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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 06 157 50886 Office: CALIFORNIA SERVICE CENTER Date: **MAR 02 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:

SELF-REPRESENTED

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.

To continue to employ him in what the petitioner designates as a Programmer Analyst, the petitioner seeks to continue the beneficiary's H-1B 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).

The director denied the petition on four 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 U.S. 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); (2) that the petitioner "has submitted a valid LCA (Labor Condition Application) covering all of the locations where the beneficiary will be employed"; (3) that the proffered position is a specialty occupation; and (4) that the petitioner has complied with the terms and conditions of employment as required by its attestations to do so in the Form I-129s and related LCAs that it has filed on behalf of other beneficiaries.

The AAO will address in detail only the specialty occupation issue, which is ultimately the paramount issue regarding eligibility for H-1B nonimmigrant classification. As will be discussed below, upon review of the entire record of proceeding as supplemented by the submissions on appeal, the AAO finds that the director's determination that the petition must be denied for its failure to establish the proffered position as a specialty occupation is correct. Consequently, the appeal must be dismissed and the petition denied. As this determination by the AAO is dispositive of the appeal, the AAO will not address and therefore not disturb the other grounds of the director's decision, except for the following modification with regard to the director's determination that the petitioner had not submitted an LCA that encompassed the beneficiary's places of employment.

On the LCA issue, the director's second basis for denying the petition, the AAO comments as follows. The first of the two LCAs submitted into the record corresponds to the location, time period, wage rate, and job position for which the beneficiary worked from the beginning of the employment period stated on the petition through March 2007. On the basis of these facts, the AAO concludes that there is an LCA supporting this petition from the start of the employment period specified in the petition through March 31, 2007. Accordingly, the AAO will affirm the director's decision on the LCA issue only for the period April 1, 2007 to July 13, 2007 (the end date of the employment period specified in the petition); but it will withdraw the director's determination that the petition is not supported by an LCA for the earlier part of the employment period specified in the petition.

The AAO will now discuss its affirmance of the director's determination that the petitioner failed to establish the proffered position as a specialty occupation.

In determining whether a proffered position qualifies as an H-1B specialty occupation, the AAO applies 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. 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.

By its own description, the petitioner is a software services/development company whose business is to provide solutions to customer companies with specific software needs. The record reflects that the substantive nature of the services that the beneficiary would perform, and hence the educational credentials required to perform them, would be determined by the particular client projects to which the petitioner would be assigned. In such circumstances, USCIS may not responsibly approve an H-1B petition without documentary evidence (such as contracts, work orders, work specifications, and petitioner-client correspondence) relating the substantive nature of the specific projects to which the petitioner would be assigned and thereby detailing the duties the beneficiary will perform at each worksite such that a determination can be made as to whether the beneficiary will at all times be employed in a specialty occupation. The petitioner, however, declined to comply with the RFE’s request for such evidence.¹

¹ The petitioner’s contention that the request for contracts and contract-related documents exceeds

For the proposition that requests for contracts exceed the scope authorized for RFEs, the petitioner relies, mistakenly, on the memorandum from Louis Crocetti Jr., Associate Commissioner, INS Office of Examinations, *Supporting Documentation for H-1B Petitions*, HQ 214h-C (November 13, 1995) (hereinafter referred to as the Crocetti memo). While the Crocetti memo states that requests for contracts should not be a normal requirement for the approval of an H-1B petition from an employment contractor, the memo does not prohibit such RFE requests. Read as a whole, the memo counsels against issuing RFEs for contracts from employment contractors without a specific need that the requesting officer can articulate for the requesting the documents. The memo, the AAO notes, does not require the requesting officer to actually articulate the need. Nor does the memo purport to bar agency officers from issuing RFEs to any category of H-1B petitioners. Further, this internal memo must be read in the context of the regulations that invest USCIS officers with the authority to pursue such evidence as they determine necessary in the exercise of their responsibility to adjudicate H-1B petitions in accordance with the applicable statutes and regulations.

The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that “[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation.” Moreover, the regulations at 8 C.F.R. §§ 103.2(b)(8) and 214.2(h)(9)(i) provide the director broad discretionary authority to require such evidence as contracts to establish that the services to be performed by the beneficiary will be in a specialty occupation. A service center director may issue an RFE for evidence that he or she may independently require to assist in adjudicating an H-1B petition, and his or her decision to approve a petition must be based upon consideration of all of the evidence as submitted by the petitioner, both initially and in response to any RFE that the director may issue. *See* 8 C.F.R. § 214.2(h)(9). The purpose of an RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(1), (b)(8), and (b)(12).

The record reflects that clients contracting for the services to be provided by the beneficiary generate the projects upon which the beneficiary would work. It is important to note that the substantive nature of the work actually to be performed by the beneficiary of this petition would be determined by the specific requirements generated by client entities contracting for the beneficiary’s services. Those client entities ultimately determine what the beneficiary would do, and, by extension, whatever practical and theoretical knowledge the beneficiary would have to apply. In these circumstances, documentary evidence from client entities generating the projects upon which the petitioner would work are relevant and material to establishing the specific work that the beneficiary would perform, and, consequently, whether the proffered position is a specialty occupation. However, when the RFE was issued for contract documents, the record was devoid of any substantive evidence from client entities, although their needs directly determine what the beneficiary would actually do on a day-to-day basis. In this context, the AAO finds that the RFE

the proper scope of an RFE is without merit.

request for contract documents was a proper exercise of the director's discretionary authority reflected in the above referenced regulations.

Specialty occupation classification is dependent upon the extent and quality of the evidence of record about the actual work to be performed, the associated performance requirements, and the nature and educational level of specialized knowledge in a specific specialty necessary for or usually associated with such performance requirements. Thus, where, as here, the 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 client entities generating the work have issued or endorsed about the work, such as specifications, performance timelines, contract amendments, work orders, and correspondence about performance expectations, to name a few examples. The logic and reasonableness of this approach is self-evident.²

Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the AAO finds that, in the context of the record of proceeding as it existed at the time the RFE was issued, the scope of the RFE was appropriate, in that it addressed the petitioner's failure to submit documentary evidence substantiating the petitioner's claim that it had H-1B caliber work for the beneficiary for the period of employment requested in the petition. The AAO finds that the RFE's request for contractual documents was a reasonable measure towards remedying a material evidentiary deficiency.

² The soundness of this approach is illustrated in *Defensor*, which USCIS routinely cites for the material relevance of documentary evidence from client entities regarding their projects to which the beneficiary is or will be assigned. In *Defensor*, an examination of the ultimate employment of the beneficiary was deemed necessary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources, was a medical contract service agency that brought foreign nurses into the United States and located jobs for them at hospitals as registered nurses. The court in *Defensor* found that Vintage had "token degree requirements," to "mask the fact that nursing in general is not a specialty occupation." *Id.* at 387.

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 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 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 evidence of the client companies' job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

Not knowing the contents of the documents that the petitioner may have submitted if it chose to comply with the RFE request for contract documents, the AAO will not speculate on the possible evidentiary impact that those documents would have had if they had been submitted. It is important to note, however, that separate and apart from the issue of the service center's authority to request contract documents, the director was constrained to base her decision exclusively on the evidence in the record of proceeding. As will now be discussed, that evidence was insufficient for approval of the petition.

The AAO recognizes the *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. The Programmer Analyst occupational category is discussed in the *Handbook* chapters entitled "Computer Programmers" and "Computer Systems Analysts."³ As will now be discussed, these chapters do not support the petitioner's contention that programmer analyst positions categorically qualify as specialty occupation positions.

The "Computer Programmers" chapter states, "In some organizations, workers known as *programmer-analysts* are responsible for both the systems analysis and programming." This chapter describes the programmer component of the occupation as follows:

Computer programmers often are grouped into two broad types—applications programmers and systems programmers. *Applications programmers* write programs to handle a specific job, such as a program to track inventory within an organization. They also may revise existing packaged software or customize generic applications purchased from vendors. *Systems programmers*, in contrast, write programs to maintain and control computer systems software for operating systems, networked systems, and database systems. These workers make changes in the instructions that determine how the network, workstations, and central processing unit of a system handle the various jobs they have been given, and how they communicate with peripheral equipment such as terminals, printers, and disk drives. Because of their knowledge of the entire computer system, systems programmers often help applications programmers determine the source of problems that may occur with their programs.

The "Training, Other Qualifications, and Advancement" section of the *Handbook's* chapter on computer programmers opens with statements that "a bachelor's commonly is required for computer programming jobs, although a two-year degree or certificate may be adequate for some positions"; that employers "favor applicants who already have relevant programming skills and experience"; and that "skilled workers who keep up to date with the latest technology usually have good opportunities for advancement." The AAO here quotes the "Education and Training" section of the

³ All references are to the 2008-2009 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

Handbook's "Computer Programmers" chapter in full in order to show that this occupation accommodates a wide variety of educational credentials short of a U.S. bachelor's degree, or its equivalent, in a specific specialty closely related to programming:

Education and training. Most programmers have a bachelor's degree, but a two-year degree or certificate may be adequate for some jobs. Some computer programmers hold a college degree in computer science, mathematics, or information systems, whereas others have taken special courses in computer programming to supplement their degree in a field such as accounting, finance, or another area of business. In 2006, more than 68 percent of computer programmers had a bachelor's degree or higher, but as the level of education and training required by employers continues to rise, this proportion is expected to increase.

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.

Most systems programmers hold a four-year degree in computer science. Extensive knowledge of a variety of operating systems is essential for such workers. This includes being able to configure an operating system to work with different types of hardware and being able to adapt the operating system to best meet the needs of a particular organization. Systems programmers also must be able to work with database systems, such as DB2, Oracle, or Sybase.

In addition to educational attainment, employers highly value relevant programming skills, as well as experience. Although knowledge of traditional programming languages still is important, employers are placing an emphasis on newer, object-oriented languages and tools such as C++ and Java. Additionally, employers seek people familiar with fourth- and fifth-generation languages that involve graphic user interface and systems programming. College graduates who are interested in changing careers or developing an area of expertise may return to a two-year community college or technical school for specialized training. In the absence of a degree, substantial specialized experience or expertise may be needed.

Entry-level or junior programmers may work alone on simple assignments after some initial instruction, or they may be assigned to work on a team with more experienced programmers. Either way, beginning programmers generally must work under close supervision.

Because technology changes so rapidly, programmers must continuously update their knowledge and skills by taking courses sponsored by their employer or by software vendors, or offered through local community colleges and universities.

The AAO notes that the employer preferences noted above do not equate to a normal hiring requirement. The AAO also notes that the wide range of educational attainment shared by computer programmers is reflected in the following two bullet statements from the “Significant Points” section which opens the *Handbook’s* chapter on computer programmers:

- Almost 8 out of 10 computer programmers held an associate’s degree or higher in 2006; nearly half held a bachelor’s degree, and 2 out of 10 held a graduate degree.
- Job prospects will be best for applicants with a bachelor’s degree and experience with a variety of programming languages and tools.

The AAO notes not only the wide range of degrees indicated above, but also that the best prospects are not even limited to holders of bachelor’s degrees in a specific specialty or range of closely related specialties.

The *Handbook’s* “Computer Systems Analysts” chapter describes the programmer analyst occupation 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. . . . 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 “Nature of the Work” segment of the *Handbook’s* “Computer Systems Analysts” chapter includes this information, which is relevant to the systems analyst component of the programmer analyst occupation: :

Computer systems analysts solve computer problems and use computer technology to meet the needs of an organization. They may design and develop new computer systems by choosing and configuring hardware and software. They may also devise ways to apply existing systems’ resources to additional tasks. Most systems analysts work with specific types of computer systems—for example, business, accounting, or financial systems or scientific and engineering systems—that vary with the kind of organization. . . .

To begin an assignment, systems analysts consult managers and users to define the goals of the system. Analysts then design a system to meet those goals. They specify

the inputs that the system will access, decide how the inputs will be processed, and format the output to meet users' needs. Analysts use techniques such as structured analysis, data modeling, information engineering, mathematical model building, sampling, and cost accounting to make sure their plans are efficient and complete. They also may prepare cost-benefit and return-on-investment analyses to help management decide whether implementing the proposed technology would be financially feasible.

When a system is approved, systems analysts determine what computer hardware and software will be needed to set it up. They coordinate tests and observe the initial use of the system to ensure that it performs as planned. They prepare specifications, flow charts, and process diagrams for computer programmers to follow; then they work with programmers to "debug," or eliminate errors, from the system. . . .

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. . . .

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 occupation 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 applicant's who have a bachelor's degree" is not indicative of a pervasive requirement for a specific major or academic concentration. As such, the preference noted by the *Handbook* is not an endorsement of the occupation as one for which all of its included jobs qualify as a specialty occupation positions. The "Education and Training" subsection of the *Handbook's* "Computer Systems Analyst" chapter continues this theme. 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.

The level and type of education that employers require reflects changes in technology. Employers often scramble to find workers capable of implementing the newest technologies. Workers with formal education or experience in information security, for example, are currently in demand because of the growing use of computer networks, which must be protected from threats.

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 majors 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 should have some expertise in finance, and systems analysts who wish to work for a hospital should have some knowledge of health management.

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.

With regard to educational requirements, the *Handbook's* "Computer Systems Analyst" chapter indicates that, while employers prefer applicants with a bachelor's degree and often seek applicants who have at least a bachelor's degree in a technical field, their employment practices have not established a bachelor's degree in a specific specialty as the norm for hiring.

While the "Computer Programmers" and "Computer Systems Analysts" chapters both discuss Programmer Analysts as a composite occupation, neither state or otherwise indicate that Programmer Analysts constitutes an occupational category characterized by a requirement for at least a bachelor's degree, or the equivalent, in a specific specialty.

In light of the educational requirements information in the *Handbook*, it is incumbent on the petitioner to provide sufficient evidence to establish not only that the beneficiary would perform the services of a programmer analyst, but that he would do so at a level that requires 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.

The record of proceeding indicates that the substantive nature of the beneficiary's services, and hence the educational attainment required to perform them, will be determined by the specific performance requirements of the particular client projects to which the beneficiary will be assigned. These project requirements will be determined by each business entity defining the particular project or project parts upon which the beneficiary will be employed. The best evidence of such requirements is the related contractual documents and contract-related correspondence generated in the ordinary course of business between or among the parties involved in the project. Accordingly, it is reasonable for USCIS to request such documents so that it can assess the actual scope and substantive nature of the services that the beneficiary will perform.

In this proceeding, the petitioner has declined to provide any contracts or contract-related documents regarding the client projects to which the beneficiary will be assigned. As will now be discussed, the documentary evidence submitted with regard to the proffered position and its duties have little or no evidentiary value.

For the period spanning the April 23, 2006 to July 15, 2007 employment period specified in the petition, the petitioner submits letters from two clients, namely, [REDACTED] and [REDACTED]

The [REDACTED] letter, which is dated April 6, 2007, reads:

Please be advised that [the] beneficiary worked at [REDACTED] of New York as an I.T. Consultant from May 2001 to April 2007.

During this time he worked as primarily as [sic] a Development Team Lead and Architect on a number of Key application projects.

In this capacity he was responsible for analysis, design and development of applications utilizing WEB SERVICES, J2EE, and JAVA technologies.

If you have any questions or require additional information, please contact me at the above address.

This letter conveys no more than generalized functions associated with the beneficiary's position, such as working "primarily" as a Development Team Lead and Architect, and being "responsible for analysis, design and development of applications utilizing WEB SERVICES, J2EE, and JAVA technologies." The letter provides no description of the "Key application projects" that engaged the

beneficiary, and no discussion of the beneficiary's "analysis, design, and development of applications" other than that they involved his applying "WEB SERVICES, J2EE, and JAVA technologies." As such, the letter conveys that the proffered position involves the application of some level of technical knowledge, but not that it requires the theoretical and practical application of at least a bachelor's degree level of knowledge in a specific specialty, as is required for recognition as a specialty occupation. In this regard, the AAO notes that the record of proceeding lacks any evidence that "utilizing WEB SERVICES, J2EE, and JAVA technologies" requires or is usually associated with at least a bachelor's degree in a specific specialty. The AAO further notes that U.S. Trust, the entity ultimately defining the work the beneficiary would perform, has not anywhere in this record even endorsed, let alone substantiated, the petitioner's claim that the services performed for it by the beneficiary require at least a bachelor's degree in a specific specialty.

In the D&B letter, which is dated July 5, 2007 - just eight days from the end of the employment period specified in the petition - a person signing as Chief Architect & Leader – Technology states:

I confirm that [the beneficiary] is working full-time at 3 Sylvan Way, Parsippany, New Jersey -07054 in a contractor capacity.

He is working as Team Lead/Developer. He is involved in analyzing, designing and developing applications using JAVA, J2EE, and WEB SERVICES technologies.

His on-site supervisor is [REDACTED] We understand he also reports to persons at [the petitioner] as [a] [petitioner] employee.

As we are not his employer, we do not pay him a salary nor do we provide him benefits.

Please feel free to contact me if you need more information about this position.

The AAO notes that the D&B letter only speaks in the present tense ("is working") and so does not address any time period prior to its composition date, July 5, 2007. The AAO further notes that neither the U.S. Trust letter nor any other documentary evidence addresses the approximately 90-day part of the requested employment period from April 1, 2007 to July 5, 2007. Further, as the D&B work location is outside the work locations specified in the petition and its accompanying LCA, any work that the beneficiary performed there is outside the scope of, and therefore not relevant to, this petition.

The petitioner also submits a letter from the beneficiary and one from a co-worker at the D&B location. The AAO notes that both letters are dated September 5, 2007; that neither addresses the beneficiary's working status prior to that date; and that both deal with a work location not included in the Form I-129 and its LCA. The AAO finds that neither letter is relevant to this petition. The beneficiary's activities outside the work locations specified in the Form I-129 and its accompanying LCA are beyond the scope of this petition; and the beneficiary's activities after July 15, 2007 fall

outside the employment period for which the petition was filed. The AAO finds that neither letter is relevant to this petition.

Even if the letters from D&B, the beneficiary, and the beneficiary's co-worker were relevant – and they are not- they would have no probative value, for they have no more substantive content than the U.S. Trust letter. They establish neither the substantive nature of the beneficiary's services nor any correlation between those services and any particular level of education in a specific specialty.

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 discussed, the pertinent chapters of the *Handbook* indicate that programmer analyst positions do not normally require at least a bachelor's degree in a specific specialty. This fact does not preclude the petitioner from establishing that its particular position is one that normally requires such an educational minimum. However, as reflected in this decision's earlier discussions about the evidence, the petitioner has failed to do so. The record's exclusively generalized and generic descriptions of the proffered position and its duties fail to distinguish it from the range of programmer analyst positions which the *Handbook* indicates do not require at least a U.S. bachelor's degree, or the equivalent, in a specific specialty.

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).

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)).

The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a specific specialty that is directly related to the specialty occupation claimed in the petition.

As reflected in this decision's earlier comments, the *Handbook* does not indicate that a programmer analyst position as so skeletally 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 or from individuals or other firms in the petitioner's industry attesting to routine employment and recruiting practices.

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 programmer analyst positions for which the *Handbook* indicates that 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. Further, it should be noted that 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*, 201 F. 3d at 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.

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. In this record of proceeding, the proposed duties are described exclusively in terms of generalized functions that do not develop the level of whatever specialization and complexity may reside in the duties.

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.

Beyond the decision of the director, the AAO finds that the petition must be denied due to the petitioner's failure to provide the contract and contract-related documents sought in the RFE, as this denial precluded USCIS from reviewing the documentation that ultimately determines the nature of the work that the beneficiary would perform. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The AAO recognizes that this is an extension petition. However, if the director's decision does not indicate whether he reviewed the prior approvals of the previous nonimmigrant petitions filed on behalf of the beneficiary. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. 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 approved the nonimmigrant petitions on behalf of the 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 prior approvals do not preclude USCIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

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).

Further, USCIS records indicate that, under the receipt number WAC-07-109-52933, the director approved a subsequently filed H-1B petition for this petitioner and beneficiary for the period July 16, 2007 to July 15, 2010, which immediately follows the employment period sought in the present petition. As it appears that the petition WAC-07-109-52933 was filed to extend a status that had not been granted, its approval appears to be subject to revocation-upon-notice proceedings pursuant to the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(5) on the basis of gross error.

The appeal will be dismissed and the petition will be denied for the above stated reasons. 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:**
1. The appeal is dismissed and the petition is denied.
 2. The director shall review the approval of H-1B petition WAC-07-109-52933 and initiate revocation proceedings under 8 C.F.R. § 214.2(h)(11)(iii)(5) if warranted.