

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D2



FILE: EAC 07 151 52269 Office: VERMONT SERVICE CENTER

Date: OCT 01 2009

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a corporation doing business as an information technology consulting and services firm. To employ the beneficiary in what it has designated a software engineer position, the petitioner endeavors to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that (1) the petitioner has a *bona fide offer of employment for the beneficiary* and that it otherwise qualifies as a United States employer as that term is defined in the regulations; and (2) the petitioner will employ the beneficiary in a specialty occupation position.

On appeal, the petitioner asserts that the director's grounds for denial were erroneous, and contends that the petitioner satisfied all evidentiary requirements. In support of these contentions, counsel submits a brief and additional evidence.

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief and attached exhibits in support of the appeal.

As a preliminary matter, the AAO withdraws the part of the director's decision denying the petition "in accordance with 8 C.F.R. [§] 214.2(h)(4)(D)(5) and 8 C.F.R. [§] 214.2(h)(11)(ii). The regulation at 8 C.F.R. § 214.2(h)(4)(D)(5), which deals with U.S. Citizenship and Immigration Services (USCIS) assessment of a beneficiary's qualifications to serve in a specialty occupation position, is not relevant, as the beneficiary's qualifications were not a subject of the director's decision. The regulation at 8 C.F.R. § 214.2(h)(11)(ii) is also not relevant, as it deals only with the grounds for automatic revocation of approval of a petition.

The first issue before the AAO is whether the petitioner has a *bona fide offer of employment for the beneficiary* and that it otherwise qualifies as a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).

"United States employer" is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;

- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

Upon review, the AAO concurs with the director's decision. The record is not persuasive in establishing that the petitioner has a bona fide offer of employment for the beneficiary or that it will have an employer-employee relationship with the beneficiary.

On appeal, the petitioner claims that it "has entered into a contractual agreement with the beneficiary that gives rise to certain rights and responsibilities for both parties." The petitioner claims that it has the right to terminate the beneficiary's work but is also obligated to pay a salary and provide employee benefits. It further claims that it has substantial control over the beneficiary's work by deciding the specific tasks on which the beneficiary will work. In conclusion, the petitioner claims that it has provided ample evidence that a bona fide offer of employment exists and that the petitioner qualifies as an employer.

To qualify as a United States employer, all three criteria at 8 C.F.R. § 214.2(h)(4)(ii) must be met. The Form I-129 and the petitioner's federal tax returns and related documents contained in the record indicate that the petitioner has an Internal Revenue Service Tax Identification Number. However, the petitioner provides no evidence to establish that, as of the date the petition was filed, actual H-1B caliber work for the beneficiary was definite and assured. Thus, the petitioner has failed to establish that the petition was filed on the basis of bona fide employment for the beneficiary.

The petitioner's March 27, 2007 letter of support filed with the petition indicates engagement of the beneficiary to work in the United States, but do so only in general and generic terms that specify neither particular projects upon which the beneficiary would work nor definite locations for such work. For example, the letter's "Description of the Position and Job Duties" states that the beneficiary "will be actively involved in various roles, including, but not limited to, providing services at Petitioner's headquarters or when required at client locations." The letter does not identify any specific work assignment for any location. Instead of identifying a definite assignment awaiting the beneficiary, the letter states, "Primarily, the Beneficiary will be providing services in designing, developing, and implementing of advance software applications." The petitioner does not identify the software application to which it refers, or the clients for which such work is to be performed. Likewise, the Offer of Employment letter, also dated March 27, 2007, identifies no particular project or assignment for the beneficiary.

In the RFE dated August 27, 2007, the director requested various tax and financial documents from the petitioner in order to corroborate the petitioner's claim that a bona fide offer of employment existed for the beneficiary. In a response dated September 12, 2007, the petitioner submitted copies of: (1) an employee list; (2) 90 Form W-2 Wage and Tax Statements for 2006; and (3) its U.S.

Corporation Income Tax Return for 2006. The AAO observes that, although counsel's September 12, 2007 letter of reply to the RFE identified them as enclosures, the RFE responses did not include copies of the petitioner's Form 941 for the last two quarters and its most recent Form W-3, although they had been requested by the RFE.

In the paragraph summarizing the bases of his decision to deny the petition, the director states, in part:

USCIS . . . must conclude that the petitioner does not qualify as an H1B employer as they failed to provide evidence to establish that they have sufficient work and resources. The beneficiary is therefore not eligible for the requested H-1B visa because the petitioner is unable or unwilling to provide qualifying employment. . . .

On appeal, counsel argues that the H-1B regulations do not require that payroll documentation be provided or that a petitioner's ability to pay wages be established. While H-1B regulations do not specifically list this type of evidence as being required, 8 C.F.R. § 214.2(h)(9)(i) and 8 C.F.R. § 103.2(b)(8) both provide broad discretionary authority for USCIS to require the submission of evidence material to establishing eligibility for the benefit sought. Evidence of compliance with the H-1B program requirements with regard to other H-1B sponsored aliens is directly material to the director's determination of whether the job offered to the beneficiary is bona fide and whether the petitioner will adhere to and abide by the H-1B program requirements with regard to its proposed employment of this alien beneficiary.

As such, the request for payroll documentation was proper. Having said that, the petitioner on appeal has still failed to fully address the director's concerns regarding its compliance with the continuous employment of its other H-1B employees and, despite the additional documentary evidence submitted on appeal, nothing to overcome this issue was submitted. While the director did not give examples, it appears based on the evidence provided that some H-1B employees, e.g., [REDACTED] and [REDACTED] were either (1) not paid the prevailing wage rate listed on their respective Labor Condition Applications (LCAs) or (2) benched during certain periods of time in 2006. More specifically, an examination of the wages paid to these sample employees as compared to the prevailing wage required to have been paid to them is deficient by approximately \$25,133.72, \$7,471.20, \$395.44, and \$9,633.15, respectively, for the part of the year the petitioner claimed to employ them. Moreover, the letters requesting leaves of absence do not include any requests from these employees that would explain this gap in pay. In any case, it does not appear that the petitioner fully complied with H-1B program requirements with regard to these and perhaps many of its other employees. As such, the director did not err in denying the petition on the ground that a bona fide offer of employment did not exist.

Without a bona fide offer of employment, the petitioner cannot be deemed a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii). For the reasons set forth above, the petition must be denied.

Remaining is the issue of whether the director was correct in determining that the petitioner had not provided sufficient evidence to establish that it would be employing the beneficiary in a specialty occupation position. The director articulated this adverse determination most clearly in the following paragraphs discussing the lack of documentary evidence of H-1B caliber work for the beneficiary:

The evidence of [the] petitioner's offer of employment contained in the record does not satisfy 8 C.F.R. § 214.2(h)(1)(B) as the agreement does not cover the entire period of requested employment except indirectly by implication. There are no additional contracts, work orders, master service agreements or statements of work establishing the specific dates and locations of the beneficiary's proposed employment. The record also contains no evidence to demonstrate that a work itinerary existed for the position at the time the petition was filed. The submitted Labor Condition Application specifies only Chantilly, VA as the work location for the beneficiary.

As the record does not contain documentation that establishes the specific duties the beneficiary would perform, USCIS cannot properly analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty or field of endeavor, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies for classification as a specialty occupation under the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(1).

The AAO finds that the director was correct in his determination that the record before him failed to establish a specialty occupation position, and the AAO also finds that the matters submitted on appeal have not remedied that failure. Accordingly, the director's decision to deny the petition shall not be disturbed.

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 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, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). 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), 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. 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 professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

The record of proceedings is fatally defective because it fails to include documentary evidence corroborating the H-1B petition’s claim that for the period requested the beneficiary would be employed on matters requiring him to apply the theoretical and practical application of a bachelor’s degree level of a body of highly specialized knowledge in a specific specialty.

The petitioner’s letter of March 27, 2007 that it submitted with the Form I-129 indicates that the petitioner provides its clients with a wide spectrum of services that are not limited to software engineering. The pertinent part of the letter states:

The petitioner is a growing and viable business organization. Specifically, the Petitioner provides professional information technology consulting services, software development and related services with expertise in Providing Business Intelligence solutions, deploying industry-leading products and solutions. The petitioner provides a whole range of services in the datawarehousing and database management domain. [The petitioner’s] specialty is working with clients in a variety of database issues including: Database Administration, Data Warehouse Readiness Assessment, Data Warehouse Delivery & Quality Assurance, Data Warehouse Monitoring & Maintenance, and Business Intelligence & Enterprise Reporting.

The petitioner’s Form I-129 identifies the Job Title as “Software Engineer” and as a Nontechnical Job Description states, “Design, develop, implement, and maintain software programs.” The petitioner’s Offer of Employment letter to the beneficiary, dated March 27, 2007, refers to the offered position as “Software Engineer, reporting to [the] Project Manager, Business Services and Solutions Group.” The AAO notes that the letter does not identify any project upon which the beneficiary would be employed.

The petitioner’s March 27, 2007 letter filed with the Form I-129 states that, for the 36-month employment period sought in the petition, the beneficiary “will be actively involved in various roles, including, but not limited to, providing services at [the] Petitioner’s headquarters or when required at client locations.” According to the letter, the beneficiary will primarily be “providing services in designing, developing, and implementation of software applications.” The letter also refers to the proposed position as a Software Engineer and describes the associated duties and responsibilities as follows:

In the capacity of a Software Engineer, the Beneficiary will have the following job duties:

- Plan, develop, test and document computer programs, applying knowledge of programming techniques in Oracle, TOAD, C++, C, [and] VC++.
- Design and development, testing and implementation of Vendor Management applications using TOAD, C++, C, [and] VC++.
- Evaluate user request for new or modified program, such as for financial or human resource management system, to determine feasibility, cost and time required, compatibility with current system, and computer capabilities.

The record does not develop the weight and relevance of these generic duty descriptions, as it lacks substantive evidence of definite work in which the beneficiary would execute these duties. According to its letter submitted with the Form I-129, the petitioner seeks an H-1B software engineer because it determined that what it describes as its rapid growth and its need to remain consistent with its goal “to remain on the cutting edge of this ever changing technology.” The AAO notes, however, that the record fails to provide substantive evidence that, at the time the petition was filed, there existed any definite work for the beneficiary to perform as a computer software engineer for the employment period sought in the petition.

Counsel’s cover letter on appeal identifies appellate exhibit 9 as a “Copy of IEA [Ian, Evan & Alexander Corporation] contract where Beneficiary will perform services at Petitioner’s business location in Chantilly VA.” This exhibit consists of (1) a one-page table entitled “Schedule of Services for the Beneficiary”; (2) a signed and notarized “Strategic Alliance Agreement” between IEA and the petitioner, executed on January 11, 2007; and (3) an eight-page document entitled “Strategic Relationship between USM Business Systems, Inc and IEA Corp.” The AAO finds that this exhibit has no probative value. Neither the Strategic Alliance Agreement nor the Strategic Relationship document provides substantive details of any work to be performed in accordance with those documents. The “Schedule of Services,” a vague document with no substantive information, merely provides a 30-month timeline for the following abstractly stated work: Project Orientation, Project Kickoff Presentation, Project Transition Plan & Its Completion, Project Development, Quality Assurance, Testing, Install Shield Preparation, and Final Onsite Project Management Plan. Neither the underlying project nor the proffered position’s connection to it is described. The AAO also observes that the title of the schedule document identifies it as developed “for The Beneficiary,” but the document does not identify that person by name. Further, neither the Strategic Alliance Agreement nor the Strategic Relationship document references the beneficiary of this petition or the Schedule of Services.

Because they deal with materially different occupational category than identified in the Form I-129 and the LCA, which specifies the beneficiary’s wages, the AAO finds that the following submissions on appeal, which counsel groups together as appellate exhibit 10, are irrelevant, and, therefore, not worthy of further comment: the printout from the Department of Labor’s *O*Net Online* Internet

site's information on Computer Programmers; the Department of Labor's *Occupational Outlook Handbook (Handbook)* chapter "Computer Programmers"; and the Internet Job advertisements, which are for positions entitled "Programmer Analyst," "Programmer/Analyst," "Programmer Analyst Advanced," and "Senior Programmer Analyst."

The AAO recognizes the Department of Labor's *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. The "Computer Software Engineers" chapter in the 2008-2009 edition of the *Handbook* does not support counsel's statement in the appellate brief that the *Handbook* states that "this position requires at least a Bachelor's Degree."¹ The *Handbook* reports that "most employers prefer applicants who have at least a bachelor's degree, and broad knowledge of, and experience with, a variety of computer systems and technologies." The *Handbook*, however, does not indicate that a baccalaureate degree is the minimum educational requirement for computer software engineers. The *Handbook* reports that for these positions "most employers prefer applicants who have at least a bachelor's degree and broad knowledge of, and experience with, a variety of computer systems and technologies." The *Handbook*, however, does not indicate that computer software engineers constitute an occupational class for which entry normally requires at least a bachelor's degree in a specific specialty. According to the *Handbook*, approximately 20% of computer software engineer positions are filled by individuals without bachelor's degrees. The *Handbook* also indicates that while computer-related majors are the usual academic concentration among the computer software engineers holding degrees, other majors are not excluded. The following excerpts from the 2008-2009 *Handbook's* "Computer Software Engineers" chapters convey these points:

[From the three introductory "Significant Points":]

- Very good opportunities are expected for college graduates with at least a bachelor's degree in computer engineering or computer science and with practical work experience.

[The "Training, Other Qualifications, and Advancement" section:]

Most employers prefer applicants who have at least a bachelor's degree and experience with a variety of computer systems and technologies. In order to remain competitive, computer software engineers must continually strive to acquire the latest technical skills. Advancement opportunities are good for those with relevant experience.

Education and training. Most employers prefer applicants who have at least a bachelor's degree and broad knowledge of, and experience with, a variety of computer systems and technologies. The usual college major for applications

¹ In an apparent clerical error, the brief here refers to the proffered position as "Programmer Analyst."

software engineers is computer science or software engineering. Systems software engineers often study computer science or computer information systems. Graduate degrees are preferred for some of the more complex jobs. In 2006, about 80 percent of workers had a bachelor's degree or higher.

Academic programs in software engineering may offer the program as a degree option or in conjunction with computer science degrees. Because of increasing emphasis on computer security, software engineers with advanced degrees in areas such as mathematics and systems design will be sought after by software developers, government agencies, and consulting firms.

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

In light of the *Handbook's* information, the AAO disagrees with the director's decision to the extent that it implicitly presumes that all jobs substantiated by evidence of record as computer software engineer positions qualify as specialty occupation positions. The *Handbook's* "Computer Software Engineer" chapter indicates that a bachelor's degree in a specific specialty may be necessary for the performance of many computer software engineer applications, but it does not indicate that computer software engineers constitute an occupational class normally requiring such a degree. Accordingly, to establish the proffered position as among the software engineer positions requiring at least a bachelor's degree in a specific specialty, it is incumbent upon the petitioner to provide sufficient evidence about the substantive software engineer work that the beneficiary would perform and the related theoretical and practical applications of highly specialized computer-related knowledge that the beneficiary would have to employ to perform that work. The record does not contain such evidence.

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not solely rely on the job title or the extent to which the petitioner's descriptions of the position and its underlying duties correspond to occupational descriptions in the *Handbook*. Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the alien will likely perform for the entity or entities ultimately determining the work's content.

On appeal, counsel claims that the beneficiary will be working in-house on Task Order Management (TOM) projects but provides no documentary evidence of their existence, the specific roles that the beneficiary would have in them, and the educational level of highly specialized knowledge that the beneficiary would have to apply in the performance of his assigned role in each project. Counsel also claims that the beneficiary will be working on "in-house projects" under the umbrella of the IEA contract document at appellate exhibit 9. However, as reflected in this decision's earlier

discussion of that exhibit, it contains no substantive evidence about any particular project that the petitioner-IEA agreement has generated for the period requested for the beneficiary's employment. The copy of the Chemonics International contract, submitted on appeal as an "available" contract, also has no probative value. It specifies assignment of a worker other than the beneficiary, and its Exhibit A and Statement of Work (SOW) indicate that it was signed prior to the filing of this petition and for a work period projected to end prior to the employment period specified in this petition.² 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).

In this respect, the AAO notes that as recognized by the court in *Defensor v. Meissner*, 201 F. 3d 384, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The court held that the legacy Immigration and Naturalization Service 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. Such evidence must be sufficiently detailed and explained so as to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. The record of proceedings lacks such substantive evidence from any end-user entities that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis. In short, as noted by the director, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary.

The petitioner's failure to establish the substantive nature of definite work to be performed by the beneficiary precludes finding a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) because it is the substantive nature of such 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's 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.

Also, at a more basic level, as reflected in this decision's discussion of the evidentiary deficiencies, the record lacks credible evidence that when the petitioner filed the petition the petitioner had secured computer software engineer work for the beneficiary for the requested period of

² The record reflects that the petition was filed on April 2, 2007 and specifies an employment period of October 1, 2007 to September 22, 2010. However, the record reflects that Exhibit A of the Chemonics International contract was signed in September 2006 to authorize the related SOW for a sixth month project to commence on October 6, 2006.

employment. 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)(12). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). For this reason also, the appeal will be denied.

The appeal will be dismissed and the petition denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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