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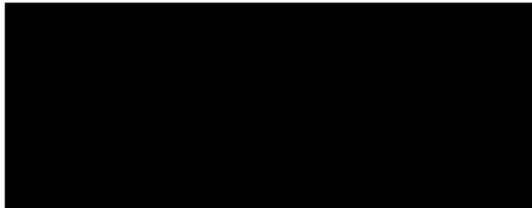
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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Services

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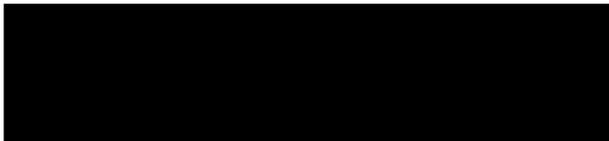
APR 05 2010

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

According to the Form I-129, the petitioner is a corporation engaged in the business of computer “[a]pplication development and support for large scale users.” The petitioner asserts that it filed the present H-1B petition to classify the beneficiary 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), so that it may employ him as a Software Engineer.

The director denied the petition because she determined that the petitioner failed to establish that it is qualified to file an H-1B petition, that is, as either (1) a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), or (2) a U.S. agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F). Based upon its review of the entire record of proceeding as supplemented by counsel’s assertions in the Form I-290B that he filed on appeal, the AAO finds that the director’s decision was correct. Accordingly, the appeal will be dismissed, and the petition will be denied.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), defines an H-1B nonimmigrant as an alien:

(i) who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 1184(i)(1) . . ., who meets the requirements of the occupation specified in section 1184(i)(2) . . ., and with respect to whom the Secretary of Labor determines . . . that the intending employer has filed with the Secretary an application under 1182(n)(1).

"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.

The relevant regulation regarding United States agents, at 8 C.F.R. § 214.2(h)(2)(i)(F), states

*Agents as petitioners.* A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange

short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A United States agent may be: the actual employer of the beneficiary, the representative of both the employer and the beneficiary, or, a person or entity authorized by the employer to act for, or in place of, the employer as its agent. A petition filed by a United States agent is subject to the following conditions:

(1) An agent performing the function of an employer must guarantee the wages and other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries of the petition. The agent/employer must also provide an itinerary of definite employment and information on any other services planned for the period of time requested.

(2) A person or company in business as an agent may file the H petition involving multiple employers as the representative of both the employers and the beneficiary or beneficiaries if the supporting documentation includes a complete itinerary of services or engagements. The itinerary shall specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed. In questionable cases, a contract between the employers and the beneficiary or beneficiaries may be required. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation.

(3) A foreign employer who, through a United States agent, files a petition for an H nonimmigrant alien is responsible for complying with all of the employer sanctions provisions of section 274A of the Act and 8 CFR part 274a.

The AAO will first address why the U.S. agent issue does not provide a basis for sustaining the appeal. The petitioner does not assert that it filed the petition as a U.S. agent. Rather, as the following statement in counsel's letter of reply to the RFE reflects, the petitioner concentrated upon asserting that it is a U.S. employer:

The petitioner is the employing entity for this petition and has the authority to hire, pay, fire, supervise, or otherwise control the work of the beneficiary, who will be on the petitioner's payroll at all times for the entire duration of the requested period of stay. Petitioner has no contract employees, and the beneficiary will not be working for a specific client or its project. . . .

Further, the petitioner's assertion that there is no itinerary for the beneficiary precludes it from qualifying as a U.S. agent, as an itinerary is required by the provisions at 8 C.F.R. §§ 214.2(h)(2)(i)(F)(1) and (2).

Next, the AAO finds that the petitioner has not established status as a United States employer within the meaning of the regulation at 8 C.F.R. § 214.2(h)(4)(ii). To establish such status, a petitioner must satisfy all three regulatory criteria. In this petition, the evidence of record does not satisfy the second criterion's requirement for an employer-employee relationship. The evidence of record fails to establish the extent of any business relationship between the petitioner and the beneficiary, including the nature and extent of control that the petitioner and/or other entities would exercise over the terms and conditions under which the beneficiary would work, over the actual work that the beneficiary would perform, and over the particular performance standards to which the beneficiary would be subjected.

The petitioner provides neither a written contract with the beneficiary nor a summary of specific terms to which the petitioner and the beneficiary may have orally agreed with regard to determination, control, evaluation, and supervision of the beneficiary's work. Rather, at paragraph 1d of his letter of reply to the director's request for additional evidence (RFE), the petitioner's counsel states:

There is no contract of employment between the petitioner and the beneficiary. This<sup>1</sup> is an offer of employment for a maximum of three years and is contingent upon the beneficiary's satisfactory performance consistent with company policy. If the beneficiary is for any reason terminated, the employer will so inform the Service and will bear the costs of the return transportation, as already undertaken in the petition.

The petitioner neither describes the content of the referenced "company policy," the extent to which that policy was presented to the beneficiary, or details of any agreement by the petitioner and the beneficiary.

The AAO acknowledges the petitioner's contention that its Subcontract Agreement with AD/Solutions Group, Inc. (AD/S) and its Master Subcontractor Agreement with Pomeroy IT Solutions (PITS) for IBM Services are evidence of its U.S. employer status. For the following reasons, however, the AAO finds that these documents are not probative of the relationship between the petitioner and the beneficiary for which this particular petition is filed. The purpose of each document is to provide terms to be automatically incorporated into any contract entered between the petitioner and the other party during the document's effective period, and neither document is accompanied by a copy of such a contract. Consequently, the record does not establish that either the AD/S or the PITS document relate to the beneficiary or have a bearing upon any work that he may perform if the petition were approved.

In addition to the fact that the subcontracting agreements are not probative of the existence of any project work for the beneficiary during the period specified in the Form I-129, the AAO also notes that, while counsel's RFE reply letter asserts that the beneficiary will work "in-house on various projects for various clients," the petitioner provides no documentary evidence of any such projects.

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<sup>1</sup> Notably, "this" is not further described in the record.

Further, it is noteworthy that the "Site Standards" section at paragraph 12(c) of the AD/S Subcontract Agreement contemplates persons being assigned by the petitioner to work at an AD/S or an AD/S client's site, and that the PITS Master Subcontract Agreement for IBM Services speaks in terms of PITS "supply[ing] personnel," including persons that may be provided by the petitioner, "to perform services for IBM and/or IBM's customer ("End Client"). By offering the aforesaid documents as proof of the relationship that it would have with the beneficiary, the petitioner also indicates the likely possibility that, despite the contrary assertion in counsel's letter of reply to the RFE, the beneficiary may be assigned to work at the location of a client or a client's client. The petitioner does not address this discrepancy.

On the basis of the aspects of the record addressed above, the AAO finds that the existence of software engineer work for the beneficiary is speculative and, as such, insufficient for a reasonable determination by USCIS that the beneficiary would be employed as asserted and for the period specified in the petition.

By not submitting any contracts or other supporting documentation evidencing that the beneficiary would be employed in the proffered position for the period of time and at the location requested in the petition, the petitioner has not established who would have actual control over the beneficiary's work or duties, or the condition and scope of the beneficiary's services. In other words, the petitioner has failed to establish whether it has made a bona fide offer of employment to the beneficiary based on the evidence of record or that the petitioner will have and maintain an employer-employee relationship with the beneficiary for the duration of the requested employment period. *See* 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer" and requiring the petitioner to engage the beneficiary to work such that it will have and maintain an employer-employee relationship with respect to the sponsored H-1B nonimmigrant worker).

Beyond the decision of the director, the AAO finds that the petitioner also has failed to establish that the proffered position is a specialty occupation. For this reason also, the petition must be denied.

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

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

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

- (A) theoretical and practical application of a body of highly specialized knowledge, and

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

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

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must 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 (5<sup>th</sup> 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. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, 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.

In the Form I-129, the petitioner describes its type of business as “Application development and support for large scale users” and the duties proposed for the beneficiary as “Design, develop, code, test and implement client/server applications.” The petitioner’s March 15, 2007 letter submitted in support of the petition addresses the proffered position as follows:

[The petitioner] is engaged in providing information systems services, systems analysis and design, software products development, turnkey software development, user training and technical consulting in the areas of programming, testing and implementation; database administration and systems administration. We distinguish ourselves by our high-energy technical services, a sharp focus in the emerging client/server technologies, and a long-term commitment to our clients. Due to the leap in economic activity, especially [the] e-commerce and web development projects, we need the services of a Software Engineer whose detailed duties are described as follows:

1. Analyze, develop, program, test, and implement computer programs for Oracle-based projects using Java, HTML, VSAM, VB.Net, C, C++, Oracle SQL Server, UML, and Crystal Reports in Windows and Real-Time NT environment.
2. Analyze, develop and program functional components of client/server and web-based multi-tier architectural application projects using J2EE and related tools with Oracle in UNIX.
3. Design, development and technical support of Oracle-based applications and Oracle database administration, performance tuning and data conversion using PL/SQL, XML, J2EE, JSP, and ASP.Net to solve data problems.

4. Provide consultation in project planning, project definition, user requirements and specifications, system documentation and user training.
5. Prepare technical reports relative to the establishment and functioning of complete operational systems;
6. Extensive knowledge of Internet, e-commerce and web applications development using various tools on a variety of platforms.

According to counsel's letter of reply to the RFE (at paragraph 1d), "the beneficiary will work in-house on various projects for various clients[,] where his training, experience, and skill sets can best be utilized." However, the petitioner provides no documentary evidence of any such project to which the beneficiary would be assigned.

Counsel's July 21, 2007 letter in response to the RFE cites the AD/S Subcontract Agreement and the PITS Master Subcontract Agreement "as a comprehensive description of the petitioner's duties, as contractor, which consequently are the duties which its employees perform and which the beneficiary of this petition will perform." However, as previously noted, the subcontracting agreements are not indicative of the substantive requirements of any particular project to which they may apply, do not mention the beneficiary, and were submitted without any actual contractual documents to which their terms would apply. As such, the subcontracting agreements are not probative of the existence of any project work for the beneficiary during the period specified in the Form I-129. The AAO also notes that, while counsel's RFE reply letter asserts that the beneficiary will work "in-house on various projects for various clients," the petitioner provides no documentary evidence of any such projects.

Because the record lacks documentary evidence supporting them, the assertions of the petitioner and counsel regarding the services that the beneficiary would perform have little weight and do not persuade the AAO that the beneficiary will likely perform the asserted duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As the petitioner fails to establish that the petition was filed on the basis of Software Engineer work that would exist for the beneficiary at the time that the petition was filed, the petition must be denied. 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). Further, 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; *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The AAO also finds that even if the petitioner had established that the beneficiary would perform the duties described by the petitioner, which it has not, the evidence of record would still fail to establish a specialty occupation.

The record's descriptions of the duties and work to be performed in the proffered position generally comport with the software engineer occupation as discussed in the "Computer Software Engineers and Computer Programmers" chapter of the Department of Labor's *Occupational Outlook Handbook (Handbook)*.<sup>2</sup> However, as the *Handbook* indicates that the computer software engineer occupation is not limited to positions that require or are associated with at least a bachelor's degree, or the equivalent, in a specific specialty, the proffered position's inclusion within the Computer Software Engineers occupational category is not sufficient to establish that it is or will be a specialty occupation.

The aforementioned chapter of 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 computer software engineers constitute an occupational class for which entry normally requires at least a bachelor's degree in a specific specialty. The following excerpts from the 2010-2011 *Handbook's* "Computer Software Engineers and Computer Programmers" chapter convey these points:

[From the three introductory "Significant Points":]

- Job prospects will be best for applicants with a bachelor's or higher degree and relevant experience.

[From the "Training, Other Qualifications, and Advancement" section:]

A bachelor's degree commonly is required for software engineering jobs, although a master's degree is preferred for some positions. A bachelor's degree also is required for many computer programming jobs, although a 2-year degree or certificate may be adequate in some cases. Employers favor applicants who already have relevant skills and experience. Workers who keep up to date with the latest technology usually have good opportunities for advancement.

***Education and training.*** For software engineering 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 usual college majors for applications software engineers are computer science, software engineering, or mathematics. Systems software engineers often study computer

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<sup>2</sup> The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations which it addresses. All references are to the 2010-2011 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

science or computer information systems. Graduate degrees are preferred for some of the more complex jobs.

\* \* \*

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

In addition to educational attainment, employers highly value relevant programming skills and experience. Students seeking software engineering or programming jobs can enhance their employment opportunities by participating in internships. Some employers, such as large computer and consulting firms, train new employees in intensive, company-based programs.

As technology advances, employers will need workers with the latest skills. To help keep up with changing technology, workers may take continuing education and professional development seminars offered by employers, software vendors, colleges and universities, private training institutions, and professional computing societies. Computer software engineers also need skills related to the industry in which they work. Engineers working for a bank, for example, should have some expertise in finance so that they understand banks' computing needs.

***Certification and other qualifications.*** Certification is a way to demonstrate a level of competence and may provide a jobseeker with a competitive advantage. Certification programs are generally offered by product vendors or software firms, which may require professionals who work with their products to be certified. Voluntary certification also is available through various other organizations, such as professional computing societies.

Computer software engineers and programmers must have strong problem-solving and analytical skills. Ingenuity and creativity are particularly important in order to design new, functional software programs. The ability to work with abstract concepts and to do technical analysis is especially important for systems engineers because they work with the software that controls the computer's operation. Engineers and programmers also must be able to communicate effectively with team members, other staff, and end users. Because they often deal with a number of tasks simultaneously, they must be able to concentrate and pay close attention to detail. Business skills are also important, especially for those wishing to advance to managerial positions.

In light of the fact that the *Handbook's* "Computer Software Engineers and Computer Programmers" chapter indicates that software engineer positions do not categorically require at least a bachelor's degree in a specific specialty, it is incumbent upon the petitioner to provide documentary evidence that establishes that its particular software engineering position is one that requires at least a baccalaureate level of highly specialized knowledge in a specific specialty closely related to the performance requirements of the position, as required by section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and its implementing regulations at 8 C.F.R. § 214.2(h)(4)(ii)(defining the term specialty occupation) and 214.2(h)(4)(iii)(A)(detailing the additional criteria that must be met to qualify as a specialty occupation). This the petitioner has failed to do.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which assigns specialty occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

As already noted in this decision's discussion of the *Handbook's* chapter regarding computer software engineers, such positions normally do not require at least a bachelor's degree, or the equivalent, in a specific specialty. The AAO finds that the record describes the proposed duties in generic terms that do not distinguish the proffered position from the range of software engineer positions not requiring at least a bachelor's degree, or the equivalent, in a specific specialty, and that the petitioner has not submitted any documentation addressing how the performance requirements of the proffered position would elevate it to a level requiring at least a bachelor's degree, or the equivalent, in a specific specialty. Accordingly, the petitioner has not satisfied the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first alternative prong assigns specialty occupation status to a proffered position whose asserted requirement for at least a bachelor's degree in a specific specialty is common to positions in the petitioner's industry that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

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

As reflected in this decision's earlier comments, the *Handbook* does not indicate that a software engineer position as described in this petition would require at least a bachelor's degree in a specific specialty. Thus, the *Handbook* does not support a favorable finding under this criterion. The AAO also

notes that the record does not include submissions from a professional association. Accordingly, the petitioner has not satisfied the first alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner also has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that “an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree.” The record does not contain substantive evidence about the proffered position and its duties that distinguish the position as unique from or more complex than the range of software engineer positions for which the *Handbook* indicates there is no requirement for a bachelor’s or higher degree in a specific specialty.

Next, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), by establishing that the employer normally requires a degree or its equivalent for the position. To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position.<sup>3</sup> This the petitioner has not done.

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. As reflected in this decision’s earlier discussion about the proposed duties as indistinguishable from those of software engineer positions not requiring a bachelor’s or higher degree in a specific specialty, the evidence of record does not establish a level of specialization and complexity above the wide range of software engineer positions for which the *Handbook* indicates that there is no usual association with a bachelor’s or higher degree in a specific specialty.

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

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<sup>3</sup> Also, the record must establish that a petitioner’s imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. This record fails in this regard also. The petitioner’s creation of a position with a perfunctory bachelor’s degree requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 384, 387-388. The critical element is not the title of the position or an employer’s self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were limited to reviewing a petitioner’s self-imposed employment requirements, then any alien with a bachelor’s degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

Counsel's assertion that the director's denial of the instant petition is inconsistent with five prior approvals of H-1B petitions based upon "the same information and documentation, as in the instant case" is noted. However, these separate records of proceeding are for different beneficiaries and are otherwise beyond the scope of this appeal. Further, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS 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 previously approved the nonimmigrant petitions on behalf of the same 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.