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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: **JUN 12 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:

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", written over a circular stamp or seal.

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.

On the Form I-129 visa petition, the petitioner describes itself as an information technology (IT) and management consulting business established in 2008. In order to employ the beneficiary in what it designates as an IT analyst position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner (1) failed to establish that the proffered position is a specialty occupation in accordance with the applicable statutory and regulatory provisions; (2) failed to submit a certified LCA that corresponds to the petition; and (3) failed to comply with the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B). On appeal, counsel for the petitioner asserts that the director's bases for denial of the petition were erroneous and contends that the petitioner satisfied all evidentiary requirements.

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

Upon review, we find that there is insufficient evidence to support the director's finding that the petitioner failed to submit a certified LCA that corresponds to the petition and that it failed to comply with the itinerary requirement. Accordingly, these grounds for the denial will be withdrawn. However, the petitioner has not established that the proffered position qualifies as a specialty occupation. Accordingly, the appeal will be dismissed, and the petition will be denied.

## I. PROCEDURAL AND FACTUAL BACKGROUND

In the petition signed on March 29, 2013, the petitioner indicates that it wishes to employ the beneficiary as an IT analyst on a full-time basis at the rate of pay of \$60,000 per year. In addition, the petitioner indicates that the beneficiary will work at its offices at [REDACTED] Piscataway Township, New Jersey [REDACTED]. The petitioner did not request any other work sites.

In the support letter dated March 29, 2013, the petitioner states that "the beneficiary is an alien of distinguished merit and ability who will be performing services in a specialty occupation."<sup>1</sup> In

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<sup>1</sup> The petitioner states that "the beneficiary is an alien of distinguished merit and ability." However, to clarify, we note that the term "distinguished merit and ability" was defined in the regulations as "one who is a member of the professions . . . or who is prominent in his or her field." See 8 C.F.R. § 214.2(h)(4) (1991). The *Immigration Act of 1990* ("IMMACT 90") deleted the term "distinguished merit and ability" from the general H-1B description and replaced it with the requirement that the position be a "specialty occupation." Pub. L. No. 101-649, 104 Stat. 4978, 5020. The implementation of this change occurred on April 1, 1992. The *Miscellaneous and Technical Immigration and Naturalization Amendments of 1991* ("MTINA"), which was enacted on December 2, 1991, modified the H-1B definition to include fashion models of distinguished

addition, the petitioner claims that the beneficiary will be responsible for the following duties:

- Develop and perform tests on various enterprises and provide dashboard solutions with help of Cognos software and assist all end users.
- Coordinate with data architecture and modeling team to design databases and prepare reports for same.
- Analyze all projects and prepare corporate strategies for same and provide support to all Cognos applications.
- Prepare all reports for management with help of Cognos Report Studio.
- Design all required excel and PowerPoint templates and prepare all metadata models in coordination with framework manager.
- Investigate and resolve all data issues and analyze all business requirements and perform interview with all stakeholders.
- Coordinate with all customers and analyze test queries and analyze client issues and assist all application analysts to translate all workflow requirements to efficient data points.
- Prepare all designs and code various Cognos reporting objects and ensure compliance to all best business practices in industry.
- Schedule and ensure compliance to all design code and test activities and prepare plans for same and design various dashboards and maintain required framework for all processes.
- Monitor work and ensure optimal utilization of all SQL scripts and documents all database requirements and analyze data anomalies and prepare reports for cycle.
- Prepare all documents for reporting objects and monitor and resolve all desk ticket issues and perform troubleshoot on all Cognos objects to prepare reports and ensure compliance to all schedule.
- Perform troubleshoot on all Cognos helpdesk tickets and resolve all queries for content and prepare standard reports and ensure accuracy of same.
- Provide support to all Cognos issues and maintain knowledge on all new techniques and prepare reports for all warehouse functions.
- Lead the effort of designing, modeling, and implementing an optimal Data Warehouse and/or Data Mart architecture that meets the information needs of the business.
- Assess and propose solutions to improve the architecture of the data warehouse and/or Data Mart to change with business need.

The petitioner further claims that "[t]he position requires an individual with a bachelor's degree (or the equivalent) and/or experience."<sup>2</sup>

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merit and ability. Pub. L. No. 102-232, 105 Stat. 1733. While the term "distinguished merit and ability" is still used with regard to fashion models, it must be noted that the term has not been applicable to the general H-1B classification ("specialty occupations") for over 20 years.

<sup>2</sup> Notably, the petitioner does not indicate that the minimum academic requirement for the proffered position is a bachelor's degree in a specific specialty, or its equivalent, that directly relates to the duties and requirements of the position.

With the initial petition, the petitioner submitted a copy of the beneficiary's foreign diploma and transcripts, however, the petitioner did not submit an educational evaluation of the beneficiary's academic credentials.

In support of the petition, the petitioner also submitted several documents, including the following:

- A Labor Condition Application (LCA). The occupational category is designated as "Computer Programmers" at a Level I wage level. The LCA lists the place of employment as [REDACTED] Piscataway Township, New Jersey [REDACTED]. No other work sites are provided.
- A Subvendor Agreement between the petitioner and [REDACTED] effective November 30, 2011. The agreement indicates that "[REDACTED] hereby retains Subvendor [the petitioner] to perform services for [REDACTED] or its Clients as set forth in the Work Order attached hereto." The petitioner did not provide a work order.
- A Vendor Services Agreement between the petitioner and [REDACTED] LLC, effective May 23, 2012. The agreement indicates that "[u]pon request of [REDACTED] from time to time, Vendor [the petitioner] shall provide the exclusive services of the persons recommended by vendor and selected by [REDACTED] (collectively, 'Contractors') to perform services."

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 22, 2013. The director outlined the evidence to be submitted.

On July 19, 2013, counsel responded with a brief and additional evidence. In the brief, counsel stated that "[t]he petitioner has plenty of specialty occupation work available for the beneficiary as petitioner has several internal and or external IT Contracts/Projects/Software Development project work." Counsel further claimed that "[t]he petitioner can assign any of the projects out of these contracts to the beneficiary to work out of the petitioner's office." In addition, counsel provided a revised description of the duties of the proffered position, along with the approximate percentage of time that the beneficiary will spend performing each duty.<sup>3</sup> Further, counsel submitted, in part, the following:

- A Contractor Agreement between the petitioner and [REDACTED]

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<sup>3</sup> It is noted that the revised job description and the percentages of time allocated to each duty provided by counsel is not probative evidence. The description was submitted by counsel, not the petitioner, and counsel's brief was not signed by or endorsed by the petitioner. The record of proceeding does not indicate the source of the expanded duties and responsibilities (and the percentages of time allocated to each duty) that counsel attributes to the proffered position. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

LLC, effective August 24, 2012. The agreement indicates the following:

Contractor [the petitioner] through the talents of [REDACTED] (SSN: [XXX-XX-XXXX])' desires to fill such temporary staffing needs of [REDACTED] a customer of [REDACTED] and, in conjunction therewith desires to enter into an agreement with [REDACTED] with respect to such placement.

The agreement also states that "this Agreement to start on or around **August 28, 2012** and estimated to be completed by Contractor by **November 30, 2012**."<sup>4</sup>

- The petitioner's product business plan for "begJM-V1.0" and "BCG-Card System Version – 3.0."
- An offer of employment letter from the petitioner to the beneficiary, dated March 21, 2013.
- A document entitled "Employer-Employee Relationship Terms."
- A copy of the petitioner's lease.
- Photographs of the petitioner's offices.
- A copy of the petitioner's Federal Income Tax Return for 2011.
- The petitioner's 2012 Wage and Tax Register (quarters 1-3) for [REDACTED]
- One-page printout of the petitioner's website.

The director reviewed the response, and found the evidence insufficient to establish eligibility for the benefit sought. The director denied the petition on July 24, 2013. Counsel submitted an appeal of the denial of the H-1B petition.

## II. PREPONDERANCE OF THE EVIDENCE STANDARD

With the appeal, counsel submitted a brief. In the brief, counsel references the preponderance of the evidence standard. We note that with respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

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<sup>4</sup> Thus, without further evidence, it appears that the project ended approximately one year prior to the requested period of H-1B employment on the Form I-129.

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The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

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Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Thus, in accordance with this standard, U.S. Citizenship and Immigration Services (USCIS) examines each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. The "preponderance of the evidence" standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, the petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *see e.g., Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). As will be discussed, in the instant case, that burden has not been met.

### III. REVIEW OF THE DIRECTOR'S DECISION

#### 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 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 387. To avoid this 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 a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

As a preliminary matter, we note that the petitioner states that the proffered position "requires an individual with a bachelor's degree (or the equivalent) and/or experience." The degree requirement set by the statutory and regulatory framework of the H-1B program is not just a college degree, but a baccalaureate (or higher degree) in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 147 (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Thus, the petitioner's assertion that a general-purpose college degree is acceptable is tantamount to an admission that the proffered position is not in fact a specialty occupation.

Further, if the requirements to perform the duties and job responsibilities of a proffered position are a combination of a general bachelor's degree and experience such that the standards at both section 214(i)(1)(A) and (B) of the Act have been satisfied, then the proffered position may qualify as a specialty occupation. *See Tapis Int'l v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000). We do not find, however, that any position can qualify as a specialty occupation based solely on the claimed requirements of a petitioner. Instead, USCIS must examine the actual employment requirements and, on the basis of that examination, determine whether the position qualifies as a specialty

occupation. See generally *Defensor v. Meissner*, 201 F.3d 384. Furthermore, we do not find (1) that a specialty occupation is determined by the qualifications of the beneficiary being petitioned to perform it; or (2) that a position may qualify as a specialty occupation even when there is no specialty degree requirement, or its equivalent, for entry into a particular position in a given occupational category.

First, USCIS cannot determine if a particular job is a specialty occupation based on the qualifications of the beneficiary. A beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. USCIS is required instead to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. Cf. *Matter of Michael Hertz Assoc.*, 19 I&N Dec. at 560 ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

Second, in promulgating the H-1B regulations, the former Immigration and Naturalization Service (INS) made clear that the definition of the term "specialty occupation" could not be expanded "to include those occupations which did not require a bachelor's degree in the specific specialty." 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991). More specifically, in responding to comments that "the definition of specialty occupation was too severe and would exclude certain occupations from classification as specialty occupations," the former INS stated that "[t]he definition of specialty occupation contained in the statute contains this requirement [for a bachelor's degree in the specific specialty or its equivalent]" and, therefore, "may not be amended in the final rule." *Id.*

In the instant case, the petitioner stated that the position requires "a bachelor's degree (or the equivalent) and/or experience." Upon review, however, the petitioner has not asserted and the record of proceeding does not support the conclusion that the petitioner's claimed requirements are the equivalent to a bachelor's or higher degree in a specific specialty.

The petitioner in this matter provided a list of the beneficiary's proposed duties.<sup>5</sup> As observed

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<sup>5</sup> With regard to the duties, we note that the petitioner designated the proffered position on the LCA under the occupational category "Computer Programmers" as a Level I (entry) position. The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL as follows:

**Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

above, USCIS in this matter must review the actual duties the beneficiary will be expected to perform to ascertain whether those duties require at least a baccalaureate degree in a specific specialty, or its equivalent, as required for classification as a specialty occupation. To accomplish that task in this matter, USCIS must analyze the actual duties in conjunction with the specific project(s) to which the beneficiary will be assigned. To allow otherwise, results in generic descriptions of duties that, while they may appear (in some instances) to comprise the duties of a specialty occupation, are not related to any actual services the beneficiary is expected to provide.

In that regard, we have reviewed the information in the record regarding the petitioner's IT and management consulting business. Upon review of this information, we find that the record of proceeding lacks documentation regarding the petitioner's business activities and the actual work that the beneficiary will perform to sufficiently substantiate the claim that the petitioner has H-1B caliber work for the beneficiary for the period of employment requested in the petition. That is, the record does not include sufficient work product or other documentary evidence to confirm that the petitioner has ongoing projects to which the beneficiary will be assigned. Thus, the petitioner has not provided the underlying documentation necessary to corroborate that the beneficiary would perform the claimed duties set out in the petitioner's letter of support.<sup>6</sup>

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) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Furthermore, we note that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1).

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

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See U.S. Dept't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

<sup>6</sup> For instance, the petitioner submitted documentation regarding its business operations, including a few client agreements, a product business plan for in-house projects (for which the petitioner states the beneficiary "may" be assigned), an offer of employment letter, tax documents, and a printout from its website. In response to the director's RFE, counsel asserts that "[t]he petitioner has plenty of specialty occupation work available for the beneficiary as petitioner has several internal and or external IT Contracts/Projects/Software Development projects work." In addition, counsel claims that "[t]he petitioner can assign any of the projects out of these contracts to the beneficiary to work out of the petitioner's office."

The evidence not establish, however, the substantive nature of the work to be performed by the beneficiary. There is a lack of documentation regarding the claimed projects and the beneficiary's specific role in the project(s). While the petitioner may be able to eventually locate some work for the beneficiary, it has failed to establish that the petition was filed for non-speculative work for the beneficiary that existed *as of the time of the petition's filing*. There is insufficient documentary evidence in the record corroborating the availability of work for the beneficiary for the requested period of employment and, consequently, what the beneficiary would do and how this would impact the circumstances of her relationship with the petitioner.

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).

Without statements of work describing the specific duties the petitioner requires the beneficiary to perform, as those duties relate to specific projects, USCIS is unable to discern the nature of the position and whether the position indeed qualifies as a specialty occupation. Without a meaningful job description within the context of non-speculative employment, the petitioner may not establish any of the alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Further, the petitioner stated on the Form I-129 that it was established in 2008 and that it has three employees. In response to the RFE, the petitioner provided several documents regarding its business operations. For instance, the petitioner provided its 2011 tax return. The tax return indicates that the petitioner did not compensate any officers (line 12), nor did it pay any salaries and wages (line 13). The petitioner also provided its wage and tax register for 2012 (quarters 1 to 3), which indicates that the petitioner paid wages to only one individual. Additionally, the petitioner submitted its lease, which states that the lease rate is "based on the offices and services being used by two persons only."

It is reasonable to assume that the size and/or scope of an employer's business has, or could have, an impact on the duties of a particular position. See *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position. In matters where a petitioner's business is relatively small, USCIS reviews the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in position requiring the theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent). Additionally, when a petitioner employs relatively few people, it may be necessary for it to establish how the beneficiary will be relieved from performing non-qualifying duties. The petitioner did not address this issue, nor did it provide information regarding the duties and responsibilities of the other employee(s). Thus, without additional information, it cannot be ascertained how the beneficiary would be

relieved from performing non-qualifying duties such that it would not affect the occupational classification of the position.

We acknowledge the petitioner's claim that the position of IT analyst qualifies for H-1B classification; however, an assertion without supporting evidence is insufficient for a petitioner to satisfy its burden of proof. The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner 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 discussed above, 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.

#### IV. BEYOND THE DIRECTOR'S DECISION

##### Beneficiary's Qualifications

We do not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the proffered 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.

#### V. CONCLUSION AND ORDER

An application or petition that fails to comply with the technical requirements of the law may be denied by us 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 143 (noting that the AAO conducts appellate review on a *de novo* basis).

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

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate 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; *see e.g., Matter of Otiende*, 26 I&N Dec. at 128. Here, that burden has not been met.

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*NON-PRECEDENT DECISION*

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**ORDER:** The appeal is dismissed.