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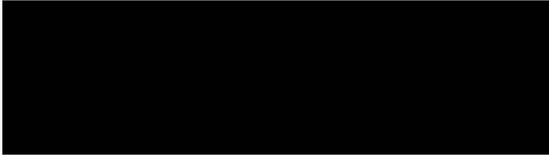
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: WAC 09 145 51504 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

JAN 06 2010

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 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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

for *Michael T. Kelly*
Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a software development and consulting company. It seeks to employ the beneficiary as a programmer analyst and to classify her 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, concluding that the petitioner failed to establish that the beneficiary is not qualified to perform services in a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In the documentation submitted with the petition on April 1, 2009, the petitioner described itself as providing information technology services and solutions to a diversified customer base, including training, consulting and staffing services. The petitioner listed 80 employees in the Form I-129. The petitioner indicated that it wished to employ the beneficiary as a programmer analyst from October 1, 2009 through September 30, 2012 at an annual salary of \$60,000.

The position is described as follows in the support letter the petitioner submitted with the H-1B petition on behalf of the beneficiary:

As a part of responsibilities, [the beneficiary] will continue to design, develop and utilize software systems for customized business applications. He will continue to analyze the communications, informational and programming requirements of their projects, and plan and design programs and systems to meet such needs.¹ He will also debug, troubleshoot and modify software programs to ensure their technical accuracy and reliability, as [sic] also provide end-user support and training.

The beneficiary will analyze software requirements to determine feasibility of design within time and cost constraints and consult with hardware engineers and other engineering staff to evaluate interface between hardware and software. He will formulate and design software system, using analysis and mathematical models to predict and measure outcome and consequences of design. He will develop and direct software system testing procedures, programming, and documentation.

[The beneficiary] will hold technical discussions with personnel of appropriate organizational units to analyze current operational procedures and identify problems. She will analyze business procedures and problems to redefine data and convert them into

¹ The petitioner sometimes refers to the beneficiary as a male, but the beneficiary is female.

programmable form of EDP. Further, she will plan and prepare technical reports, memoranda and instructional manuals to document program development. She will be responsible for developing and programming software systems using various hardware and operating systems.

Also, the beneficiary will utilize his knowledge and experience in the field of various business sectors of the industry to design, develop, enhance, integrate, create, and implement applications and systems based on business and user needs. Her duties entail working with, C, C++, HTML, SQL and PL/SQL on Operating systems like Sun Solaris, Unix and Windows XP/2000/NT. She has extensive working knowledge on databases like Oracle 8.x, DB2, MY SQL and MS-Access. She also had hands on experience on Web applications like Servlets, JSP, JDBC, XML, Cold Fusion and Websphere. She had testing knowledge with QTP 8.2/9.x, Win Runner 7.6/8.2., load runner 8.0. [The beneficiary] will study existing information processing systems to evaluate effectiveness and developing new systems based on user needs.

[The beneficiary] will provide training and support in the installation, implementation and utilization of new systems, enhancements and modifications. She will also provide solutions for various software problems of compatibility of various systems.

The position of Software Engineer² requires a theoretical and practical application of highly specialized knowledge. An individual having a Bachelor's degree in Computer Science, Engineering, Business, Math, Science, Technology, MIS, CIS, Finance, Economics, a related analytic or scientific discipline, or the equivalent thereof, as well as working experience in the field could discharge the duties of this professional position.

The submitted Labor Condition Application (LCA) was filed for a programmer analyst to work in Shawnee, KS from September 25, 2009 to September 24, 2012. The LCA lists a prevailing wage of \$49,275.

With respect to the proposed worksite where the beneficiary will be assigned, the petitioner's support letter does not state where she will be employed, but the forms indicate that she will work at the petitioner's offices in Shawnee, KS. This appears to conflict with the petitioner's statement in its petition support letter that it assigns workers pursuant to third-party client contracts. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The beneficiary's education documents, indicating that she has a foreign degree, were submitted with the petition, along with an education evaluation stating that the beneficiary's education is equivalent to a Bachelor of Pharmacy from an accredited institution of higher education in the United States.

² Elsewhere in the petition, this position is referenced as a Programmer Analyst. Therefore, the AAO assumes that the petitioner's reference to the proffered position as a Software Engineer is an inadvertent error.

The director's RFE asked for additional documentation evidencing that the proffered position is a specialty occupation, including a more detailed job description, a clarification of the workplace, copies of any contracts, and an itinerary of definite employment for the beneficiary. The RFE specifically states:

The evidence must show specialty occupation work for the beneficiary with the actual end-client company where the work will ultimately be performed. Merely providing contracts between the petitioner and other consultants or employment agencies that provide consulting or staffing services to other companies may not be sufficient. There must be a clear contractual path shown from the petitioner, through any other consultants or staffing agencies, to an ultimate end-client.

If the petitioner claims that the beneficiary will work on an "in-house" project[,] provide a technical description of the alleged internal development project which includes the timeline, current status, number of employees assigned, worksite location, and a marketing analysis for the final product.

The RFE also requested documentation evidencing that a Bachelor's degree in Pharmacy is required for the proffered position.

The petitioner responded to the RFE and included a copy of the Employment Agreement with the beneficiary, which is dated March 30, 2009. The Employment Agreement states in pertinent part:

You will render all reasonable duties expected of a Programmer Analyst. These services are to be provided at locations designated by [the petitioner], and *will include the offices of [the petitioner's] clients.*

* * *

This is a contract for employment for *Eighteen Months.*

(Emphasis added.)

The petitioner also provided a copy of a Statement of Work (SOW) between the petitioner and a client called Adara Business Brokers (ABB) that is "being entered into pursuant to the terms and conditions of a Master Services Agreement [(MSA)]" dated March 26, 2009. The petitioner did not include a copy of the MSA. The SOW lists the beneficiary and provides as follows:

During the term of the SOW, the Supplier shall provide the services and/or materials (collectively "Services") as set forth in this SOW. These services include software development (SAS) in UNIX and Windows environment. The services performed are Testing Applications using WinRunner, LoadRunner and QTP. SAS programming in Clinical [T]rials (Phase I-IV) and Prescription (IMS/NDC) Data (Market Research,

Prescription & Retail Auditing) various therapeutics like CVS, Pain, Metabolic, Pulmonary, Oncology, CNS and GI. *These services are to be provided at the ABB location.*

(Emphasis added.) Because the petitioner did not provide a copy of the MSA and because the SOW does not describe a time period in which the work must be performed, the AAO cannot determine how long the project will last. According to the SOW, the work will be performed at the client's offices, which is listed as the same address as the petitioner's, although in a different suite.

The SOW provides additional generic duties for the proffered position as described above, with no description of the project on which the beneficiary will work that requires the performance of these duties. The petitioner's RFE response also includes a revised evaluation of the beneficiary's credentials, which states that the beneficiary holds the equivalent of a U.S. Bachelor of Science in Pharmaceutical Science with a concentration in Computer Information Systems.³ However, the petitioner did not explain how the work the beneficiary will perform requires a Bachelor's degree in Pharmaceutical Science. The AAO acknowledges that some of the duties listed in the SOW are for programming in clinical trials and prescription data, but the petitioner did not provide a percentage breakdown of duties that would explain how much of the beneficiary's time would be spent on programming in clinical trials and prescription data or a detailed description of the project demonstrating that a Bachelor's Degree in Pharmaceutical Science is required to perform these duties. Additionally, as mentioned above, without a copy of the MSA, the AAO cannot determine how long this project will last and whether there is sufficient work for the beneficiary to perform in a specialty occupation.

The director denied the petition on the ground that the beneficiary is not qualified in a specialty occupation by virtue of possessing a baccalaureate degree or equivalent in a specific field of study which is clearly related to the position being offered.

On appeal, counsel for the petitioner provides an "Expert Opinion Evaluation of Academics and Work Experience" written by [REDACTED] that evaluates a combination of the beneficiary's degree and experience as being equivalent to a Bachelor's Degree in Computer Science. Counsel also includes a letter from the beneficiary's previous employer describing the work she performed, which states that the beneficiary had just over three years of experience as a Quality Assurance Analyst and that she also trained as a Quality Assurance Analyst for approximately one and a half years. The letter does not state whether this employment was full-time or part-time.

The AAO first turns to the director's basis for denial, in which he determined that the record is insufficient for USCIS to establish that the beneficiary is qualified to perform the duties of a specialty occupation by virtue of possessing a baccalaureate degree or equivalent in a specific field of study which is clearly related to the position being offered.

³ The initial credential evaluation, by [REDACTED], opined that the beneficiary holds a foreign degree in Pharmacy, from India, that is equivalent to a Bachelor's degree in Pharmacy from an accredited institution of higher education in the United States. The credential evaluation submitted as part of the RFE response is also produced by PET, but styled as an "Evaluation of Academics and Experience."

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), an alien must meet one of the following criteria to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating the beneficiary's credentials to a United States baccalaureate or higher degree shall be determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

As mentioned above, on appeal, counsel for the petitioner submitted an evaluation of the beneficiary's work and academic experience prepared by ██████████ in the Department of Decision, Operations, and Information Technologies at the Robert H. Smith School of Business at the University of Maryland, College Park, Maryland. Upon review of the beneficiary's academic transcript and work experience, ██████████ concluded that the beneficiary possessed the equivalent of a U.S. Bachelor's Degree in Computer Science.

██████████ bases his opinion on the beneficiary's degree (which he states is equivalent to a U.S. Bachelor's Degree in Pharmacy) and four and one half years of work experience. However, ██████████ omitted critical evidence. Specifically, ██████████ failed to provide independent evidence that he had the authority to grant college credit for training and/or work experience in the field at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience, as the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) requires for a person to be recognized as competent to render an opinion on the academic equivalency of training and/or work experience. This deficiency is decisive and precludes any weight being given to ██████████'s opinion with regard to the academic equivalence of the beneficiary's work experience. Furthermore, ██████████ failed to explain exactly how he concluded that the beneficiary's work experience together with her Bachelor's Degree in Pharmacy equated to a Bachelor's Degree in Computer Science, for he did not provide a detailed discussion with regard to the specific tasks and positions from which she gained her qualifications, and how they substantively correlate to the specific coursework cited by ██████████. 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)). The AAO does not see any reason to doubt that the beneficiary's education is equivalent to a U.S. Bachelor's Degree in Pharmacy. However, the evidence submitted is not sufficient to establish that she has the equivalent of a U.S. Bachelor's Degree in Computer Science through a combination of education and experience.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) provides that an individual's credentials may be evaluated for equivalency with a U.S. bachelor's degree in the specific specialty by an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience. Although Professor Chen claims that he has "the authority to grant college level credit for experience, training, and/or courses taken at other U.S. or international universities," no documentary evidence, such as a letter from the school's president or provost, supporting this contention has been submitted. None of the documentation submitted establishes that the University of Maryland has a program that provides college level credit for work experience or training and that Professor Chen has the authority to grant such credit. Therefore, the AAO finds that the evaluation from

██████████, together with the supporting documentation submitted, does not meet the standard described in 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

When USCIS determines a beneficiary's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;⁴
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

██████████ opinion letter does not describe which courses taken by the beneficiary are relevant to a Bachelor's Degree in Computer Science. The transcripts submitted by the beneficiary appear to entail only eight credits of computer-related coursework. As stated earlier, counsel for the petitioner also submits an employment letter from the beneficiary's former employer, which provides a very brief overview of her duties and position title during her former employment.

The AAO now turns to the beneficiary's prior work experience, and whether it included the theoretical and practical application of specialized knowledge required by the specialty. The beneficiary's duties as set forth in this letter does not appear to involve the theoretical and practical application of computer science. The letter identifies general tasks such as web development project testing. It describes the beneficiary's duties generically;

⁴ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

no specificity to the beneficiary's daily activities or her level of responsibility is provided. Thus, the AAO cannot conclude that the beneficiary's past work experience included the theoretical and practical application of a body of highly specialized knowledge, which in this case is computer science. Moreover, the letter gives no indication that she was working on a team or that her work experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation.

Finally, the petitioner has failed to document recognition of expertise, as required by the regulation.

The AAO also finds that the that the PET evaluation submitted in the petitioner's response to the RFE shares the fatal evidentiary deficiencies that this decision notes with regard to [REDACTED]'s evaluation.

As discussed above, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of a specialty occupation requiring a degree in Computer Science or a related specialty. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the AAO finds that the evidence is insufficient to determine that the proffered position is a specialty occupation.

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

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

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

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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 requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular

position is so complex or unique that it can be performed only by an individual with a degree;

- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

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

In addressing whether the proposed position is a specialty occupation, the record is devoid of documentary evidence with respect to the substantive performance requirements that would be determined by the particulars of the project defined by the end-client firm, and therefore whether the beneficiary would actually perform services in a specialty occupation.

The section on Computer Systems Analysts, which encompasses programmer analysts, in the 2008-09 Department of Labor’s *Occupational Outlook Handbook (Handbook)* states “when hiring computer systems analysts, employers *usually prefer* applicants who have at least a bachelor’s degree.” (Emphasis added.) The use of the word “prefer” indicates that employers do not normally require programmer analysts to have a bachelor’s degree in a specific specialty. The *Handbook* section on Computer Systems Analysts also states, “Despite the

preference for technical degrees, however, people who have degrees in other majors may find employment as systems analysts if they also have technical skills.”

Therefore, based on the *Handbook's* overview of educational requirements for programmer analysts, it is apparent that a bachelor's degree in a specific specialty is not a normal requirement.

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 beneficiary will likely perform for the entity or entities ultimately determining the work's content.

As discussed above, the record contains conflicting statements with respect to whether the beneficiary will be working in-house at the petitioner's offices, or whether the beneficiary will be working at different third-party client sites. In the RFE, the director provided what evidence might satisfy the independent objective criteria standard. The petitioner alleges that the beneficiary will work at the petitioner's offices, but the documentation it submitted demonstrates that the beneficiary will be assigned to a client's offices. The documentation submitted by the petitioner does not provide sufficient information with respect to how long the project at the client site will last or whether the project requires the performance of duties in a specialty occupation. Additionally, the petitioner's employment contract with the beneficiary does not cover the full period of time requested in the petition.

As recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387, 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 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, 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 the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for 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.

The AAO therefore finds that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation. For this reason also, the petition must be denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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.