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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



D2

FILE: WAC 07 205 51310 Office: CALIFORNIA SERVICE CENTER Date: APR 05 2010

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:



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 specializes in technology services and support for a broad range of companies. To continue to employ the beneficiary in what the petitioner designates as a Programmer Analyst position, the petitioner seeks to continue his classification and extend his stay as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

On September 7, 2007, the director denied the petition on three independent grounds, namely, her findings that the evidence of record failed to establish: (1) that the petitioner is qualified to file an H-1B petition, that is, as either (a) a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), or (b) a U.S. agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F); (2) that the Labor Condition Application (LCA) filed with the petition does not correspond to the petition; and (3) that the proffered position is a specialty occupation. Upon consideration of a timely motion to reopen and reconsider, on January 4, 2008 the director issued a new decision affirming the totality of her initial decision. On appeal, counsel contends that the evidence of record supports neither of the director's decisions and therefore requires that they be overturned and that the petition be approved.

Based upon its review of the entire record of proceeding as supplemented by the Form I-290B, the accompanying brief, and the documents filed in support of the appeal, the AAO finds that the director was correct in denying the petition on each of the other grounds that she cites as the bases for her decision. Therefore, the appeal will be dismissed, and the petition will be denied.

While fully affirming the director's decision on the petitioner's standing to file the petition and on the specialty occupation issue, the AAO will further address in detail only the specialty occupation basis of the director's decision, as establishing specialty occupation status (along with the requisite beneficiary qualifications) is paramount to the successful adjudication of any H-1B petition, regardless of the entity filing it.

The AAO analyzes the specialty occupation issue according to the statutory and regulatory framework below.

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

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

Based upon its review of the entire record including the documentation submitted on appeal, the AAO concludes that the petitioner failed to establish that the beneficiary would perform specialty occupation services for the period sought in the petition. As will be discussed below, the AAO bases this conclusion on its evaluation of the evidence of record related to the proposed duties and the knowledge required to perform them. The AAO finds this evidence insufficient to satisfy any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), that is, by establishing the proffered position as either (a) a particular position for which the normal minimum requirement for entry would be at least a bachelor’s degree, or its equivalent, in a specific specialty (criterion 1); (b) parallel to positions for which organizations in the petitioner’s industry that are similar to the petitioner commonly require at least a bachelor’s degree, or its equivalent, in a specific specialty (the first alternative prong of criterion 2); (c) shown to be so complex or unique that it can be performed only by an individual with a degree (the second alternative prong of criterion 2); (d) one for which the employer normally requires at least a bachelor’s degree, or its equivalent, in a specific specialty (criterion 3); or (e) one with specific duties so specialized and complex that their performance requires knowledge usually associated with the attainment at least a bachelor’s degree in a specific specialty (criterion 4).

The present petition, filed on June 28, 2007, seeks the petitioner’s services as a Programmer Analyst for the period July 23, 2007 to July 22, 2010.

The record’s documentation indicates that the petitioner is one of several business entities involved with the beneficiary. It appears that the petitioner has provided the beneficiary to its client Smart Info Tech Solutions (SITS), which in turn “sub-contracted” the beneficiary to its client Programmer Resources International (PRI), which, in turn, assigned the beneficiary to work at MasterCard International, Ltd (MCIL). Further, the record indicates that direct and proximate control over the scope and content of the beneficiary’s everyday work would not reside with the petitioner, but with MCIL, an entity with whom the petitioner has no direct relationship.

MCIL is the ultimate user of the services that the beneficiary would perform if the present extension petition is approved. The petitioner filed the present petition so that the beneficiary could continue working in H-1B status at MCIL’s St. Louis offices, where he has been assigned since April 30, 2007, under the petitioner’s previously approved H-1B petition for the beneficiary. The record’s documentation indicates that MCIL’s supervisory staff has been and would continue to directly supervise and determine the substantive nature of the beneficiary’s day-to-day work, and there is no

indication in the record that the beneficiary would be subject to the influence of petitioner in this regard.

The record also contains a September 18, 2007 letter from the Senior Business Leader, Settlement, eService, BPM Development, of MasterCard Worldwide, written to verify that the beneficiary “is currently contracted as a Sr. Software Engineer to work on various MasterCard projects, by Master[C]ard Worldwide through [PRI].”¹ The letter states that the beneficiary has been working in this capacity since April 30, 2007. According to the letter, the beneficiary “has the following important roles at MasterCard”:

- Technical support for user applications within eService/Settlement Development.
- Developing and testing eService on line application and Settlement application.
- Migrating Java/J2EE applications from Weblogic to Websphere.
- Developing enterprise applications using Java, J2EE, Struts, XML, jsp, EJB, Websphere, RAD, HTML, and CSS etc.
- Involved in analysis, design, code, unit test of the projects.

The letter states that the beneficiary “reports to [REDACTED] who assigns and oversees [the beneficiary’s] duties in the role of business leader of eServices team.”

The record’s documentation also shows that the beneficiary is assigned to MCIL pursuant to a Statement of Work (SOW), executed by MCIL and PRI on April 23, 2007, which obligates PRI to provide the beneficiary to perform services for MCIL under the Job Title “Sr. Software Engineer,” pursuant to Requisition Number 9080, for the period “4-30-07 to 12-31-07.” An April 11, 2007 e-mail to the beneficiary from a representative of PRI confirmed the scheduling of a face-to-face interview of the beneficiary at MasterCard on the following day, for the position of a “senior developer.” Thus, the record indicates that the beneficiary’s assignment to MCIL was the result of negotiations between PRI and MasterCard in which the petitioner did not participate.

The record also contains an April 12, 2007 Purchase Order (P.O.) issued by PRI to SITS for the “Consulting Services” of the beneficiary to be performed at MCIL’s address, commencing April 30, 2007 and to extend for an “Anticipated Duration” of “24 months plus.”²

In a September 18, 2007 letter addressed “To Whom It May Concern,” SITS identifies the beneficiary as a subcontractor resource that it obtained from the petitioner and, in turn,

¹ A June 1, 2007 Independent Contractor Services Agreement between MCIL and PRI sets forth terms to govern any agreement by PRI to perform services for MCIL. This document does not mention the petitioner.

² An April 12, 2007 Subcontract Agreement between PRI and SITS provides terms to be automatically incorporated into any work order issued by PRI for SITS to provide services to PRI or its clients as a subcontractor.

“sub-contracted” to PRI, who assigned the beneficiary to work for MasterCard. Specifically, SITS states in pertinent part:

This is to confirm that [the beneficiary] has been employed as [REDACTED] [REDACTED] subcontractor from [the Petitioner] from 4/30/2007.

SITS has sub-contracted [the beneficiary] with [PRI] and [he] works at MasterCard Worldwide as a Sr. Software Engineer.

The record’s September 18, 2007 “To Whom It May Concern” letter from PRI reflects that PRI obtained the beneficiary from SITS to perform as a subcontractor, stating in pertinent part:

This is to confirm that [the beneficiary] has been employed as a [PRI] sub-contractor from [SITS] from 04/30/2007.

[PRI] has placed [the beneficiary] at MasterCard World[w]ide as a Sr. Software Engineer. [He] works at MasterCard’s St. []Louis office

In the same vein, a prior, May 31, 2007 PRI letter “To Whom It May Concern” confirms that the beneficiary is “a subcontractor for [PRI] working as a Sr. Software Engineer at MasterCard Worldwide as of April 30, 2007.”

Against this background, the AAO will now apply the H-1B analytical framework to the record of proceeding.

The AAO notes that the record of proceeding contains no documentation that performance of the particular position proffered here requires at least a U.S. bachelor’s degree, or its equivalent, in a specific specialty directly related to the position, as required by section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and the implementing regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A). The Form I-129 and the related LCA identify the proffered position as a Programmer Analyst position. The AAO recognizes the Department of Labor’s *Occupational Outlook Handbook (Handbook)* as an authoritative source on the general duties and educational requirements of the wide variety of occupations that it addresses.³ However, as will now be discussed, the *Handbook* indicates that programmer analyst positions do not categorically require at least a bachelor’s degree in a specific specialty.

The pertinent section of the 2010-2011 edition of the *Handbook*, its “Computer Systems Analysts” chapter, identifies programmer analysts as a subcategory of that occupation, which the *Handbook* generally describes as follows:

Computer systems analysts use IT tools to help enterprises of all sizes achieve their goals. They may design and develop new computer systems by choosing and

³ All references in this decision to the *Handbook* are to its 2010-2011 edition.

configuring hardware and software, or they may devise ways to apply existing systems' resources to additional tasks.

The chapter briefly describes the Programmer Analysts subcategory as follows:

In some organizations, *programmer-analysts* design and update the software that runs a computer. They also create custom applications tailored to their organization's tasks. Because they are responsible for both programming and systems analysis, these workers must be proficient in both areas. (A separate section on computer software engineers and computer programmers appears elsewhere in the *Handbook*.) As this dual proficiency becomes more common, analysts are increasingly working with databases, object-oriented programming languages, client server applications, and multimedia and Internet technology.

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

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

The AAO notes that the paragraph's statement that "many employers prefer applicants who have a bachelor's degree" is not indicative of a pervasive requirement for a specific major or academic concentration. The *Handbook's* observation of a preference of "many employers" is not evidence that systems analysts positions normally require a bachelor's degree level of knowledge in a specific specialty. The "Education and Training" subsection of the *Handbook's* "Computer Systems Analyst" chapter confirms this fact, as it states:

Education and training. When hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor's degree. For more technically complex jobs, people with graduate degrees are preferred. For jobs in a technical or scientific environment, employers often seek applicants who have at least a bachelor's degree in a technical field, such as computer science, information science, applied mathematics, engineering, or the physical sciences. For jobs in a business environment, employers often seek applicants with at least a bachelor's degree in a business-related field such as management information systems (MIS). Increasingly,

employers are seeking individuals who have a master's degree in business administration (MBA) with a concentration in information systems.

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

Employers generally look for people with expertise relevant to the job. For example, systems analysts who wish to work for a bank may need some expertise in finance, and systems analysts who wish to work for a hospital may need some knowledge of health management. Furthermore, business enterprises generally prefer individuals with information technology, business, and accounting skills and frequently assist employees in obtaining these skills.

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

The *Handbook's* "Computer Systems Analysts" chapter's comments with regard to educational requirements - that employers prefer applicants with a bachelor's degree and often seek applicants who have at least a bachelor's degree in a technical field - is authoritative evidence that a bachelor's degree or higher in a specific specialty is not the normal minimum requirement for hiring systems analysts, or its subcategory of programmer analysts. In light of this occupational context, it is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers here would necessitate programmer analyst services at a level requiring the theoretical and practical application of at least a bachelor's degree level of knowledge in a computer-related specialty. This the petitioner has failed to do. Contrary to counsel's assertion on appeal, neither the April 11, 2007 e-mail from PRI to the beneficiary regarding his MasterCard interview nor any other document in the record indicates that MCIL specified a baccalaureate degree in a specific specialty for the position to which the beneficiary would be assigned.⁴ The job prerequisites described in the

⁴ Where, as here, the specific and substantive nature of the work to be performed is determined not by the petitioner but by its clients [or its client's clients], the AAO focuses on whatever documentary evidence the business entities generating the work have issued or endorsed about it, such as specifications, performance timelines, contract amendments, work orders, and correspondence about performance expectations, to name a few examples. Here, the specific and substantive nature of the beneficiary's work is determined not by the petitioner, PRI, or SITS, but by MCIL and MasterCard Worldwide.

In support of this approach, USCIS routinely cites *Defensor v. Meissner*, 201 F.3d 384, in which an examination of the ultimate employment of the beneficiary was deemed necessary to determine whether the position constitutes a specialty occupation. The court in *Defensor* held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is

e-mail include particular types of experience and skill sets, but they do not specify any degree requirement. Further, the full text of Requisition Number 9080, under which the beneficiary was selected by MasterCard, contains no mention of any requirement for any level of formal education. While the MasterCard Worldwide “Sr. Programmer, Systems Programming (Unix)” job advertisement submitted by the petitioner on appeal states that the position requires a “Bachelor’s degree in Computer Science or a combination of equivalent experience and formal training,” the advertisement is not relevant, for it references a different job designation and duties than those applying to the proffered position.

The AAO acknowledges that the job description in the PRI e-mail to the beneficiary and the letter submitted by the MasterCard Worldwide contain technical terms, acronyms, and IT terms of art that indicate that performance of the proffered position would require application of some level of specialized IT knowledge. However, the type and level of education required to attain such knowledge is not self-evident, and the record of proceeding contains no documentation that the attainment of such knowledge requires a particular level of education, or its equivalent, in a specific specialty at an accredited U.S. college or university.

The evidence of record does not distinguish the proffered position from programmer analyst positions that do not require at least a bachelor’s degree, or the equivalent, in a specific specialty. Therefore, as the petitioner has not established that the particular position proffered here is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position’s duties, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor’s degree, in a specific specialty, that is common to the petitioner’s industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry’s professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms “routinely employ and recruit

merely a “token employer,” while the entity for which the services are to be performed is the “more relevant employer.” *Id.* at 388. The *Defensor* court recognized that evidence of the client companies’ job requirements is critical where the work is to be performed for entities other than the petitioner. The *Defensor* court held that legacy INS [Immigration and Naturalization Service (INS)][had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary’s services. *Id.* In *Defensor*, the court found that that evidence of the client companies’ job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Also, there are no submissions from professional associations, individuals, or firms in the petitioner's industry.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." First, the evidence of record does not refute the indication in the *Handbook's* "Computer Systems Analysts" chapter that there is a wide spectrum of educational credentials acceptable for programmer-analyst positions, including degrees not in a specific specialty closely related to such positions. Second, the record of proceeding does not contain evidence distinguishing the proffered position as unique from or more complex than programmer analyst positions that can be performed by persons without a specialty degree or its equivalent.

As the record has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).⁵ In this regard, the AAO notes that the job placement advertisements submitted by the petitioner do not support the petitioner's assertion that it has satisfied this criterion, in that (1) they do not establish the credentials of persons actually hired for the type of position proffered here, and (2) they indicate the petitioner's acceptance of less than a bachelor's degree or its equivalent in a specific specialty, in that they state that a person not holding a degree specified in the advertisements may qualify by virtue of "any reasonable combination of education, training, and experience," without specifically requiring that (a) this combination be equivalent to the

⁵ To satisfy this criterion, the record must establish that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

completion of a U.S. bachelor's degree or higher in a specific specialty and (b) the applicant also have "recognition of expertise in the specialty through progressively responsible positions directly related to the specialty." 8 C.F.R. § 214.2(h)(4)(iii)(C).

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The evidence of record does not convey that the duties of the proffered position are more specialized and complex than those of programmer analyst positions not usually associated with the attainment of a baccalaureate or higher degree.

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

Finally, as the adverse determination of the specialty occupation issue is dispositive of the appeal, the AAO will not further address in detail its affirmance of the director's denial of the petition for the petitioner's failure to establish its standing to file this petition as either a United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii), or (b) a U.S. agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F), except to note the following material aspects of the record that refute the petitioner's claim that it filed the petition as a United States employer.⁶ This decision's review of the documentary evidence regarding the progression of contractual agreements which leads to the beneficiary's present and requested continued assignment to MCIL establishes that the petitioner's relationship to the actual work that the beneficiary will perform is remote, attenuated, and inconsequential. In fact, the evidence of record indicates that, in the present matter, the petitioner functions as an H-1B resource pool which a client of the petitioner (SITS) uses to expand its pool of IT workers from which its clients (including PRI) could draw H-1B workers for their clients (such as MCIL). In the particular circumstance of the present matter, the petitioner appears to function as no more than a conduit of H-1B workers through multiple intervening employment contractors to an end-user entity (MCIL) with which it has no contractual relationship and no mechanism for exercising control over the nature and scope of the beneficiary's work. In this scenario, the petitioner is reimbursed for its role as a resource pool that is several times removed from the contractual agreement governing the beneficiary's use and the day-to-day manner in which that agreement will be executed with regard to the beneficiary's use. Simply put, as the record indicates that the petitioner will not actually control the work of the beneficiary under the common-law touchstone-of-control analysis, it cannot be found that the petitioner qualifies as having the requisite employer-employee relationship with respect to the beneficiary such that it meets or will meet the definition of United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). Therefore, the petition must be denied and the appeal dismissed for this additional reason.

⁶ The AAO will not address the U.S. agent aspect of the standing-to-file issue, as the appeal is silent on the director's finding that the petitioner is not a U.S. agent and focuses exclusively on the petitioner's status as a United States employer.

Finally, the AAO also affirms the director's finding that the submitted LCA does not correspond to the petition, adding that it is filed for, and the related LCA is certified for, a position other than that which the beneficiary would be assigned. The Form I-129 and the LCA specify a Programmer Analyst position, but the record indicates that the beneficiary would serve in a Software Engineer position. Further, the AAO notes that the Department of Labor's *Foreign Labor Certification Data Center (FLCDC) Online Wage Library*, accessible on the Internet at <http://www.flcdatacenter>, indicates that the prevailing wage for the type of job for which the beneficiary would be assigned to MCIL, that is, Computer Software Engineer, commands a higher prevailing wage than applies to the Computer Systems Analyst type of position for which the petition is filed.⁷

The AAO recognizes that the present petition is for an extension of H-1B classification approved in the previous petition filed by the petitioner on behalf of the beneficiary. A prior approval does not preclude USCIS from denying an extension petition based upon its reassessment of the qualifying factors. See *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

The director's decision does not indicate whether she reviewed the prior approval. If the previous nonimmigrant petition was approved based on the same assertions and evidence as contained in the current record, the approval would constitute material error on the part of the director.⁸ The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology*

⁷ According to the FLCDC Online Wage Library, for the lowest wage level of Computer Systems Analysts, Computer Software Engineers (Applications), and Computer Software Engineers (Systems Software), the All Industries database for the St. Louis MO-IL MSA for 7/2009 – 6-2010 reports prevailing wages of \$51,646, \$58, 573, and \$61,214 per year, respectively. The AAO also notes that, as the beneficiary would be working at MCIL as a *Senior* Software Engineer, the actual prevailing wage for that position may be higher. Level 2 of the 4 pay levels for Computer Software Engineers (Applications) and Computer Software Engineers (Systems Software) are, respectively, \$70,283 and \$71,594 per year, amounts which exceed the \$60,000 annual salary specified on the Form I-129. In this regard, it should be noted that, per the Department of Labor's Employment and Training Administration's Prevailing Wage Determination Policy Guidance, also accessible at <http://www.flcdatacenter>, provides following information about assignment of the lowest level of prevailing wage:

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.

⁸ The AAO notes that there is no indication in the record the previously approved petition was based on the beneficiary's performing the work that is the basis of the present petition, that is, serving in a Senior Software Engineer position at MCIL and on assignment from a client of a client of the petitioner.

International, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved a nonimmigrant petition on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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

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