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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: FEB 04 2014 OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

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:

SELF-REPRESENTED

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
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 petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center on April 3, 2012. In the Form I-129 visa petition and supporting documents, the petitioner describes itself as an information technology solutions business established in 2003. In order to employ the beneficiary in what it designates on the Form I-129 as a programmer analyst, 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 March 21, 2013, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that it satisfied all evidentiary requirements.

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 response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. 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 that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.¹

In this matter, the petitioner stated in the Form I-129 that it seeks the beneficiary's services as a programmer analyst to work on a full-time basis at a rate of pay of \$60,000 per year. In a job description submitted with the initial Form I-129 petition, the petitioner indicated the following regarding the responsibilities and requirements for the proffered position:

[The beneficiary] will interact with functional and technical people to get the requirements for each specific business process. Involve in analysis of user requests, preparing System requirements document and preliminary estimate. Consult with users, determines application development requirements, and provides recommendations for database, report and interface development. Effectively translate end user programming requirements into working applications. Modify web pages as directed and develop new web pages using .NET and Classic ASP technology. Develop SQL queries and reports to extract, manipulate, and/or calculate information to fulfill data and reporting requirements. Assist with on-going database support of applications for the Association Management and Accounting Systems and websites. Troubleshoot reporting and report scheduling issues. Compile ad-hoc reports as requested by management. Read, analyze and interpret job related business

¹ The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

periodicals and technical manuals; ability to write reports, business correspondence and assist in the preparation of procedure manuals. Develop both stored procedure and report templates as may be required to fulfill data and reporting requirements.

Also he will be required to plan, develop, test and document computer program, applying knowledge of programming techniques and computer system. He will evaluate user requests for new and modified program and find solutions to complex process simulation requirements. He will also modify existing software to correct errors, allow it to adapt to new hardware, or to improve its performance. He will also be required to design, install and test system integration. He will obtain and evaluate information on factors such as reporting formats required, costs, and security needs to determine hardware configuration. He will also store, retrieve, and manipulate data for analysis of system capabilities and requirements. He will consult with PC users to identify current operating procedures and clarify program objectives. In performing his duties, he will be dividing 15% of his time in System and Software requirement analysis, 50% in implementation, 15% in solution research, 15% in Unit and System testing and 5% in End-User training.

As with any Programmer Analyst position, the usual minimum requirement for performance of the job duties is a bachelor's degree (or equivalent) in Engineering or Computer Science. For a position at the level offered, it is not uncommon for the incumbent to also hold a master's degree and/or a number of years of experience of increasing responsibility in programming, programming analysis, and system analysis.

(Text as it appears in the original.) In support of the Form I-129 petition, the petitioner provided copies of the beneficiary's foreign diploma and transcripts, and certificates; and documents regarding the beneficiary's prior employment. The petitioner did not provide an evaluation of the beneficiary's foreign credentials.

In addition, the petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the petitioner designated the proffered position under the SOC (ONET/OES Code) 15-1179, which corresponds to the occupational classification "Information Security Analysts, Web Developers, and Computer Network Architects." On the LCA, the petitioner classified the position at a Level I (entry level) wage.

In support of the instant petition, the petitioner also provided various documents including (1) an offer of employment letter from the petitioner to the beneficiary (not signed by the beneficiary); (2) a letter from the petitioner dated March 15, 2012, indicating the beneficiary will be assigned to projects for clients, [REDACTED] (3) tax documents including an unsigned Form 941 Quarterly Federal Tax Return and a Form 1120S for 2011; (4) corporate documents; (5) a printout of the petitioner's registration with the [REDACTED] (6) a proposal to provide services to [REDACTED] and (7) a document entitled "[Petitioner] Corporate Case Studies; and (8) related documents.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on January 14, 2013. The director outlined the evidence to be submitted.

On February 11, 2013, the petitioner responded to the director's RFE. In a letter dated February 6, 2013, the petitioner claimed to provide the following evidence in response to the director's request:

1. Signed NDA and statement of work for mobile initiative with client Ireferpro.com.
2. Signed Statement of work from Imageworkstudio.com for the Mobile Site Development and Mobile Application development initiatives.
3. Signed outgoing contract with [redacted] technology subsidiary)
4. Please also see the signed [sic] contracts with our other clients [redacted] (please note we are only mailing the signed pages between two parties as the contract pages are over 50 pages).
5. [redacted] application development proposal documentation is already submitted.
6. [Petitioner] service offerings document.
7. [Petitioner] Tax filings for year 2011 and 2010.
8. [Petitioner] Organizations chart document.
9. [Petitioner] Performance review procedure document.
10. [Beneficiary's] signed offer letter of agreement.
11. Office lease agreement document with landlord [redacted].
12. Cooperate [sic] in Good standing certificate from State of Virginia.
13. Recent BPOL license copy issued by [redacted]
14. Link for company photographs.

(Text as it appears in the original.) The AAO notes that the petitioner's list of evidence does not correspond to the evidence actually provided in response to the RFE. The documents provided are as follows:

- "Non Compete / Non Disclosure Agreement" between [redacted] and the petitioner;²
- "Non Compete / Non Disclosure Agreement" between [redacted] and the petitioner;³
- Statement of Work from [redacted] signed by [redacted]

² The AAO observes that this document, which was prepared on the petitioner's letterhead, appears to bear an electronic signature for [redacted] CEO of [redacted]. The agreement states that it "is made on September 29, 2012"; however, the signature lines bear the date of September 26, 2012. No explanation for the discrepancy was provided.

³ The document, prepared on the petitioner's letterhead, does not bear a signature for the President of [redacted]

on May 5, 2012, indicating that the start date is "TBD";⁴

- "Nondisclosure Agreement" between [REDACTED]⁵
- "Consulting and Services Agreement" between [REDACTED] and the petitioner, indicating that services and deliverables are to be provided pursuant to a statement of work, which was not provided;
- "Consulting and Services Agreement" between [REDACTED] and the petitioner, indicating that services and deliverables are to be provided pursuant to a statement of work, which was not provided;⁶
- "Consulting and Services Agreement" between [REDACTED] and the petitioner, indicating that services and deliverables are to be provided pursuant to a statement of work, which was not provided;
- Printout of PowerPoint slides regarding the petitioner's services;
- Petitioner's Form 1120S Federal Income Tax Return for 2011 (previously provided) and 2010;
- Signed offer of employment from the petitioner to the beneficiary;
- Letter from [REDACTED] indicating that the petitioner has a physical office at the [REDACTED] Virginia;
- Certificate of good standing from the State Corporation Commission;
- 2012 Business, Professional and Occupational License;
- Promotional flyer regarding the petitioner's services; and
- Printout of from the Foreign Labor Certification Data Center, Online Wage Library for the occupational classification "Computer Programmers" -- SOC (ONET/OES Code) 15-1131.⁷

In a letter submitted in response to the RFE, the petitioner referred to the proffered position as a "systems analyst" and provided the following new description of the proffered position:

- Responsible for gathering business requirements, writing technical specifications, scoping releases, managing development and release cycles, and coordinating releases with other departments such as Marketing and Quality Assurance.

⁴ The statement of work describes the scope of work as "Mobile Site Development for [REDACTED] [REDACTED]" The SOW does not describe deliverables, or the petitioner's resources to be dedicated to the project. No duration is specified. The cost of the project is redacted.

⁵ This document is signed by [REDACTED] on behalf of the petitioner, although the petitioner does not appear to be a party to the agreement. No explanation was provided.

⁶ This document is dated "effective as of January XX 2012." Thus, no effective date has been provided. As noted, the related statement of work was not provided.

⁷The AAO observes that the petitioner designated the proffered position as falling under a different occupational category on the LCA. No explanation was provided.

- Map SAP GUI to Mobile APPS GUI applications.
- Perform Migration of SAP data to Mobile Cloud database.
- Involved in the design, development, testing and implementation of Business Warehouse using extended star schema and configuring the system and users.
- Extracted data for Inventory and Sales from Different Business Content extractors [REDACTED] for Stock initialization, Stock moments, Stock Revolutions.
- Activated Business Contest Info Sources, Info Cubes, Roles, Queries, and Info Objects and customized Business Content to meet business requirements.
- Developed multidimensional models to handle SAP and Non SAP systems and designed ODS objects and Cubes to handle summary and detailed level Reporting needs.
- Worked on Data transformation process, data stage object (DSO) on BI 7.0.
- Developed expert routines, start routines and end routines in BI 7.
- Developed ABAP exits (CMOD) for Reporting needs.
- Developed flexible queries in BEX analyzer to facilitate data analysis in a drill down and summarized way to give detailed level of information.

(Text as it appears in the Petitioner's letter.) The director reviewed the information provided by the petitioner. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish that it had work available for the beneficiary necessitating services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the entire validity period of the requested visa. The director denied the petition on March 21, 2013.

The petitioner submitted an appeal of the denial of the H-1B petition. On appeal, the petitioner provided the following documentation: (1) a letter from the petitioner's president; (2) a letter from [REDACTED] dated March 5, 2013;⁸ (3) a proposal to the [REDACTED] for a project entitled "Move Health Portal Software Development Plan"; (4) a proposal to the [REDACTED] (5) a proposal for hosting services from [REDACTED] to provide services to the petitioner; (6) a proposal to the [REDACTED] to provide "Emergency Alerting and Notification Software"; and (7) copies of previously submitted documents.

Based upon a complete review of the record of proceeding, the AAO 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 as it relates to the particular employer. To ascertain the intent of a petitioner, U.S. Citizenship and

⁸ The AAO notes that this letter appears to have been "signed" with the same computer generated signature that appears on the previously submitted "Non Compete / Non Disclosure Agreement" between [REDACTED] and the petitioner.

Immigration Services (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."

Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through at least a baccalaureate degree in a specific discipline, or its equivalent. The AAO finds that the petitioner has not done so.

In the instant case, the AAO observes that the duties of the proffered position, as described by the petitioner in support of the Form I-129 petition and in response to the director's RFE, have been copied from various Internet sources, including the Occupational Information Network (O*NET) OnLine Summary Report for the occupational category "Software Developers, Applications" and the Dictionary of Occupational Titles (DOT) description for the occupation Programmer-Analyst, as well as other Internet sources.

Furthermore, the duties are stated in generic terms that fail to convey the actual tasks the beneficiary will perform on a day-to-day basis. The description fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations. In establishing a position as qualifying as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner's business operations, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

Such generalized information does not in itself establish a correlation between any dimension of the proffered position and a need for a 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, merit recognition of the proffered position as a specialty occupation.

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 entire 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. Moreover, the job descriptions in the record of proceeding fail to communicate (1) the actual work that the beneficiary would perform on a day-to-day basis; (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 assertion with regard to the educational requirement for the position is conclusory and unpersuasive, as it is not supported by the job description or probative evidence.

That is, the job duties of the proffered position, as provided by the petitioner, do not convey the substantive nature of the actual work that the beneficiary would perform. Rather, the job descriptions convey, at best, only generalized functions of the occupational category of "programmer analysts" or "software developers" at a generic level.⁹

The AAO notes that in its initial submission, the petitioner provided a letter offering employment to the beneficiary, which states the following "responsibilities" of the offered position:

Responsibilities: As an Associate, you will render all duties expected of a Programmer Analyst which includes analysis, design, development and Maintenance new software system to improve process engineering utilizing different development tools, database environments and platform Also will be responsible for Software system testing and validation procedures, Programming and Documentation. As the services will be provided by [the petitioner], and will include the offices of [the petitioner's] clients during the term of your employment, you will devote your full abilities to the performance of your duties, and agree to comply with [the petitioner's] policies and standards in force.

(Text as it appears in the original.)

⁹ The petitioner has indicated that the proffered position involves duties that pertain to the occupational category of occupational category of "Software Developers, Applications." The AAO notes that the prevailing wage for "Software Developers, Applications" is substantially higher than that of the occupational category of "Information Security Analysts, Web Developers, and Computer Network Architects" (the occupational category designated by the petitioner on the LCA).

Notably, the prevailing wage for "Information Security Analysts, Web Developers, and Computer Network Architects" at a Level I wage in Fairfax County, VA for the relevant time period was \$57,866. See All Industries Database for 7/2011 - 6/2012 for Information Security Analysts, Web Developers, and Computer Network Architects at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatcenter.com/OesQuickResults.aspx?code=15-1179&area=47894&year=12&source=1> (last visited January 31, 2014). The prevailing wage for a Level I "Software Developers, Applications" position was \$67,454 for the same area during the same period. See All Industries Database for 7/2011 - 6/2012 for Software Developers, Applications at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatcenter.com/OesQuickResults.aspx?code=15-1132&area=47894&year=12&source=1> (last visited January 31, 2014).

The AAO notes that the petitioner stated on the Form I-129 petition that it would pay the beneficiary \$60,000 per year. However, as the petitioner now represents that the proffered position also pertains to the classification of "Software Developers, Applications," it is not apparent that the petitioner will pay the beneficiary at least the prevailing wage for the proffered position.

The duties of the proffered position as stated on the offer letter are general in nature and do not detail the specific tasks that the beneficiary is expected to perform. The AAO additionally notes that the revised list of duties of the proffered position provided by the petitioner in response to the director's RFE appears to be recited from the beneficiary's resume, which the petitioner provided to USCIS in its initial submission. Specifically, the new list of duties appears to be an excerpt from the portion of the beneficiary's resume detailing his experience at "HP, Bangalore."

The AAO has reviewed various descriptions of the proffered position provided by the petitioner, and observes that the totality of the evidence fails to establish the substantive nature of the proffered position such that the AAO can ascertain in what capacity the beneficiary will actually be employed. Consequently, the petitioner has not demonstrated that the proffered position qualifies as a specialty occupation, and the appeal may be dismissed and the petition denied on this basis alone.

In addition to the above noted inconsistencies, the AAO notes numerous additional discrepancies in the petition and supporting documents that undermine the petitioner's credibility with regard to the services the beneficiary will perform, as well as the actual nature and requirements of the proffered position. When a petition includes numerous discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions.

For instance, the AAO observes that the petitioner indicated on the Form I-129 that the beneficiary would not work offsite, by checking "no" in response to question 5 on page 4 of the petition. However, the petitioner informed the beneficiary in its offer letter that the beneficiary's services "will include the offices of [the petitioner's] clients during the term of [his] employment."

Additionally, the AAO notes that the petitioner provided two versions of the offer letter. The first letter, dated March 5, 2012, was provided with the initial Form I-129 submission. The letter was not signed by the beneficiary. The second version was provided in response to the director's RFE. This letter is dated March 1, 2012. The letter indicates that the beneficiary was interviewed in May 2012, and bears a signature for the beneficiary that differs from the beneficiary's signature as it appears on the beneficiary's passport. No explanation for the two versions of the letter was provided.

Further, the petitioner has not established that it has sufficient office space to accommodate the beneficiary. The petitioner has represented that the beneficiary will work at [REDACTED]. As noted in the director's RFE, the petitioner's physical address is a [REDACTED] executive suite, shared by numerous companies. In response to the RFE, the petitioner indicated that it was providing an "[o]ffice lease agreement document with landlord [REDACTED]" However, the only document provided regarding the petitioner's locale is a brief letter stating that the petitioner has had a "physical office" at the location "since August 2005." The letter does not state the size of the premises, nor does it establish that the space is sufficient to accommodate its current employees and the beneficiary.

The AAO observes numerous inconsistencies with regard to the contracts the petitioner claims it has received, and the actual work that it has available for the beneficiary. In its initial letter of support, the petitioner stated that it is "positioned more towards offering services to clients such as

[REDACTED] in specific areas of expertise, but the petitioner did not provide probative evidence to establish that it has any actual contracts with these companies.

The petitioner also stated that "every-sale product is still in the initial development stage" and that it planned "to release the first trial version by the end of [2012]." The petitioner indicated that its "product is targeted more toward Retail and financial firms." The petitioner did not submit probative evidence that establishes the nature of its product.

In a letter dated March 15, 2012, the petitioner represented that the beneficiary would be "assigned to work as a Programmer Analyst for [its] in-house Projects in the areas of web development using RoR and Mobile Application development for our clients [REDACTED]. The AAO notes that the petitioner submitted a copy of a **proposal** to [REDACTED] dated February 28, 2012 (1 to 5 days before it offered employment to the beneficiary). The petitioner has not provided any evidence of an actual agreement or contract with [REDACTED]."

In response to the director's RFE, the petitioner provided a "Non Compete / Non Disclosure Agreement" with [REDACTED]. As previously noted, this document is printed on the petitioner's letterhead and does not bear a signature for either party. The petitioner also provided a statement of work, dated May 3, 2012, by the [REDACTED] representative.¹⁰ As previously noted, the statement of work provides minimal information regarding the work to be provided. Specifically, the statement of work describes the scope of work as "Mobile Site Development for [REDACTED]." The SOW does not describe deliverables or the petitioner's resources to be dedicated to the project. Furthermore, the evidence does not specify the duration of the project, and the cost of the project is redacted. Thus, the documents provided by the petitioner do not establish sufficient work for the beneficiary based on the petitioner's

¹⁰ The AAO notes that the instant petition was filed on April 3, 2012, prior to the execution of the statement of work for the client for which the petitioner claims the beneficiary will work. The agency made clear long ago that speculative employment is not permitted in the H-1B program. For instance, 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.

representations regarding the beneficiary's assignment on contracts for [REDACTED] and [REDACTED]

The AAO additionally notes that the petitioner has failed to establish the extent of available work for the beneficiary beyond the two contracts to which the beneficiary was to be assigned. The petitioner provided various non-compete agreements, detailed above, but it did not provide the associated statements of work to establish specific projects and deliverables. On appeal, the petitioner provided additional evidence; however, this evidence also fails to establish the availability of work for the beneficiary. For instance, on appeal, the petitioner provided a letter from iReferpro indicating that it has a "signed agreement in place with [the petitioner]" and that, as of March 5, 2013, it had a meeting planned with the petitioner and was having "discussions." The petitioner did not provide a copy of the "signed agreement."¹¹ The petitioner also provided three unsigned proposals; however, the petitioner did not provide any evidence that the proposals were accepted and that it entered into any agreements.

The petitioner did not submit probative evidence establishing specific work for the beneficiary. Although the petitioner requested the beneficiary be granted H-1B classification from October 1, 2012 to October 1, 2015, there is a lack of substantive documentation regarding any work for the duration of the requested period. The petitioner has made various claims regarding the available work for the beneficiary, including assignments for [REDACTED]. However, the petitioner did not submit probative evidence substantiating these projects or the existence of other specific work for the beneficiary.

The documentation provided appears to support the assertion that the petitioner is engaged in some business activities. However, the lack of evidence relevant to the beneficiary in the context of the petitioner's normal staffing operations leaves unanswered a number of material questions, such as the location where the beneficiary will be employed, the duration of the work, whether the work would be continuous, the type and level of work to be performed, and the actual duties of the position. 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'r 1978).

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. 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'r 1998). 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).

¹¹ The AAO notes that the various proposals reveal a discrepancy in the work performed for [REDACTED]. In the proposal for the [REDACTED] project, the petitioner listed the value of services provided to [REDACTED] in June 2011 as \$245,000. In a proposal to the [REDACTED], it listed the value of services provided to [REDACTED] in June 2011 as \$18,000.

Although the petitioner requested the beneficiary be granted H-1B classification for a three-year period, the evidence does not establish that the petitioner would be able to sustain an employee performing the duties of a full-time programmer analyst at the level required for the H-1B petition to be granted for the entire period requested, and there is insufficient information regarding how the beneficiary's duties will be allocated during this three-year period. The petitioner failed to establish that the petition was filed on the basis of employment for the beneficiary as a programmer analyst that, at the time of the petition's filing, was nonspeculative. The petitioner did not submit evidence establishing any specific work for the beneficiary. The petitioner has not established that the beneficiary's overall day-to-day duties would require at least a baccalaureate degree in a specific specialty, or its equivalent, as required for classification as a specialty occupation.

The record of proceeding lacks (1) evidence corroborating that the petitioner has work that exists as an ongoing endeavor generating definite employment for the beneficiary's services (e.g., documentary evidence regarding the scope, staging, time and resource requirements, supporting contract negotiations, documentation regarding the business analysis and planning to support the work); and (2) evidence that the beneficiary's duties ascribed would actually require the theoretical and practical application of at least a baccalaureate level of a body of highly specialized knowledge in a specific specialty, as required by the Act.

Thus, based on a complete review of the record of proceeding, and for the specific reasons described herein, the AAO agrees with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

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 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.

The regulation at 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), 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.

To determine whether the proffered position qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). In the instant case, the petitioner has failed to establish nature of the proffered position and in what capacity the beneficiary will actually be employed. The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

For the reasons related in the preceding discussion, the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, in any event, that the petitioner failed to provide an evaluation of the beneficiary's credentials to establish that the beneficiary possesses the equivalent of a U.S. bachelor's degree in a specific specialty, or its equivalent. Without an evaluation, the petitioner has failed to establish any of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(C).

Thus, as evidence was not presented that the beneficiary has at least a U.S. bachelor's degree in any specific specialty, or its equivalent, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.¹²

¹² As previously mentioned, the AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 145. Here, the petitioner has not established that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. Accordingly, the appeal will be dismissed. Given that this issue is dispositive for the case, the AAO reserves the remaining issues. That is, as the grounds discussed above are dispositive of the petitioner's eligibility for the benefit sought in this matter, the AAO will not address and will instead reserve its determination on the additional issues that it observes in the record of proceeding.

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; *see e.g., Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.