level of responsibilities and requirements necessary for the performance of this task. The petitioner did not provide information regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision to be received.

Additionally, the petitioner indicated that the beneficiary will work on "implementing the [redacted] and [redacted]" but the petitioner failed to substantiate an on-going project that would be active for the duration of the beneficiary's H-1B classification. As noted in the director's denial, the [redacted] is estimated to be completed by January 28, 2013. Moreover, the document is simply a proposal to an Information For Bid, and there is no evidence that the parties entered into an agreement or contract. On appeal, counsel states that [redacted] is just a part of the [redacted] which is consisted [sic] of many tools and modules." Counsel asserts that "[a]fter completion, the beneficiary will move to develop other part of the [redacted]. However, counsel did not submit further evidence to support the statements. 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)). 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).

The record of proceeding contains inconsistent evidence regarding the nature of the position. Additionally, there is insufficient information to determine in what capacity the beneficiary will actually be employed. This precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner 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.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

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 1043, *aff'd*, 345 F.3d 683; *see also Soltane v. DOJ*, 381 F.3d 145 (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, 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 appeal will be dismissed 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, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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