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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: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date **SEP 03 2010**

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

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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

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

On the Form I-129 visa petition the petitioner stated that it is an information technology services and consulting firm. To employ the beneficiary in a position designated as a senior programmer analyst, the petitioner endeavors to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, counsel submitted additional evidence and contended that the petitioner satisfied all evidentiary requirements.

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

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. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would be employing the beneficiary in a specialty occupation position.

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 a particular position 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.

A letter, dated December 29, 2008, from the petitioner's chief executive officer was submitted with the petition. That letter describes the beneficiary's prospective duties and states, "[The petitioner has] both in[-]house projects as well as offsite projects at the client site where our resources provide services." On the Labor Condition Application submitted to support the visa petition, the petitioner stated that the beneficiary would be employed in Rochester, Minnesota. On the Form I-129, the petitioner gave its own address as [REDACTED]. The space for information entry at Part 5, Item 5, of the Form I-129 is labeled, "Address where person(s) will work if different from address in Part 1. (Street number and name, city/town, state, zip code)." In that space the petitioner failed to list the address where the beneficiary would work, as the form required, stating only that he would work in "Rochester, Minnesota." This combination of documentary information suggests that the petitioner did not then know the exact extent of the client locations where the beneficiary would work if this petition were granted.

The petitioner also submitted Professional Services Consulting Agreements (PSCAs) it entered into with Mayo Foundation for Medical Education and Research (MFFMEAR) in Rochester, Minnesota on December 20, 2005, and with Kardia Health Systems Inc. (Kardia), also in Rochester, on August 30, 2007. In both of those consulting agreements, which are substantially identical, the petitioner agreed to provide consulting services to those companies in accordance with specific terms to be detailed in an initial Statement of Work (SOW), which could be modified by either additional SOWs or "in an electronic format mutually agreed to by the parties, for instance, a Consultant management system." Both PSCAs state that the amount that Mayo and Kardia will pay for the petitioner's consulting services is "specified in the Statement of Work attached [to the consulting agreement]." The AAO notes that the petitioner has failed to submit any initial SOW.

The PSCA with MFFMEAR states, "*Work on Mayo's Premises.* [The petitioner] and its employees and agents shall, at all times, adhere to Mayo's safety and security guidelines while on Mayo's premises." The consulting agreement with Kardia states, "*Work on Kardia's Premises.* [The petitioner] and its employees and agents shall, at all times, adhere to Kardia's safety and security guidelines while on Kardia's premises." These provisions, as well as the petitioner's support letter's description of its business model as including services at clients' locations and the January 14, 2009 and the February 19, 2009 letters from the Unit Manager-IT of Mayo Clinic Health Solutions (submitted, respectively, in the RFE response and on appeal) indicate that the beneficiary has been working at, and in the future, would conduct at least some work at, client sites.

On January 13, 2009 the service center issued the RFE in this matter, asking for evidence pertinent to, *inter alia*, the petitioner's providing specific specialty-occupation work to the beneficiary for the period specified in the petition.

Among the documents submitted with the RFE response is a January 14, 2009 letter signed by [REDACTED] - IT Mayo Clinic Health Solutions, which states that the beneficiary

is working, under her supervision, for Mayo Clinic Health Solutions as a “contracted web developer.” As to the beneficiary’s duties, the letter states:

[The beneficiary’s] duties include redesigning the look and feel of the site, navigation, and adding functionality as specified by our business colleagues. In the performance of his duties, the following languages, Technologies, and tools are used:

- * Languages and technologies: Java/J2EE technologies – JSP, EJB, Servlets, JDBC, and XML,
- * Tools: IBM Websphere Application Developer (SWAD), IBM Websphere Application Server (WAS), IBM Websphere Portal Server (WPS).

As part of the RFE response, counsel submitted her own letter, dated January 29, 2009. In it, counsel stated that the beneficiary is working at Mayo Clinic Health Solutions as a web developer. As to the difference between the job title of the position in which Mayo employs the beneficiary (web developer) and the job title of the position petitioned for (senior programmer analyst), counsel stated:

The Web Developer is an internal designation which Mayo Clinic uses for its contracted workers. [The petitioner] as per its policy has designated the beneficiary as a “Senior Programmer Analyst,” however, at Mayo Clinic, he is designated as a Web Developer.

The AAO finds that the [redacted] letter submitted as part of the RFE response indicates that the beneficiary has been serving and continues to serve as a web developer, rather than as a senior programmer analyst as claimed by the petitioner. Counsel’s attempt to explain as insignificant the difference between the beneficiary’s position as described by the beneficiary’s onsite supervisor and as claimed by the petitioner is unsuccessful, as it is not supported by any documentation in the record of proceeding. 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).

Counsel also provided copies of job-vacancy announcements from the Internet. One such announcement is for a “web developer” at Mayo Foundation Information Technology. That announcement lists various languages and programs the position requires, but, tellingly, it contains no indication that the position requires a college degree. Another announcement is for a “Senior Web Application Developer” at Mayo Clinic Health Solutions. That announcement indicates that the position requires a bachelor’s degree in Computer Science or a closely-related field. It further indicates that the position pays a minimum of \$2,630 every two weeks, which equates to \$68,360 annually. However, this document is irrelevant, as the evidence in the record of proceeding indicates

the beneficiary's position as a Web Developer position, rather than a Senior Web Application Developer. Other announcements are for analyst programmer positions with the Information Technology Department of the Mayo Clinic and the Mayo Center for Innovation. As Mayo designates the beneficiary's position as a web developer position, those announcements have no apparent relevance to this case.¹

Other announcements were placed by the petitioner and are for a CERNER Applications Analyst, a Systems Analyst I, a Programmer Analyst, a Client Server Analyst Programmer, a web developer, and a Systems Analyst II. All of those announcements state that the positions require a bachelor's degree, and none state the wages the positions pay. As the petitioner designates the proffered position as a Senior Programmer Analyst position, the educational requirements of most of those announcements have no relevance to this case. The sole possible exception is the Programmer Analyst position.

In any event, the Internet vacancy announcements submitted into the record are not probative that the proffered position is a specialty occupation. The record of proceeding does not establish that the actual performance requirements of the advertised positions are substantially the same as those of whatever work the beneficiary would actually perform in the proffered position. So, the relevancy of the advertisements has not been established. Further, the extent to which the advertisements may represent industry recruiting and hiring practices – or even the recruiting and hiring practices of the advertisers – is not self-evident, and the record of proceeding lacks any authoritative documentation establishing this aspect, which is critical to establishing probative value in the advertisements. Further, there is no independent evidence in the record of proceeding that any degree specified in the advertisements is necessary for performance of the advertised positions.

On February 9, 2009 the director denied the visa petition, finding that the evidence provided from Mayo, the end user of the beneficiary's services, was insufficient to demonstrate that the proffered position is a position in a specialty occupation.

On appeal, counsel provided an additional letter from Ms. Bashaw, Unit Manager – IT Mayo Clinic Health Solutions, dated February 19, 2009. The letter states the beneficiary's duties as follows:

- Implementation of client requested enhancements to our web application. This includes review and understanding of client requirements, use cases, technical design documentation, coding, testing, and implementation of these enhancements

¹ Various interpretations of the evidence presented are possible. Mayo may designate some positions as "Senior Web Application Developers" and require a degree for those positions, but designate other positions as "Web Developers" and not require a degree for those positions. Mayo Management Services Inc. and Mayo Clinic Health Solutions may require a degree, whereas Mayo Foundation Information Technology may not. In any event, the vacancy announcements submitted do not demonstrate that Mayo requires all workers in positions designated web developer positions must have a minimum of a bachelor's degree or the equivalent in a specific specialty. To the contrary, the announcement for a web developer position indicates that it does not require such a degree.

- Updates to the site in support of changing business needs, which include look and feel of the site and navigation
- Writing queries to our DB2 database in support of statistics that are used in client communication
- Providing design recommendations for enhancements and providing an overview for technical reviews
- Support of the web application which includes trouble shooting, working with our MMSI team and implementation of fixes as needed

As in her initial letter, [REDACTED] states: “Web developers at Mayo Clinic are required to have a Bachelor[‘s] degree in computer science or a closely[-]related field.” As [REDACTED] provides no independent evidence to support this conclusionary statement, and as it is not self-evident that the duties as described require the theoretical and practical application of at least a bachelor’s degree level of highly specialized knowledge in a specific specialty - in accordance with the provisions of the Act and the implementing regulations regarding a specialty occupation - her claim carries little evidentiary weight. Again, 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

On appeal, counsel states that because “[Mayo] does not have paper statements of work or engagement letters or work orders for each separate consultant or contractor working at Mayo” such evidence was not initially provided.” The AAO notes that the PSCA between the petitioner and MFFMEAR with Mayo refers to a “Statement of Work attached,” which, together with other references to SOW in the PSCA, suggests that at least one statement of work was in the petitioner’s possession when it filed the visa petition. Neither the petitioner, its counsel, nor any Mayo representative explains the absence of the initial SOW which, as this decision’s previous discussion of the PSCA and its reference to SOWs reflects, the PSCA cites as the document embodying the specific terms of any project to be performed under the PSCA. The AAO finds this to be a material discrepancy in the record which has not been effectively explained.

Likewise the AAO finds that the petitioner has failed to effectively address conflicting assertions regarding the general nature of the beneficiary’s work for Mayo. With the appeal, counsel submits a letter from [REDACTED] – Mayo Clinic IT Contract Management Services Office. It states that the beneficiary is working for Mayo as a “senior contract programmer analyst.” That letter includes a computer screen printout showing that Mayo agreed to engage the beneficiary’s services through December 31, 2009, but does not indicate how many hours per week Mayo will engage those services. [REDACTED]’s assertion that beneficiary would be working as a “senior contract programmer analyst,” materially conflicts with (1) the “snapshot of the electronic Statement of Work (contract)” provided by [REDACTED] which itself describes the “Requirement Title” as

“Web Developer”; and (2) [REDACTED] statement that the beneficiary has been working as a “contract web developer.”²

The AAO finds that the above reviewed discrepancies regarding the SOW issue and the characterizations of the beneficiary’s work are in themselves sufficient to fatally undermine the credibility of the petitioner’s claim that the beneficiary would be employed in the position specified in the petition. Aside from the overall failure of the record of proceeding to establish the proffered position as a specialty occupation, these material discrepancies by themselves preclude approval of the petition, and require that the appeal be dismissed. Doubt cast on any aspect of the petitioner’s claim may, of course, lead to a reevaluation of the reliability and sufficiency all aspects of the claim and all of the evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In any event, to determine whether a particular job qualifies as a specialty occupation position, the AAO does not rely on the job title. Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the alien will likely perform for the entity or entities ultimately determining the work’s content.

Next, the AAO finds that even if the overall credibility of the petition had not been undermined as discussed above, the record of proceeding still fails to establish the proffered position as a specialty occupation.

The AAO recognizes the Department of Labor’s (DOL) *Occupational Outlook Handbook*³ (the *Handbook*) as an authoritative source on the duties and educational requirements of a wide variety of occupations. The *Handbook* describes the duties of programmer analyst positions, included in the section pertinent to computer systems analyst positions, as follows:

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

² On appeal, counsel added another description, referring to the position as a software consultant position.

³ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO’s references to the *Handbook* are to the 2010 – 2011 edition available online.

with databases, object-oriented programming languages, client-server applications, and multimedia and Internet technology.

The *Handbook* further describes the education necessary for such a position as follows:

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

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

That passage indicates that a minimum of a bachelor's degree or the equivalent in a specific specialty is usually preferred - but not usually required - for entry into the computer programmer analyst occupation. Thus, AAO notes that even if the petitioner had demonstrated that the proffered position is a position for a programmer analyst - and the petitioner has not - that would not automatically qualify it as a position in a specialty occupation. The petitioner would have to submit sufficient evidence to establish that its particular proffered position, as it would be actually performed, would require the theoretical and practical application of at least a bachelor's degree level of highly specialized knowledge in a particular specialty. However, even if accepted on face value, the duties ascribed to the beneficiary in this record of proceeding do not in themselves indicate a requirement for such credentials, and the petitioner has not supplemented the record with any documentary evidence to remedy this failure.

The requirements for positions in programmer analyst positions, however, are not especially germane here. The duties of a programmer-analyst as described in the *Handbook* do not correspond with the duties of the proffered position as described in the petitioner's evidence. The *Handbook* describes the duties of a web developer in the section on computer network, systems and database administrators. That section states,

Web developers are responsible for the technical aspects of Web site creation. Using software languages and tools, they create applications for the Web. They identify a site's users and oversee its production and implementation. They determine the information that the site will contain and how it will be organized, and may use Web development software to integrate databases and other information systems. Some of

these workers may be responsible for the visual appearance of Web sites. Using design software, they create pages that appeal to the tastes of the site's users.

The February 19, 2009 letter from [REDACTED] is the most detailed description provided by the end user of the beneficiary's services. That description closely corresponds with the description in the *Handbook* of the duties of web developers. The AAO finds that, aside from the issue of credibility already addressed in this decision, the evidence in the record of proceeding does not indicate that the proffered position is anything but that of a web developer.

The *Handbook* does not support the proposition that web developer positions require a minimum of a bachelor's degree or the equivalent in a specific specialty. As to the education required of network and computer systems administrators, including web developers, the *Handbook* states:

Network and computer systems administrators often are required to have a bachelor's degree, although an associate degree or professional certification, along with related work experience, may be adequate for some positions. Most of these workers begin as computer support specialists before advancing into network or systems administration positions. (Computer support specialists are covered elsewhere in the *Handbook*.) Common majors for network and systems administrators are computer science, information science, and management information systems (MIS), but a degree in any field, supplemented with computer courses and experience, may be adequate.

This passage does not support the proposition that a minimum of a bachelor's degree or the equivalent in a specific specialty is required for entry into a web developer position.

Further, the vacancy announcements from various departments at Mayo make clear whether the positions announced require bachelor's degrees. The announcement for a position that Mayo designates as a web developer position does not. This flatly contradicts the assertion of [REDACTED] of Mayo that all such positions require a bachelor's degree.

Further still, the petitioner has stated that it has in-house projects, and that in the event that Mayo does not continue to employ the beneficiary beyond the expiration of its current contract on December 31, 2009, it would employ the beneficiary at its own location on its own projects. The record, however, contains no evidence to corroborate the petitioner's assertion that it has its own projects, or, if it does, that its projects encompass sufficient specialty occupation work to fully employ the beneficiary in a specialty occupation. Although the agreements with Mayo indicate that it can, if it wishes, extend its contract with the petitioner, it is not obliged to and gave no indication that it would. Although the beneficiary has asked to employ the beneficiary through January 13, 2012, the evidence does not indicate that it has any employment to offer him after December 31, 2009, or that, if it has any employment for him, that it is employment in a specialty occupation.

As discussed above, the petitioner has not demonstrated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position and has not,

therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

No evidence was provided pertinent to the educational requirements web developer positions at other hospitals or similar health care institutions. The petitioner has not demonstrated that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the end user's industry in parallel positions among similar companies, and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of the first clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The evidence pertinent to whether Mayo requires its web developers to have a minimum of a bachelor's degree or the equivalent in a specific specialty is mixed, as was noted above, and does not adequately support the proposition. The petitioner has not, therefore demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).⁴

Next, the petitioner has not demonstrated that the proffered position or its duties are so complex, unique, or specialized that they can only be performed by a person with a minimum of a bachelor's degree in a specific specialty or the equivalent, or that performance of the duties is usually associated with a minimum of a bachelor's degree, or the equivalent, in a specific specialty.

As reflected in this decision's earlier discussions of the inconsistent job and duty descriptions ascribed to the proffered position in the record of proceeding, the petitioner has presented conflicting evidence about the nature of the position and about the duties that comprise it. As indicated earlier in this decision, this factor alone precludes a finding of a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). Additionally, the descriptions provided of the beneficiary's duties are exclusively general and generic, and, as such, they do not develop uniqueness or relative complexity

⁴ To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000). In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

as aspects of the proffered position, which are critical elements of the criterion of the second clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). By the same token, the petitioner has failed to present the duties of the proffered position with sufficient specificity to establish that they are so specialized and complex that their performance would usually be associated with attainment of at least a bachelor's degree in a specific specialty, as required to establish a position as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) or the criterion of the second clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons discussed above, the AAO finds that the director was correct in her determination that the record before her failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the evidence and argument submitted on appeal have not remedied that failure. The appeal will be dismissed and the petition will be denied on this basis.

Also, at a more basic level, as reflected in this decision's discussion of the evidentiary deficiencies, the record lacks credible evidence that when the petitioner filed the petition, the petitioner had secured work of any type for the beneficiary to perform during the greater portion of the requested period of employment, from January 1, 2010 to January 13, 2012. For this reason also, the appeal will be dismissed and the petition denied. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). 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 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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. The appeal will be dismissed and the petition denied.

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