

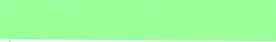


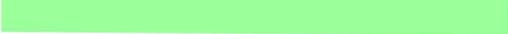
U.S. Citizenship
and Immigration
Services

(b)(6)



AUG 30 2013

DATE: Office: CALIFORNIA SERVICE CENTER File: 

IN RE: Petitioner: 
Beneficiary: 

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

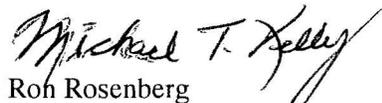
ON BEHALF OF PETITIONER:


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

for 
Ron Rosenberg
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, through counsel, submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on June 7, 2012. On the Form I-129 visa petition, the petitioner describes itself as an IT consulting business¹ with 19 employees, established in 2001. In order to employ the beneficiary in a position to which it assigned the job title, "Sr. Technical Specialist" the petitioner seeks 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 on the basis of her adverse determinations on two separate and independent issues, which the decision specified as (1) "whether the petitioner has demonstrated that there exists a reasonable and credible offer of employment,"² and (2) "whether the beneficiary is qualified to perform services in a specialty occupation."

On appeal, counsel submits a brief and contends that the director's basis for denial of the petition was erroneous.

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

For the reasons that will be discussed below, the AAO agrees with the director's determinations that the petitioner (1) submitted insufficient evidence to show that its business requires the beneficiary's services as a software developer and that it has sufficient work for the requested period of employment; and (2) failed to establish that the beneficiary is qualified to perform services in a specialty occupation. Accordingly, the appeal will be dismissed, and the petition will be denied, because the evidence of record fails to establish that the petition was filed on the basis of a reasonable and credible offer of employment.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof

¹ The petitioner provided a North American Industry Classification System (NAICS) Code of 5415, "Computer Systems Design and Related Services." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "5415 Computer Systems Design and Related Services," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (accessed on August 15, 2013).

² At the end of the reasonable-and-credible-offer-of-employment analysis, the director phrased as follows his negative determination on the issue:

Therefore, the petitioner has submitted insufficient documentary evidence to show its business requires the beneficiary's services as a software developer and that it has sufficient work for the requested period of intended employment.

in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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.

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

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, 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 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 providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and 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. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular 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 occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position titled, "Sr. Technical Specialist," to work on a full-time basis at a salary of \$84,000 per year. In addition, the petitioner stated that it requires a Bachelor's degree in computer science or its equivalent for the proffered position.

As the Labor Condition Application (LCA) for this petition, the petitioner submitted an LCA that had been certified for use with a job prospect that would be within the occupational classification of "Software Developers, Systems Software" – SOC (ONET/OES Code) 15-1133.00, and for which Level I (the lowest of four assignable wage levels) would be the appropriate wage level.

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.³ As previously discussed, the petitioner asserts in the LCA that the proffered position falls under the occupational category "Software Developers."

³ The *Handbook*, which is available in printed form, may also be accessed on the Internet at <http://www.bls.gov/ooh/>. The AAO's references to the *Handbook* are to the 2012-2013 edition available online.

While the AAO is not persuaded that the proffered position would fall within the Software Developers occupational category, the AAO will nonetheless provide – as a reference point - the following informative section “What Software Developers Do,” excerpted from the *Handbook’s* chapter on the Software Developers occupational classification:⁴

Software developers are the creative minds behind computer programs. Some develop the applications that allow people to do specific tasks on a computer or other device. Others develop the underlying systems that run the devices or control networks.

Duties

Software developers typically do the following:

- Analyze users’ needs, then design, test, and develop software to meet those needs
- Recommend software upgrades for customers' existing programs and systems
- Design each piece of the application or system and plan how the pieces will work together
- Create flowcharts and other models that instruct programmers how to write the software’s code
- Ensure that the software continues to function normally through software maintenance and testing
- Document every aspect of the application or system as a reference for future maintenance and upgrades
- Collaborate with other computer specialists to create optimum software

Software developers are in charge of the entire development process for a software program. They begin by understanding how the customer plans to use the software. They design the program and then give instructions to programmers, who write computer code and test it. If the program does not work as expected or people find it to [sic] difficult to use, software developers go back to the design process to fix the problems or improve the program. After the program is released to the customer, a developer may perform upgrades and maintenance.

⁴ The AAO’s view in this respect is based, of course, on the record’s evidentiary deficiencies (noted in this decision), but it is also supported by the totality of the evidence in this record of proceeding, including the job descriptions provided in the record of proceeding; the petitioner’s self-description; printouts from the petitioner’s website; the beneficiary’s resume detailing his professional profile as an “IT Technician,” (not a software developer); the depictions in the beneficiary’s work history as an “IT Technician” and “IT Apprentice”; his description of his professional accomplishments at several [redacted] meetings which are not indicative of systems-software-development work either); and his description of his “strengths” “in handling support requests” and in “having been able to participate in the setup of the IT specific infrastructure needed for . . . conferences and summits organized by the [redacted].”

Developers usually work closely with computer programmers. However, in some companies, developers write code themselves instead of giving instructions to programmers. For more information, see the profile on computer programmers.

Developers who supervise a software project from the planning stages through implementation sometimes are called IT (information technology) project managers. These workers monitor the project's progress to ensure that it meets deadlines, standards, and cost targets. IT project managers who plan and direct an organization's IT department or IT policies are included in the profile on computer and information systems managers. For more information, see the profile on computer and information systems managers.

The following are types of software developers:

Applications software developers design computer applications, such as word processors and games, for consumers. They may create custom software for a specific customer or commercial software to be sold to the general public. Some applications software developers create complex databases for organizations. They also create programs that people use over the Internet and within a company's intranet.

Systems software developers create the systems that keep computers functioning properly. These could be operating systems that are part of computers the general public buys or systems built specifically for an organization. Often, systems software developers also build the system's interface, which is what allows users to interact with the computer. Systems software developers create the operating systems that control most of the consumer electronics in use today, including those in phones or cars.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, "Software Developers," available on the Internet at <http://www.bls.gov/ooh/Computer-and-Information-Technology/Software-developers.htm#tab-2> (last visited August 15, 2013).

In its support letter, dated May 20, 2012, the petitioner described the proposed duties of the proffered position, as follows:

- Modify existing software to correct errors, to adapt it to new hardware, or to upgrade interfaces and improve performance.
- Advise customer about or perform maintenance of software system.
- Analyze information to determine, recommend, and plan installation of a new system or modification of an existing system.
- Consult with engineering staff to evaluate interface between hardware and software, develop specifications and performance requirements, or resolve customer problems.

- Direct software programming and development of documentation.
- Store, retrieve, and manipulate data for analysis of system capabilities and requirements.
- Confer with data processing or project managers to obtain information on limitations or capabilities for data processing projects.
- Consult with customers or other departments on project status, proposals, or technical issues, such as software system design or maintenance.
- Coordinate installation of software system.
- Prepare reports or correspondence concerning project specifications, activities, or status.

Upon comparison of the above duty descriptions with the O*NETS's statement of Tasks associated with the occupational classification of Software Developers, Systems Software, at the O*NET Internet site <http://www.onetonline.org/link/summary/15-1133.00>, on August 26, 2013, the AAO finds that the following finding by the director was correct:

Although [the petitioner] titled the beneficiary as Senior Technical Specialist, the petitioner filed the labor condition application (LCA) to employ him as a software developer. Moreover, the beneficiary's duties above were verbatim paraphrased from the O*Net Online for "Tasks" normally performed by Software Developers, System Software.

In fact, the AAO finds, the support letter's list of duties is a verbatim quotation of the "Tasks" list in the O*NET summary for Software Developers, Systems Software, at the aforementioned Internet site. As such, the AAO reads the letter's list of duties as a general attestation by the petitioner that the beneficiary would perform the various generalized functions that characterize the occupational classification Software Developers, Systems Software (to which we will hereinafter refer by the shorthand term "Systems Software Developers"). It is worth emphasis that, as such, the AAO does not accord to this list any significant weight towards establishing that, at the time of the petition's filing, the petitioner actually had secured for the beneficiary any work in which he would be performing the services of a systems software developer.

The support letter further stated the following:

With respect to each of the above job duties, [the beneficiary] will perform all implementation tasks, including deployment of computer networking equipment, installation of system, and staff training. After implementation of various new software systems, he will perform continuous maintenance, upgrading, troubleshooting, and administration of systems.

These job duties require [the beneficiary] to write programs to maintain and control our entire networked system and require knowledge of both computer and hardware design. It also requires [him] to provide clients with programming analysis, custom designs, modifications and problem solving of software. This is not a position that simply requires the entry or review of computer code.

Upon review of the documentation, the director found the evidence insufficient to establish eligibility for the benefit sought and issued an RFE on October 15, 2012. The petitioner was asked to submit probative evidence to establish that a specialty occupation position exists for the beneficiary. The RFE clearly alerted the petitioner to the director's concerns with the quality and weight of the evidence in the record of proceeding; and the RFE outlined the specific types of evidence to be submitted to address the director's concerns.

On November 19, 2012, counsel for the petitioner responded to the RFE and submitted a response letter and additional evidence. In its response to the RFE, the petitioner provided, *inter alia*, (1) a copy of an *unsigned* document entitled, "Employment Agreement," between the petitioner and the beneficiary⁵; (2) background information about the petitioner's services; (3) copies of the petitioner's *unsigned* Forms 1120S, U.S. Income Tax Return for an S Corporation and Utah S Corporation Tax Returns for 2009, 2010, and 2011. The Forms 1120S indicate that the petitioner is engaged in the business activity of "computer services" and that its product or service is "network installations"; (4) a copy of the first page of the petitioner's letter of support, dated May 20, 2012, specifying the duties of the proffered position (previously submitted with the petition); (5) a copy of a document entitled, "Commercial Lease," made on June 14, 2002, between the landlord and the petitioner, for the premises consisting of approximately 1920 square feet located at [REDACTED], Orem, Utah [REDACTED]; (6) a copy of a one-page document with a cover page heading of "2013 Contracted IT Plan" listing column headings such as "[REDACTED]" "Location," "Dates," "IT Contractor," etc.; and (7) a document entitled, "[REDACTED]" dated August 21, 2012, by [REDACTED], Professor and Department Chair at the [REDACTED] Department of Decision, Operations, and Information Technologies.

As earlier noted, the director denied the petition, based upon her determinations that the petitioner (1) had submitted insufficient evidence to show that its business requires the beneficiary's services as a software developer and that it has sufficient work for the requested period of employment; and (2) had not established that the beneficiary is qualified to perform services in a specialty occupation.

The AAO reviewed the record of proceeding in its entirety and will make some preliminary findings that are material to the determination of the merits of this appeal.

When determining whether a position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position

⁵ The AAO notes that the Employment Agreement states that the beneficiary's salary will be \$91,000 per year, whereas on the Form I-129 and on the LCA the petitioner attested that the beneficiary's salary would be \$84,000 per year. No explanation was provided for this discrepancy.

as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. 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 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."

One consideration that is necessarily preliminary to, and logically even more foundational and fundamental than the issue of whether a proffered position qualifies as a specialty occupation, is whether the petitioner has provided substantive information and supportive documentation that are sufficient to establish that, in fact, the beneficiary would be performing the services for the type of position for which the petition was filed (here, a systems software developer). Another such fundamental preliminary consideration is whether the petitioner has established that, at the time of the petition's filing, it had secured definite, non-speculative work for the beneficiary that accords with the petitioner's claims about the nature of the work that the beneficiary would perform in the proffered position.

The AAO finds that the petitioner has failed in each of these regards. Accordingly, the AAO affirms the director's conclusion that the petitioner failed to establish that the offer of employment represented in the petition was credible.

It is noted that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). As such, eligibility for the benefit sought must be assessed and weighed based on the facts as they existed at the time the instant petition was filed and not based on what were merely speculative facts not then in existence.

The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request

for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

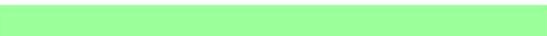
63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While the petitioner is certainly permitted to petition for H-1B classification on the basis of facts not in existence at the time the instant petition was filed, it must nonetheless file a new petition to have these facts considered in any eligibility determination requested, as the agency may not consider them in this proceeding pursuant to the law and legal precedent cited, *supra*.

The petition was filed on June 7, 2012. On the Form I-129, the petitioner listed the intended dates of employment of the beneficiary as being from October 1, 2012 to October 1, 2015. It is noted that the petitioner submitted a cover letter with the heading, "2013 Contracted IT Plan," followed by a document containing a table with 12 columns. The following are the contents of the first three columns:

	Location	Dates
	Davos	23-27 January 2013
	Lima, Peru	23-25 April 2013
	Cape Town	8-10 May 2013
	Dead Sea	24-26 May 2013
	Myanmar	05-07 June 2013
	Dalian	11-13 September 2013
	New Delhi	5-7 October 2013
		Date to be confirmed
		18-20 or 19-21 2013 [sic] November (UAE)
		Date to be confirmed
	NY, NY	1 January 2013 - 31 December 2016

The AAO notes that the document containing the aforementioned table does not establish that the petitioner has ever secured the summit work listed in the table, not to mention by the time the petition was filed. The petitioner did not submit any contractual documentation to establish what work it was hired to undertake in relation to this table. Also, the table contains gaps in the dates listed which are inconsistent with availability of work for the entire requested period of intended employment listed on the petition. Moreover, the table neither indicates nor is supported by independent documentation substantiating that the beneficiary would be working on any of the aforementioned summit dates, let alone on software development in connection with those dates.

Finally, the table indicates various foreign locations and New York City as the locations for the summit work, whereas the petitioner is located in Utah and on page 19 of the petition, at Part D, sub-part a, the petitioner indicated that the beneficiary would *not* be assigned to work at an offsite location for all or part of the period for which H-1B classification is sought.

The document on the petitioner's letterhead, entitled " January 25th - 29th, 2012, Estimate, 22/11/2011," indicates that it is

merely an “estimate” and there is no evidence that the petitioner secured the work referenced therein. Moreover, the estimate appears to be for work that predated the filing of the petition on June 7, 2012 and thus would not apply to the beneficiary. In the letter in response to the RFE, dated November 15, 2012, the petitioner stated that the estimate “is one *example* of work that [the beneficiary] will perform for us at our Utah location.” (Emphasis added.) As such, the document obviously is not evidence of any work actually assigned to the beneficiary.

Next, the AAO notes that the document entitled, “[REDACTED], [REDACTED] 24 January 2013, [REDACTED] between the petitioner and [REDACTED] [REDACTED] (the Subcontract), post-dates the filing of the petition (and the director’s denial decision) and does not indicate work for the beneficiary that had been secured for him at the time of the petition’s filing. Moreover, the Subcontract indicates that “1 full time IT resource” [sic] “will work at the Client’s [REDACTED] site in the New York office and will be remotely managed by the [REDACTED] dedicated team in Geneva.” As previously noted, the petitioner attested that the beneficiary would not be assigned to work at an offsite location.

The AAO notes that Section 2.2, Definitions, subsection 1, of the Subcontract states that “the [REDACTED] office in New York . . . have engaged the Company to provide a specialised [sic] IT Ressource in order to take care of it’s [sic] IT infrastructure in the office and also during the events organized by the Client.” Section 2.2, Definitions, subsection 2, of the Subcontract further states that “[t]he term “Ressource,” as used in this agreement, shall mean an IT specialist with good knowledge of the Client’s infrastructure and needs. The Ressource will be remotely managed on a day to day basis by the Company’s IT team at the Client’s site in Geneva, Switzerland. The AAO finds that the language in the Subcontract appears to indicate that an “IT specialist” would perform the services contemplated in the Subcontract and that such services are not indicative of the software developer occupational category. In any event, the content of the Subcontract document does not establish that its performance would require the services of a systems software developer.

With regard to the nature of the position, the AAO also finds that the “Employment Agreement” document submitted into the record bears negatively upon the petitioner’s claim that the petition was filed for systems software development work that the beneficiary would actually perform. The AAO notes first that the petitioner failed to provide a signed copy of that document, although the RFE specifically requested it. Therefore, the petitioner has not even established whatever representations it may have made to the beneficiary about the work that he would perform. More critically questionable, however, is the fact that the Employment Agreement nowhere specifies software development as the work which the beneficiary would perform. Rather, the terms of the Employment Agreement states that the beneficiary “shall provide to [the petitioner] the following services: duties as needed.” The petitioner’s failure to specify for the beneficiary the substantive scope of the work for which he was being employed raises substantial doubt as to the substantive nature of the work, if any, that would be assigned to the beneficiary if the petition were approved. 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). Doubt cast

on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

Thus, the evidence in the record of proceeding fails to establish that, at the time the petition was filed, the petitioner had secured definite systems-software-development employment for the beneficiary for the requested period of H-1B employment.

For all of the reasons discussed above, the AAO concludes that the director's determination to deny the petition for its failure to establish that it was based upon a reasonable and credible offer of employment was correct. Accordingly, the appeal will be dismissed and the petition will be denied on this ground.

Additionally, as a correlative matter that is beyond the decision of the director, the AAO here incorporates and adopts its earlier comments and findings with regard to the lack of probative weight that the petitioner's job and duty descriptions, assertions about the proffered position and its duties, and documentary submissions merit with regard to establishing software development work for the beneficiary.

Such generalized information as the petitioner provided does not in itself establish any necessary correlation between any dimension of the proffered position and a need for any particular level of education, or educational equivalency, in a body of highly specialized knowledge in a specific specialty. The AAO also observes, therefore, that it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, would merit recognition of the proffered position as a specialty occupation even if – as is not the case – the petitioner had established that the petition was based upon a reasonable and credible offer of employment. To the extent that they are described, the AAO finds, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the period requested, so as to persuasively support the claim that the position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the duties and responsibilities of the proffered position.

In short, although not specifically addressed by the director, by failing to provide substantively specific details regarding the nature and scope of the beneficiary's employment or any substantive evidence regarding the actual work that the beneficiary would perform, the petitioner has also failed to establish that the proffered position would qualify as a specialty occupation – that is, of course, if the petitioner had not failed as it indeed has - to establish that the petition had been based upon work that had actually been secured for the beneficiary.

The record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. The tasks as described fail to communicate (1) the actual work that the beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. The petitioner's assertions with regard to the educational requirements of the position are conclusory and unpersuasive, as they are not supported by any substantive evidence. For this reason also, the petition must be denied.

Next, the AAO finds that the director's determination to also deny the petition on the separate and independent ground that the evidence of record does not establish that the beneficiary is qualified to perform the services of a specialty occupation is also correct. For this reason also, the appeal will be dismissed and the petition will be denied.

Thus, even if the petitioner had overcome the director's other ground for denying the petition, which it did not, the petition still could not be approved because the petitioner has not demonstrated the beneficiary is qualified to perform the services of a specialty occupation in accordance with the governing statutory and regulatory framework.

The record of proceeding contains a transcript from [REDACTED] reflecting that the beneficiary took courses at [REDACTED] during the fall semester, beginning on August 23, 2000 and ending on December 19, 2000, and during the winter semester, beginning on January 8, 2001 and ending on May 8, 2001. The AAO notes that this coursework did not result in the award of any degree. The record also contains an untranslated document, with the words [REDACTED] Because the petitioner failed to submit a certified translation of this document, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

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:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
 - (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In implementing section 214(i)(2) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order 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 are 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.

Therefore, to qualify an alien for classification as an H-1B nonimmigrant worker under the Act, the petitioner must establish that the beneficiary possesses the requisite license or, if none is required, that he or she has completed a degree in the specialty that the occupation requires. Alternatively, if a license is not required and if the beneficiary does not possess the required U.S. degree or its foreign degree equivalent, the petitioner must show that the beneficiary possesses *both* (1) education, specialized training, and/or progressively responsible experience in the specialty equivalent to the completion of such degree, *and* (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

As the beneficiary did not earn a baccalaureate or higher degree from an accredited college or university in the United States, he does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(1). Next, as the beneficiary does not possess a foreign degree that has been determined to be equivalent to a baccalaureate or higher degree from an accredited college or university in the United States, he does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(2), either.⁶ As the petitioner has not demonstrated that the beneficiary holds an unrestricted state license, registration or certification to perform the duties of a specialty occupation, he does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(3), either. Accordingly, 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) remains as the only avenue for the petitioner to demonstrate the beneficiary's qualifications to perform the duties of the proffered position.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) establishes a double-element threshold, as it requires the petitioner to establish *both* that the beneficiary has "education, specialized training, and/or progressively responsible experience that are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation" *and also* that the beneficiary has "recognition of that expertise in the specialty through progressively responsible positions directly related to the specialty."

⁶ Although the record of proceeding contains two evaluations that address the beneficiary's education, neither evaluation focused only upon academic credentials. Rather, each evaluator based his opinion upon his assessment of a *combination* of academic studies and work experience. Accordingly, neither evaluations satisfies the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(2).

In order to be relevant under 8 C.F.R. § 214.2(h)(4)(iii)(C)(2), an evaluation must be based upon the beneficiary's academic credentials alone.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating a beneficiary's credentials to a United States baccalaureate or higher degree under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) is determined by at least one 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;⁷
- (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.

In the present matter, the petitioner relies upon two evaluations of the beneficiary's qualifications. However, upon review of the record, the petitioner has failed to establish that the beneficiary is qualified to serve in a specialty occupation position.

The evaluations of the beneficiary's academic credentials and work experience were provided by the following individuals: (1) [REDACTED] and (2) [REDACTED]. The evaluators assert that the beneficiary possesses the equivalent of a bachelor's degree in information technology based upon his education, training and/or work experience.

The first evaluation of the beneficiary's academics and work experience was prepared by [REDACTED] and is dated August 21, 2012. [REDACTED] claimed that, as of the date he signed the evaluation, he was Professor and Chair of the Department of Decision, Operations, and Information Technologies at the [REDACTED]. According to [REDACTED], the beneficiary's foreign education and work experience are collectively equivalent to a U.S. bachelor's degree in information technology.

⁷ The petitioner should note that, in accordance with this provision, the AAO will accept a credentials evaluation service's evaluation of *education only*, not experience.

While [REDACTED] asserts that he is an official at the [REDACTED] and that he has "authority to grant college level credit for experience, training, and/or courses taken at other U.S. or international universities," he does not even assert that he satisfies any of the following elements which are essential to establishing himself as an 8 C.F.R. § 214.2(h)(4)(iii)(D)(I) official in compliance with the terms of that provision: (1) that his educational institution has a program for granting college-level credit for experience or training in the specialty upon which he is opining (namely, Industrial Engineering); and (2) that, pursuant to such a program, his educational institution has granted him authority to grant college-level credit specifically in information technology, that is, the specialty about which [REDACTED] is opining. Accordingly, [REDACTED] broad assertion of authority does not satisfy the precise elements of proof stated at 8 C.F.R. § 214.2(h)(4)(iii)(D)(I). For these reasons, the AAO accords no probative value to [REDACTED] document. Additionally, and as a separate and independent reason for discounting [REDACTED] document, the AAO notes that [REDACTED] assertion of authority is ambiguous, as it could be naturally read as an assertion that his college-level-credit authority extends only to college-gained or university-gained experience and/or training.

As a matter of discretion, USCIS may accept expert opinion testimony. However, USCIS will reject an expert opinion or give it less weight if it is not in accord with other information in the record or if it is in any way questionable. *Matter of Caron International, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought; the submission of expert opinion letters is not presumptive evidence of eligibility. *Id.*; see also *Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) ("[E]xpert opinion testimony, while undoubtedly a form of evidence, does not purport to be evidence as to 'fact' but rather is admissible only if 'it will assist the trier of fact to understand the evidence or to determine a fact in issue.'").

Aside from and in addition to the above discussed fatal deficiencies of [REDACTED] document, the AAO also finds that the very content of the document would not be probative, even if the document were accepted at face value. The reason is, as will now be discussed, the content of the document is conclusory and lacks sufficient factual and analytical foundations to establish that its conclusions are reliable and merit any evidentiary weight or deference. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. at 791.

In the document, [REDACTED] does not list the reference materials on which he relies on as a basis for his conclusion but appears to basically summarize the beneficiary's professional experience and training, as listed on the beneficiary's resume. [REDACTED] then concludes - without documenting any particular analyses that led to this conclusion - that the beneficiary possesses the equivalent of a bachelor's degree in Information Technology. In pertinent part, the letter states as follows:

The foregoing summary of [the beneficiary's] professional experience itemizes his responsibilities during a period of at least eleven years of employment experience and training in the concentration of Information Technology.

After assessing the specifics of [the beneficiary's] work experience in detail, it becomes apparent that the responsibilities throughout his career are indicative of university level course work in Information Technology, and related subjects. The knowledge obtained during [the beneficiary's] work experience directly corresponds to the knowledge obtained by a student completing a Bachelor's Degree program in Information Technology consisting of a curriculum with the courses listed above. . . .

On the basis of the credibility of [REDACTED], the number of years of course work, the nature of the course work, and considering at least eleven years of work experience and professional training in Information Technology, and related areas, [the beneficiary] has attained the equivalent of a Bachelor's Degree in Information Technology from an accredited institution of higher education in the United States.

Next, the AAO notes that the record does not contain persuasive evidence independently establishing that [REDACTED] is "an authorized official" within the meaning of 8 C.F.R. § 214.2(h)(4)(iii)(D)(I).

The AAO notes that the petitioner submitted a letter, dated July 11, 2012, from [REDACTED] Dean and [REDACTED] Professor of Management Science of the [REDACTED]

The AAO acknowledges that [REDACTED] letter states that "[t]he [REDACTED] offers academic programs in which students are granted credit based on course work, training, and experience in a wide range of fields," and that "[i]n his capacity as a Full Professor in our school, [REDACTED] authorizes the granting of credit to students for completion of degree program requirements." The AAO finds that this letter shares materially fatal evidentiary deficiencies noted with regard to [REDACTED] letter, namely, (1) [REDACTED] does not attest that his educational institution has a program for granting college-level credit for experience or training in the specialty upon which [REDACTED] has opined (namely, Information Technology); and (2) [REDACTED] does not attest that, pursuant to such a program, his educational institution has granted [REDACTED] authority to grant college-level credit specifically in Information Technology, that is, the specialty about which [REDACTED] is opining.

Thus, [REDACTED] also does not provide any documentation corroborating that he has the authority to grant academic credit for training and/or experience in the specific specialty upon which he opines, namely information technology. Furthermore, [REDACTED] does not even state that his academic institution has a program for granting such credit based on a person's training and/or work experience.

In summary, [REDACTED] has not established that he qualifies under 8 C.F.R. § 214.2(h)(4)(iii)(D)(I) to evaluate the educational equivalency of the beneficiary's work experience. Accordingly, this evaluation, does not meet the standard of 8 C.F.R. § 214.2(h)(4)(iii)(D)(I) for USCIS recognition of competency to render to USCIS an opinion on

the educational equivalency of work experience in the area of the H-1B specialty-occupation program. Consequently, the portion of the letter addressing work experience merits no weight. Moreover, the AAO notes that [REDACTED] mistakenly counts the beneficiary's work experience as an IT Apprentice as beginning in February 2001, whereas the beneficiary's resume indicates that it began in April 2003. It, of course, follows that the author's ultimate conclusion also merits no weight in that it is largely dependent upon his assessment of work experience.

On appeal, the petitioner also submitted a second evaluation of the beneficiary's academic and work experience credentials prepared by [REDACTED] dated January 22, 2013. [REDACTED] claimed that, as of the date he signed the evaluation, he was Associate Professor of Computer Applications and Information Systems, School of Business at the [REDACTED]. According to [REDACTED] the beneficiary's foreign education and work experience are collectively equivalent to a U.S. bachelor's degree in information technology.

The AAO notes that [REDACTED] evaluation is nearly identical to [REDACTED] evaluation and appears to have been prepared based on [REDACTED] evaluation. [REDACTED] evaluation even includes the same incorrect dates of the beneficiary's work experience. As previously noted, the AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where, as here, an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. at 791.

The record does not contain persuasive evidence independently establishing that [REDACTED] is "an authorized official" within the meaning of 8 C.F.R. § 214.2(h)(4)(iii)(D)(I).

The AAO notes that the petitioner submitted a letter, dated February 22, 2012, from [REDACTED], Dean, School of Business at the [REDACTED].

The AAO acknowledges that [REDACTED] letter states that "[i]n his capacity as Associate Professor of Computer Applications and Information Systems, [REDACTED] is authorized and qualified to grant "life experience" credits through the [REDACTED] degree completion program offered through the School of Continuing and Professional Studies." The AAO finds that this letter shares materially fatal evidentiary deficiencies noted with regard to [REDACTED] letter, namely, (1) [REDACTED] does not attest that his educational institution has a program for granting college-level credit for experience or training in the specialty upon which [REDACTED] has opined (namely, Information Technology); and (2) [REDACTED] does not attest that, pursuant to such a program, his educational institution has granted [REDACTED] authority to grant college-level credit specifically in Information Technology, that is, the specialty about which [REDACTED] is opining.

Thus, [REDACTED] has not established that he is competent under 8 C.F.R. § 214.2(h)(4)(iii)(D)(I) to evaluate the educational equivalency of the beneficiary's work experience. Accordingly, this evaluation, does not meet the standard of 8 C.F.R. § 214.2(h)(4)(iii)(D)(I) for competency to render to USCIS an opinion on the educational equivalency of work experience. Consequently, the portion of the letter addressing work experience merits no weight.

For all of these reasons, the beneficiary does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

No evidence has been submitted to establish, nor does the petitioner assert, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(2), which requires submission of 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).

Nor does the beneficiary qualify under 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). As discussed with regard to the evaluations submitted into the record of proceeding, and as evident in the record, the petitioner has not submitted evidence of the beneficiary's having attained education sufficient to be evaluated as in itself equivalent to at least a U.S. bachelor's degree.

No evidence has been submitted to establish, nor does the petitioner assert, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(4), which requires that the beneficiary submit 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.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) states the following with regard to achieving a USCIS determination that a beneficiary has the requisite qualifications to serve in a specialty occupation:

For purposes of determining equivalency to a baccalaureate degree in the specialty, 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;⁸
- (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;

⁸ *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. See 8 C.F.R. § 214.2(h)(4)(ii).

- (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.

Although the record contains some information regarding the beneficiary's work history, it does not establish that this work experience included the theoretical and practical application of specialized knowledge required by the proffered position; that it was gained while working with peers, supervisors, or subordinates who held a bachelor's degree or its equivalent in the field; and that the beneficiary achieved recognition of his expertise in the field as evidenced by at least one of the five types of documentation delineated in 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(i)-(v).

Accordingly, the beneficiary does not qualify under any of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(i)-(v) and therefore does not qualify to perform the duties of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4). As such, the petitioner has failed to establish that the beneficiary qualifies to perform the duties of a specialty occupation. Accordingly, the petition must also be denied on this basis. Thus, even if it were determined that the petitioner had overcome the director's grounds for denying this petition (which it has not), the petition could still not be approved.

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 Soltane v. DOJ*, 381 F.3d 145 (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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