

(b)(6)



U.S. Citizenship  
and Immigration  
Services

DATE: **OCT 16 2014** OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

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,

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

Ron Rosenberg  
Chief, Administrative Appeals Office

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

## I. PROCEDURAL AND FACTUAL BACKGROUND

On the Form I-129 visa petition, the petitioner describes itself as a "Software Development & Consulting" business. In order to continue to employ the beneficiary in what it designates as a "Computer Programmer" position, 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, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director's basis for denial was erroneous and contended that the petitioner satisfied all evidentiary requirements.

As will be discussed below, we have determined that the director did not err in her decision to deny the petition on the specialty occupation issue. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

We base our decision upon our review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

## II. THE LAW

The issue before us is whether the petitioner has demonstrated that the proffered position qualifies as a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

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 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.

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.

We note that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. The court held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

### III. EVIDENCE

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a Computer Programmer position, and that it corresponds to Standard Occupational Classification (SOC) code and title 15-1131 Computer Programmers from the Occupational Information Network (O\*NET). The LCA further states that the proffered position is a Level I, entry-level, position.

With the visa petition, counsel submitted evidence that the beneficiary received a bachelor's degree in computer engineering from the [REDACTED] in India and a master's degree in electrical and computer engineering from the [REDACTED]

Counsel also submitted: (1) a Master Services Agreement dated July 15, 2010, ratified by [REDACTED] and the petitioner; (2) a statement of work (SOW) issued by [REDACTED] to the petitioner on July 16, 2010; (3) a Consulting Agreement between [REDACTED] and

[REDACTED] dated March 17, 2010; (4) a Task Order, also dated March 17, 2010, issued by [REDACTED] (5) numerous status reports pertinent to work performed by the beneficiary; (6) letter, dated May 7, 2013, from [REDACTED] who identified himself as the Regional Manager of [REDACTED] (7) a letter, dated May 7, 2013, from [REDACTED], who identified herself as the Manager of [REDACTED]; (8) a letter, dated July 1, 2013, from [REDACTED] who identified herself as the petitioner's HR Manager; and (9) counsel's own letter, dated July 22, 2013.

The July 15, 2010 Master Services Agreement sets out terms pursuant to which [REDACTED] may request the use of the petitioner's workers to assign them to work on other companies' projects. In the July 16, 2010 SOW, [REDACTED] requested the use of the beneficiary's services to be assigned to a location identified as [REDACTED] beginning on August 9, 2010 and continuing for "6+ Months." The description of the work to be performed pursuant to that agreement is "SQL Server DBA." That document contains no indication of any educational requirements imposed on the position by any party.

The March 17, 2010 Consulting Agreement sets out terms pursuant to which between [REDACTED] may render services to [REDACTED]. It states that any services to be performed, and the estimated duration of those services, shall be defined in a Task Order.

The March 17, 2010 Task Order states that [REDACTED] would provide the beneficiary to work beginning on August 9, 2010 and continuing for an estimated six months. It states that the location of the work is [REDACTED] and the nature of the work to be performed is "Senior SQL DBA."

The status reports provided cover weeks from March 11, 2013 to July 22, 2013 and describe the beneficiary's work on a project at the location of [REDACTED] New Jersey. They purport to be signed by [REDACTED], whose position is identified as Technical Manager. [REDACTED] employer is not identified. The entity to which those reports were sent when issued, if any, is not identified.

The May 7, 2013 letter from [REDACTED] indicates he is the Regional Manager of [REDACTED]. As to the project on which the beneficiary was then working, it states:

[REDACTED] is executing the current project at [REDACTED]. [REDACTED] is a subsidiary of [REDACTED] owns and controls our parent company, [REDACTED] are subsidiaries of [REDACTED] and members of the [REDACTED] frequently partner on technology projects in the United States and abroad.

Mr. [REDACTED] stated that, for the proffered position, [REDACTED] requires a minimum of a bachelor's degree in computer science or a closely related field. He also stated, "The [beneficiary's] present assignment duration is expected to continue for the long term," but did not otherwise state the likely duration of the project or of the beneficiary's involvement in the project.

In her May 7, 2013 letter, [REDACTED] stated that she is a Manager at [REDACTED]. She further stated that the beneficiary has been working at [REDACTED], NJ since **August 9, of 2010.**" It characterized his duties<sup>1</sup> as "Support, Deployment, Maintenance and Error Reporting for [REDACTED] Applications in all the environments." She described those duties, more specifically, as:

- Design, maintain and tune various [REDACTED] based solutions using SQL server 2005 /2008, and deliver long lasting and scalable data base solutions for [REDACTED] systems.
- Provide 24/7 support for [REDACTED] Applications.
- Deploy various enhancements to Dev, AQ, Staging and Production environments on the Database and Application servers.
- Upgrade the various environments to the latest Service Packs.
- Ensure that the various Scheduled jobs are running without any errors.
- Work on alerts created by Microsoft Operations Manager.
- Work with Developers and Business in the various enhancements or requirements for the application.
- Maintain DR environments.

In her July 1, 2013 letter, [REDACTED] the petitioner's HR Manager, stated the following:

**THE JOB DUTIES OF A COMPUTER PROGRAMMER:**

A Computer Programmer is essentially one who writes, updates, tests, monitor computer programs and software packages. He creates detailed workflow charts and diagrams that describe input, output and logical operations and converts them into series of instructions so that others may understand the program. He corrects the errors and conducts trial runs of program and software applications to ensure proper results. In order to accomplish the level of analysis, a Computer Programmer must coordinate and link the computer systems within an organization to increase compatibility and allow the information to be shared. He determines which computer software or hardware is needed to create or alter a system and also revises, repairs,

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<sup>1</sup> We observe, however, that as [REDACTED] does not appear to be the end user of the beneficiary's services, and will not apparently be assigning duties to the beneficiary, the description provided by an official of [REDACTED] is not a critical consideration. *See Defensor v. Meissner, supra.*

and expands existing programs to increase operating efficiency. The Computer Programmer must be one who develops, documents, and revises system design procedures, test procedures and quality standards.

[Errors in the original.]

We observe that Ms. [REDACTED] did not appear to represent that description as being specific to the proffered position, but as a generic description of computer programmers' duties. As to the educational requirements of such positions, Ms. [REDACTED] stated:

In order to satisfactorily perform these duties, it is required by the U.S. Department of Labor, that an individual should possess in the least a bachelors degree in computer science, computer applications, management information systems or in any branch of engineering with additional experience in practical application or theoretical knowledge of computer science or a specialized field of study in engineering with substantial training and / or experience in designing and implementing computer based models and solutions to practical and technical problems in terms of 8 C.F.R. Sec 214.2(h)(4)(ii).

[Errors in the original.]

The proposition for which Ms. [REDACTED] intended to cite 8 C.F.R. 214.2(h)(4)(ii) is unclear. We observe, however, that the regulation cited contains no indication of the educational requirements of computer programmer positions and it is unclear what the petitioner meant by its statement regarding the U.S. Department of Labor's (DOL's) requirements for computer programmer positions.

In his July 22, 2013 letter, counsel stated:

The normal minimum educational requirement for entry into the position of Computer Programmer is a 4[-]year baccalaureate degree in Science, Computer Applications, Computer Engineering, Computer Science, Engineering, a related scientific or analytic discipline, or the equivalent in education and experience.

Counsel did not state his bases for that assertion.

On December 6, 2013, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation. The service center provided a non-exhaustive list of items that might be used to satisfy the specialty occupation requirements.

In response, counsel submitted (1) a vacancy announcement placed by the petitioner; (2) two vacancy announcements placed by other firms; (3) a copy of an employment agreement, dated September 6, 2007, between the petitioner and the beneficiary; (4) an evaluation dated September

16, 2013; (5) an SOW dated September 30, 2013 and executed by representatives of [REDACTED] (6) a letter, dated January 15, 2014, from the petitioner's HR Coordinator; (7) a document, dated January 15, 2014, headed, "Sub: Itinerary of Services of [the beneficiary] during his term of employment with [the petitioner]," and signed by the petitioner's project manager; and (8) a letter, dated January 20, 2013, from counsel.<sup>2</sup>

The petitioner's vacancy announcement indicates that the petitioner has one or more vacancies available for Java Developers, .Net Developers, [REDACTED] Security Analysts, Jr. Micro-Strategy, Mid/Sr. Quality Assurance Engineers, Mid/Sr. Business Analysts, Share Point Developers, Mid Level JAVA Developers, and IT Project Managers. However, it does not indicate that the petitioner is seeking computer programmers or, if it were, what educational requirements it would place on that position. As such, those announcements are not directly relevant to whether the proffered position requires a minimum of a bachelor's degree in a specific specialty or its equivalent.

The September 6, 2007 employment agreement states, *inter alia*:

[The beneficiary] understands and agrees that, regardless of which party terminates this Agreement, the obligations and agreements set forth in . . . the indemnification provisions of paragraph twelve (12) of this Agreement shall survive and continue after said termination and shall remain in full force and effect. [The beneficiary] understands and agrees that, in the event of either a [termination by the petitioner with cause] or [a termination by the beneficiary] which is effective less than eighteen (18) months from the date of this Agreement, [the beneficiary] shall be responsible for the Reimbursement Obligations set forth in paragraph twelve (12) of this Agreement.

Paragraph 12 states:

**Reimbursement.** If this Agreement is breached by the [beneficiary] at any time, or if the Agreement is terminated by the [beneficiary], or by [the petitioner] with cause, less than twelve (12) months from the date of execution of this Agreement, then the [beneficiary] represents, agrees and promises that he/she shall immediately pay to [the petitioner], as reimbursement for all expenses, to the extent permitted by applicable law, the following:

- a. All training, education, certification, and other expenses incurred by [the petitioner] on behalf of the [beneficiary] to train, educate, certify, market and/or prepare [the beneficiary] for the performance of the services to be provided hereunder;

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<sup>2</sup> Because of the timing of its submission and the fact that it was submitted in response to the December 6, 2013 RFE, we believe that letter was dated incorrectly.

- b. All immigration, travel, relocation, housing and board expenses incurred by [the petitioner] in recruiting and relocating [the beneficiary] to perform the services required hereunder;
- c. If [the petitioner] is unable to immediately replace the [beneficiary] after pursuing reasonable efforts to find a replacement, up to one (1) month of the billable hours which the [beneficiary] was required to perform for the Client to whom [the beneficiary] was providing services at the time of the termination, if applicable;
- d. Such costs that are sustained by [the petitioner] as a result of damages because of illegal disputes with any firm, company, corporation, or individual to whom [the beneficiary] has been introduced directly or indirectly and to the Client's project because of [the beneficiary's] breach of this agreement.
- e. Any and all charges on any corporate credit/charge card supplied by [the petitioner] to the [beneficiary] which were not previously authorized in writing by [the petitioner]; and
- f. All such other expenses that [the petitioner] incurred on behalf of the [beneficiary] and which reasonably relate to [the beneficiary's] position with [the petitioner].

Without in any way limiting or waiving the amount of damages which [the petitioner] may seek from [the beneficiary] hereunder, [THE BENEFICIARY] AGREES AND UNDERSTANDS THAT HE/SHE MAY BE OBLIGATED TO PAY [THE PETITIONER] DAMAGES UNDER THIS PARAGRAPH WHICH MAY EXCEED \$20,000 DEPENDING ON THE EXPENSES INCURRED BY [THE PETITIONER].

The September 16, 2013 evaluation is not an evaluation of the position offered in this case. It is an evaluation of a position with an unidentified company in an unknown industry,<sup>3</sup> rather than of a position with the instant petitioner. Further, it is an evaluation of a programmer analyst position rather than a computer programmer position, which is ostensibly the position offered in the instant case. Thus, not only has that position not been shown to be with a similar company in the petitioner's industry, it has not been shown to be a position parallel, or even similar, to the proffered position. The evaluation provided has not been demonstrated, therefore, to have any relevance to whether the position proffered in the instant case qualifies as a specialty occupation position. It will not be addressed further.

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<sup>3</sup> The name of the company offering that programmer analyst position was redacted from the evaluation.

The September 30, 2013 SOW executed by [REDACTED] indicates that [REDACTED] would provide some services to [REDACTED] from October 1, 2013 to September 30, 2014 in the Netherlands. It contains no indication that the beneficiary will work pursuant to that SOW.

The petitioner's HR Coordinator's January 15, 2014 letter states that the beneficiary "will be exclusively providing services to [REDACTED]," and reiterates the duty description previously provided in [REDACTED] May 7, 2013 letter.

The January 15, 2014 itinerary restates that same list of duties. It states that "[the beneficiary] is presently working at [REDACTED] NJ as a Computer Programmer." As to the location where the beneficiary would work in the future, that itinerary states that the beneficiary's work location will be the [REDACTED] New Jersey location of [REDACTED] and that (1) the "Employer" is the petitioner, (2) the "Prime Vendor" is [REDACTED] Virginia, (3) the "Vendor" is [REDACTED] in Jersey City, New Jersey.

In his own letter, counsel stated:

Please find that the minimum requirement entry [sic] into the position of Computer Programmer is Bachelor's degree [sic] in Technology, Science, Mathematics, Computer Programming, Computer Information Systems, Management Information Systems, Computer Science, Computer Engineering, Electrical Engineering, and Electronics & Telecommunication Engineering or any engineering or related field.

However, elsewhere, counsel cited DOL's *Occupational Outlook Handbook (Handbook)* for the proposition that:

The minimum requirement for Computer Programmer position [sic] is a 4[-]year Baccalaureate degree in the Physical science[sic], Science, Mathematics, Computer Programming, Computer Information Systems, Management Information Systems, Computer Science, Computer Engineering, Electrical Engineering, and Electronics & Telecommunication Engineering or related field or, a related scientific or analytic discipline, or the equivalent in education and experience.

The director denied the petition on February 13, 2014, finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent. More specifically, the director found that the petitioner had satisfied none of the supplemental criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel submitted (1) five additional vacancy announcements; (2) portions of an SOW dated January 28, 2011; (3) portions of an SOW dated September 30, 2011; (4) an SOW dated September 30, 2013; (5) a letter, dated February 17, 2014, from [REDACTED] the petitioner's HR Coordinator; (6) a letter, dated February 17, 2014, from [REDACTED] the petitioner's Project

Manager; (7) a declaration, dated February 18, 2014, from [REDACTED] (8) a letter, dated February 18, 2014, from [REDACTED] IT Manager for [REDACTED] (9) a letter, dated February 24, 2014, from [REDACTED], Regional Manager of [REDACTED]; and (10) a brief.

The January 28, 2011 SOW states that [REDACTED] would provide services to [REDACTED] from February 1, 2011 to September 30, 2011 in the Netherlands. However, the even numbered pages of that document were not provided, and the portions submitted contain no indication that the SOW was ever signed or that [REDACTED] agreed to utilize the beneficiary's services.

The September 30, 2011 SOW states that [REDACTED] would provide services to [REDACTED] from October 1, 2011 to September 30, 2013, again, in the Netherlands. That document was signed by representatives of both [REDACTED]. However, the even numbered pages of that document were not provided. The pages provided do not indicate that [REDACTED] agreed to utilize the beneficiary's services.

The September 30, 2013 states that [REDACTED] would provide services to [REDACTED] from October 1, 2013 to September 30, 2014. It does not indicate that [REDACTED] agreed to utilize the beneficiary's services.

In her February 17, 2014 letter, [REDACTED] the petitioner's HR Coordinator, stated:

[REDACTED] have any control over the employment status of [the beneficiary] nor do they have any control over the work assignments of [the beneficiary].

Ms. [REDACTED] also provided the following amended description of the duties of the beneficiary:

- Design, maintain and tune various [REDACTED] based solutions using SQL Server 2005/2008 and windows 2003/2008 servers and deliver long lasting and scalable data base solutions for various Risk applications including Sentinel, GCCS, NG-CEAC and PRS.
- Providing 24/7 support to the Risk applications;
- Deploy application and DB to various environments including Dev, QA, Training, Staging and Production;
- Created DML Scripts for modifying data based on the business requirements;
- Created DDL SQL scripts for creating and modifying database objects;
- Automate job loading provided in XML Feeds;

- Performance monitoring and performance tuning by implementing efficient schemas, Optimizing queries, Tuning indexes and Database Consistency Checks using [REDACTED] Utilities;
- Installing and Configuring Failover Clustering for high availability in Active/passive or Active/Active and also combined clustering and database mirroring;
- Upgrade environments to latest to latest service Packs.
- Ensure that the various Scheduled jobs are running without any issues.
- Work on alerts created by Microsoft Operations Manager.
- Work on DR site and make sure that the data is successfully moved over to DR Servers;
- Work with Developers and Business in the various enhancements and requirements for the Risk applications;
- Maintain DR Environments.

In his February 17, 2014 letter, [REDACTED] the petitioner's Project Manager, reiterated that duty description, reiterated that the beneficiary will be assigned to work at the [REDACTED] location in [REDACTED] New Jersey.

In his February 18, 2014 declaration, [REDACTED] stated that he works as a senior developer with [REDACTED] and that the beneficiary works there. He further stated that the petitioner's position as a computer programmer requires a minimum of a bachelor's degree in "Science/Computer Science/Engineering/Technology."

In her February 18, 2014 letter, [REDACTED] reiterated the duty description from [REDACTED] February 17, 2014 letter and stated: "A minimum of a Bachelor's degree in Engineering is required to perform the above mentioned duties . . . ."

In his February 24, 2014 letter, [REDACTED] Regional Manager of [REDACTED] also reiterated the duty description from [REDACTED] letter, and stated that the beneficiary's background satisfies [REDACTED] requirements for the proffered position, "which include at least a bachelor's degree in computer science or a closely related field."

In his brief, counsel asserted that the evidence of record is sufficient to demonstrate, by a preponderance of the evidence, that the proffered position qualifies as a specialty occupation position.

#### IV. ANALYSIS

Initially, we note that the evidence contains various contradictory statements pertinent to the educational requirements of the proffered position.

In his May 7, 2013 letter, [REDACTED] stated that, for the proffered position, [REDACTED] requires a minimum of a bachelor's degree in computer science or a closely related field.

In her July 1, 2013 letter, [REDACTED] the petitioner's HR Manager, stated that DOL requires that computer programmers have at least a bachelor's degree in computer science, computer applications, management information systems or in any branch of engineering with additional experience in practical application or theoretical knowledge of computer science or a specialized field of study in engineering with substantial training and/or experience in designing and implementing computer based models and solutions to practical and technical problems. She appeared to cite 8 C.F.R. Sec 214 2(h)(4)(ii) for that proposition. It does not support that proposition and we are unaware of any such DOL requirement.

In his February 18, 2014 declaration, [REDACTED] stated that the beneficiary's position as a computer programmer requires a minimum of a bachelor's degree in "Science/Computer Science/Engineering/Technology."

In her February 18, 2014 letter, [REDACTED] stated: "A minimum of a Bachelor's degree in Engineering is required to perform the above mentioned duties . . . ."

In his February 24, 2014 letter, [REDACTED] stated that [REDACTED] requirements for the proffered position, "include at least a bachelor's degree in computer science or a closely related field."

In the letter he submitted in response to the RFE, counsel stated that the minimum requirement for computer programmer positions is a bachelor's degree in physical science, science, mathematics, computer programming, computer information systems, management information systems, computer science, computer engineering, electrical engineering, or electronics and telecommunication engineering, or related field, or a related scientific or analytic discipline, or the equivalent in education and experience.

However, in that same letter counsel urged that we find that the minimum educational requirement for entry into a computer programmer position is a bachelor's degree in technology, science, mathematics, computer programming, computer information systems, management information systems, computer science, computer engineering, electrical engineering, or electronics and telecommunication engineering or any engineering or related field.

The various contradictory assertions pertinent to the educational requirements of the proffered position, even in the brief on appeal, do not lend credibility to the petitioner's case.<sup>4</sup> However, as was noted above, in cases where the beneficiary is to perform duties for an end-user that is not the petitioner, the educational requirements imposed on the performance of the duties by the end-user of the beneficiary's services are the critical consideration.

In the instant case, the petitioner claims that it would supervise the beneficiary's work. However, there is insufficient evidence that the petitioner would provide supervisory personnel to the claimed site to supervise the beneficiary. Further, no evidence from confirms that the beneficiary would perform the duties described by the petitioner, or the intermediaries, including . Further still, no evidence from confirms that it has agreed to utilize the beneficiary's services.<sup>5</sup> As such, the record contains no evidence from an entity that has been reliably identified as the end-user of the beneficiary's services establishing the substantive nature of the duties the beneficiary would perform if the visa petition were approved or the educational requirement the end-user would place on the performance of those duties.

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.

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<sup>4</sup> We observe, though, that in various letters submitted by the petitioner, an otherwise undifferentiated bachelor's degree in engineering is claimed to be a sufficient educational qualification for the proffered position. If any of those letters were taken to be authoritative statements pertinent to the educational requirements of the proffered position, then the proffered position would clearly not qualify as a specialty occupation position.

The field of engineering is a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering. All of the various sub-specialties of engineering, considered as a group, do not delineate a specific specialty. Therefore, an educational requirement that may be satisfied by an otherwise unspecified bachelor's degree in any branch of engineering is not a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent.

<sup>5</sup> We acknowledge the letter from however, that letter is not on letterhead and there is no indication that any official from authorized to speak on the corporation's behalf regarding the instant petition and the beneficiary's work pursuant to the petition.

Also, at a more basic level, as reflected in this decision's discussion of the evidentiary deficiencies, because the record contains no confirmation from [REDACTED] that it has agreed to utilize the beneficiary's services at its site, the record lacks credible evidence that when the petitioner filed the petition, the petitioner had secured work of any type for the beneficiary to perform during the requested period of employment. USCIS regulations 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 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). For this reason also, the appeal will be dismissed and the petition denied.

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.

#### V. ADDITIONAL BASES

The record suggests additional issues that were not addressed in the decision of denial but that, nonetheless, also preclude approval of this visa petition.

##### A. EMPLOYER-EMPLOYEE RELATIONSHIP

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant in pertinent part as an alien:

subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . , who meets the requirements for the occupation specified in section 214(i)(2) . . . , and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1) . . . .

The term "United States employer" is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

*United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) *Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and*

- (3) Has an Internal Revenue Service Tax identification number.

(Emphasis added); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

As was noted above, in the scenario proposed, in which the petitioner will assign the beneficiary, though intermediaries, to work on a remote location on a project of another company, it is very unlikely that the petitioner will assign the beneficiary's duties and supervise his performance. This is especially unlikely as the petitioner has not demonstrated that it would assign a supervisor to work at the remote location with the beneficiary. We therefore find that, notwithstanding that the petitioner would pay the beneficiary's wages, provide benefits, and perform periodic evaluations of his performance, the petitioner is not the beneficiary's actual employer within the meaning of the salient statutes and regulations. The visa petition must be denied on this additional basis.

#### B. LOCATION

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

While the U.S. Department of Labor (DOL) is the agency that certifies LCAs before they are submitted to USCIS, the DOL regulations note that it is within the discretion of the U.S. Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) to determine whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification. . . .

[Italics added]

The LCA submitted in the instant case is certified for employment at and near the [REDACTED] New Jersey location of [REDACTED]. The record contains no evidence, however, that [REDACTED] has agreed to utilize the beneficiary's services there. As such, the evidence does not demonstrate that the petitioner has work to which to assign the beneficiary in any location for which the LCA is valid. The visa petition has not been shown, therefore, to correspond to the instant visa petition. The visa petition must be denied on this additional basis.

## VI. CONCLUSION

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, 145 (3d Cir. 2004) (noting that we conduct 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.

We recognize that this is an extension petition. The director's decision does not indicate whether she reviewed the prior approvals of the previous nonimmigrant petitions filed on behalf of the beneficiary. If the previous nonimmigrant petitions were approved based on the same evidence and assertions that are contained in the current record, those approvals would constitute material and gross error on the part of the director. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990).

Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the instant nonimmigrant petition on behalf of the beneficiary, we would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). The prior approvals do not preclude USCIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. See *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

The director's decision will be affirmed and the petition will be denied 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.