



U.S. Citizenship
and Immigration
Services

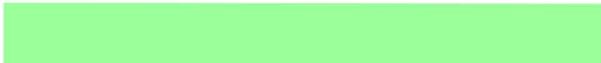
(b)(6)



DATE **SEP 08 2014**

OFFICE: VERMONT SERVICE CENTER

FILE: 

IN RE: Petitioner: 
 Beneficiary: 

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

ON BEHALF OF PETITIONER:

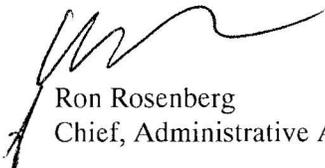


INSTRUCTIONS:

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

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

Thank you,



Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and 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, Petition for a Nonimmigrant Worker, the petitioner describes itself as a two-employee company that develops and implements information management systems,¹ established in 2006. In order to employ the beneficiary in what it designates as a full-time network systems administrator position at a salary of \$53,269 per year,² 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 January 13, 2014, 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, counsel asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements. In support of this assertion, counsel submits a brief and additional evidence.

The record of proceeding 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, Notice of Appeal or Motion, and supporting documentation. We have reviewed the record in its entirety before issuing our decision.³

For the reasons that will be discussed below, we find that the evidence of record does not overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. FACTS AND PROCEDURAL HISTORY

The petitioner filed the Form I-129 on April 2, 2013, listing its business address as [REDACTED] Florida. On the Form I-129, the petitioner stated that it seeks the beneficiary's services as a full-time network systems administrator for a period of three years. The petitioner specifically stated that the beneficiary will work at the petitioner's business address as

¹ The petitioner provided a North American Industry Classification System (NAICS) Code of 423430, "Computer and Computer Peripheral Equipment and Software Merchant Wholesalers," thus representing that the petitioner is "primarily engaged in the merchant wholesale distribution of computers, computer peripheral equipment, loaded computer boards, and/or computer software." U.S. Dept of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, 423430, "Computer and Computer Peripheral Equipment and Software Merchant Wholesalers," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited August 21, 2014).

² The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the "Network and Computer Systems Administrators" occupational classification, SOC (O*NET/OES) Code 15-1142, and a Level I prevailing wage rate.

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

listed above, and will not work off-site. The petitioner listed its gross annual income as \$229,219 and its net annual income as \$18,109.

With the Form I-129 petition, the petitioner provided a letter of support dated March 29, 2013, in which it described itself as a company that develops and implements proprietary information management systems: [REDACTED] The petitioner explained [REDACTED] as a document management system (DMS) that will support clients' "projects of management by processes, knowledge management, audit processes and obtaining certificates, BPM, ISO, OSHA, among others, using their internal, Intranet or Internet [*sic*]." The petitioner explained [REDACTED] as a management system of files which "aims to collect, classify, store and distribute efficiently [clients'] documentation in an internal network. These projects can be digitizing documents, paperless office, and centralization of documentation." The petitioner then provided the following description of the duties of the proffered position:

Organize, install, and support customer systems, including local area network, wide area network segments, intranets and other data communication systems. Install and implement [REDACTED] in the different environments that combine the use of the following software suites: Office, Open Office, and Libre Office, in its different versions; internet browsers such as: Firefox, Internet Explorer and Google Chrome, in its different versions; database managers: Postgresql and SQL, in its different versions and operating systems Windows and Linux. Installing software management tools for Tomcat and SQL Server. Elaboration and execution of the Technical Certification Protocol (directions to follow for systems validation), based on the results obtained from the client evaluation. Document management under quality norms, manufacturing good practices, ISO 9001, ISO 14001, ISO 22000, ISO 27001, auditing . . . Experience performing Certification Protocols (Technical ITEMS) for freeing of [REDACTED] Packages or Versions of [REDACTED] and [REDACTED] in the different environments. Knowledge and expertise using SalesLogix as CRM to generate and process tickets, related to attention of technical requirement of clients. Experience performing integration of [REDACTED] Capture Software for document digitizing (version 1.1). Knowledge of various digitizing software packs, such as [REDACTED] [REDACTED] PLANETARY SCANNER E-SCAN, [REDACTED] Use of first-level supporting tools: Web Ticket Support, Skype, Google Talk, TeamViewer. Knowledge and experience with hardware: laptops, desktops, servers and performed other related duties [*sic*].

The petitioner submitted a letter dated January 17, 2013 from [REDACTED] (hereinafter [REDACTED]), located in [REDACTED] Venezuela, attesting that the beneficiary has worked at its company since 2006 as a "Technical Support" and is now being promoted "to play the same position, at [its] headquarters in [the petitioning company] in Miami, in order to market our Software's [REDACTED] in the United States [*sic*]." The letter listed the following as duties that the beneficiary currently performs at [REDACTED] and will continue to perform at the petitioning company:

- 1) Elaboration and execution of the Technical Certification Protocol (directions to

follow for systems validation), based on the results obtained from the client evaluation. This report is then conveyed to the Systems Maintenance Department, part of the Project Management Office.

- 2) Performing Certification Protocols (Technical ITEMS) for freeing of Packages or Versions of in the different environments that combine management of software suites, internet browsers, database managers and operating systems.
- 3) Installing, implementing and technical configuring of Document Management Software in the different environments that combine the use of the following software suites: Office, Open Office, and Libre Office, in its different versions; internet browsers such as: Firefox, Internet Explorer and Google Chrome, in its different versions; database managers: Postgresql and SQL, in its different versions and operating systems Windows and Linux. Installing software management tools for Tomcat and SQL Server.
- 4) Document management under quality norms, manufacturing good practices, ISO 9001, ISO 14001, ISO 22000, ISO 27001, Norven (Venezuelan Norms), auditing. ISO 9001-2000 norms for client certification process.
- 5) UML Document production/Use cases for system on-line documentation, software technical documentation, README files for Packages and Versions. Making of the Administrators' Manual (technical manual) for
- 6) Adaptation of systems. if requested by the client, Support to the in the performing of the Activity Chronogram.
- 7) Gathering technical information for clients, both for new installations and new requirements.
- 8) Elaboration of schedules using the SalesLogix (Customer Relationship Management) program and memorandums using Word, out of the kick-off activities (first approach made to the client), advance monitoring meetings (status of the client), in activities related to technical support for hardware and software for installing.
- 9) Active partaking in the functional analysis for performance improvement and incorporation of new technological aids and their integration into y systems.
- 10) Advisory of websites, as well as other websites developed for its clients.
- 11) Customer support, as a part of the Software Help Desk of and

- [REDACTED]
- 12) Integration of [REDACTED] Capture Software for document digitalizing (version 1.1), with [REDACTED] indexation of files in regular indexes, barcodes and OCR, as well as massive migration of them to web or desktop tools.
 - 13) Supervision of personnel appointed to the project by [REDACTED] or the client: technical consultants and digitalizers.
 - 14) Training courses for the technical personnel allotted by the client to perform manager functions in [REDACTED] systems, plus the technical personnel in charge of providing internal support in the Client installations.
 - 15) Use of SalesLogix as CRM to generate and process tickets, related to attention of technical Customers support. First-level support using tools as TeamViewer, Skype and Google Talk.
 - 16) Plan, coordinate and implement security measures to safeguard information in computer files against accidental or unauthorized damage, modification or disclosure.

The director issued a request for evidence (RFE), instructing the petitioner to submit additional evidence that it will have in-house specialty occupation work available for the beneficiary for the entire requested validity period. Specifically, the director requested, *inter alia*: copies of relevant portions of valid contracts, statements of work, work orders, service agreements, and letters between the petitioner and authorized officials of the ultimate end-client companies to whom the end product or services worked on by the beneficiary will be delivered; copies of company brochures, pamphlets, internet websites, or any other published work outlining the petitioner's products or services; copy of the petitioner's marketing analysis for its products or services; and a copy of a cost analysis for the petitioner's products or services. The director also instructed the petitioner to submit additional evidence confirming the petitioner's official name and address, such as current leases, state quarterly wage reports, federal tax statements, and invoices or payment receipts.

In response to the RFE, counsel for the petitioner submitted a letter dated November 24, 2013 explaining that the petitioner is a subsidiary of [REDACTED]. Counsel stated that [REDACTED] was formed on January 2, 2006, and the petitioner was subsequently formed on February 20, 2006. Counsel explained: "In the initial stage of [the petitioner], all IT services have been provided in house through [REDACTED] while a strategic launching of [the petitioner], as well as proper staffing is organized." Counsel further explained the nature of the petitioner's business as developing and implementing management systems such as its exclusive products known as [REDACTED] and [REDACTED]. Specifically, counsel asserted that both companies "provide support of the products, receive

⁴ The petitioner did not submit evidence to corroborate its assertion that it is a subsidiary of [REDACTED]. We note that the petitioner's 2010-2012 federal tax returns all reflect that the petitioner is not a subsidiary in an affiliated group or a parent-subsidiary controlled group, and that no foreign or domestic corporation or entity owns the petitioner directly 20% or more, or 50% or more of its total voting power.

inquiries, make the improvements or customize products as per customer requests, and remotely install and provide training." Counsel again reaffirmed that installation and maintenance support of the company's products and computer systems are "completed in-house." With respect to the proffered position, counsel asserted:

The complex position requires the utilization of complex IT processes and the knowledge of the relationship/interconnectedness of the processes to the Petitioner's unique products to ensure proper set up and functioning of said products. This requires the Beneficiary to have a unique comprehension and interpretation of the various networks and computer platforms in both locations (U.S. & Venezuela) and knowledge of systems protocol in addition to the integration and impact upon each system by the use of various browsers. . . The Beneficiary's specific and detailed knowledge of Certificate Protocols, SalesLogix (as CRM), Capture Software and various other digitalizing software packs, gained through his Bachelor's Degree in Computer Technology, is vital to the continued expansion of the Petitioner's products throughout the English Speaking global markets.

In support of the RFE, the petitioner submitted, *inter alia*:

- One Software Licensing Agreement between the petitioner and [REDACTED] ("the client"), located in [REDACTED] Columbia, for use of [REDACTED] that is not signed by the client;
- Agreements between [REDACTED] and various clients, written in the Spanish language and unaccompanied by English translations. These agreements list [REDACTED] address as [REDACTED]
- The petitioner's lease agreement, effective February 1, 2013 to February 1, 2014, for [REDACTED] Miami, Florida;
- The petitioner's 2010 Form 1120, U.S. Corporation Income Tax Return, reflecting the petitioner's business address as [REDACTED] Miami, Florida, and reflecting, in pertinent part: \$297,755 in gross receipts or sales; \$275,481 in cost of goods sold; \$22,274 in total income; \$0 in compensation of officers; \$0 in salaries and wages; and \$1,937 in taxable income. Under Schedule K, the petitioner attested that it is not a subsidiary in an affiliated group or a parent-subsidiary controlled group, and that no foreign or domestic corporation or entity owns the petitioner directly 20% or more, or 50% or more of its total voting power;
- The petitioner's 2011 Form 1120, reflecting the petitioner's business address as [REDACTED] Florida, and reflecting, in pertinent part: \$229,219 in gross receipts or sales; \$211,110 in cost of goods sold; \$18,109 in total income; \$0 in compensation of officers; \$0 in salaries and wages; and \$2,593 in taxable income. Under Schedule K, the petitioner attested that it is not a subsidiary in an affiliated group or a parent-subsidiary controlled group, and that no foreign or domestic corporation or entity owns the petitioner directly 20% or more, or 50% or more of its total voting power;

- The petitioner's 2012 Form 1120 reflecting the petitioner's business address as [REDACTED] Florida, and reflecting, in pertinent part: \$4,161 in gross receipts or sales; \$0 in cost of goods sold; \$4,161 in total income; \$0 in compensation of officers; \$0 in salaries and wages; and -\$612 in taxable income. Under Schedule K, the petitioner attested that it is not a subsidiary in an affiliated group or a parent-subsidiary controlled group, and that no foreign or domestic corporation or entity owns the petitioner directly 20% or more, or 50% or more of its total voting power;
- Print-outs from [REDACTED] generally describing [REDACTED] printed on November 26, 2013. These documents contain no reference to the petitioner or [REDACTED]. The contact information provided is: [address] [REDACTED]
- Numerous invoices from the petitioner to various clients in Latin America, dates ranging from October 22, 2008 through September 19, 2013, all listing the petitioner's business address as [REDACTED] Miami, Florida;
- [REDACTED] User Guide, written in July 2012, developed "by the team of [REDACTED]"; and
- Document describing the newest version of [REDACTED] 4.5.2 from [REDACTED] listing the company's address as [REDACTED]

The director denied the petition, finding insufficient evidence that the petitioner has sufficient in-house projects to sustain employing the beneficiary in qualifying specialty occupation work for the requested validity period. The director acknowledged the submitted [REDACTED] document, but determined that it is abstract and does not contain practical or specific information about the system or the proposed job duties. The director also concluded that because the record of proceeding contained insufficient information and evidence of the specifics of the proposed in-house employment, the director was unable to determine if the proffered position qualifies as a specialty occupation.

On appeal, counsel maintains that the petitioner provided sufficient documentation and proof of sufficient available work for the beneficiary. Counsel explains that the petitioner is "an international IT web management company . . . which offers and markets its proprietary software document management platforms [REDACTED] to companies of varying size." Counsel states that the petitioner's clientele "include businesses within the United States and Latin America," some of whom were acquired through [REDACTED] and others obtained by the petitioner "at inception." Counsel asserts that the petitioner "services an extensive client list annually," and that "[e]ach client requires installation and ongoing maintenance of the Petitioner's product(s) which varies based on their internet platform needs and payment structure." Counsel further asserts that "[a]s long as the client licenses the product, ongoing system maintenance is required to ensure accurate development with the changing web and server structure due to the unique configuration of the software."

Citing to two unpublished AAO decisions rendered in February 2004 and December 1996, counsel asserts that "legal precedent holds that a 'network systems administrator' meets the requirements for a 'specialty occupation.'" In the present case, counsel asserts that the position satisfies the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) because "the nature of the specific duties of the position are so 'specialized and complex' that it requires the attainment of a baccalaureate degree or its equivalent. Specifically, counsel claims:

As an IT company with proprietary software, the position requires specific knowledge of the proprietary functioning of the software in addition to in-depth Information Technology (IT) analysis concepts crucial to the implementation and maintenance of the product within various web platforms . . . The customer's needs vary widely depending on their location and web platforms; therefore, the position requires more than an applicant that can merely traverse the IT world. Instead, it requires a candidate with a high level of specialized knowledge related to the functioning of [REDACTED] and how they interact with various web browsers. Furthermore, the Petitioner continues to provide upgrades to the products due to the continuous change of browsers and internet platforms and therefore requires a Network Systems Administrator to monitor system performance and user access.

In support of the appeal, the petitioner submits a new letter, dated January 9, 2014, reaffirming the same previously listed duties for the proffered position, as well as adding the following new duties:

- Administration and configuration of the main functions of a computer platform such as Domain Name System (DNS), Dynamic Host Configuration Protocol (DHCP), Active Directory, Internet Service Provider (ISP), Windows Internet Naming Service (WINS), automated Local Area Networks backups, Fortinet (Firewall), files and data base organization.
- Technical support for the webpage of [REDACTED] and [the petitioner].
- [S]erver restores for disaster applications, restores previous state applications, JAVA protection and encryption of the data and documentation hosted on servers in the database of customers, key protection with access to the database and generation of licenses for the authentication of users in information systems, copy protection of application, database and licensing to prevent illegal duplication and extraction software and information.
- Network Directory Services as Active Directory, integrate with [REDACTED]
- Maintenance of hard drives, physical memory, firewalls and security agents.
- Administration and configuration of standard Routers, professional Routers, Fortinets and their integration with the security agent, forwarding ports to applications in intranet and Internet. Filters for block web addresses not allowed, Intruders, Internet Protocols, potential malware and network attacks.
- The upkeep, configuration and reliable operation of computer systems, especially multi-user computers, such as servers.

- Performance, resources, and security of the computers meet the needs of the users. Diagnose, troubleshoot, and resolve hardware, software, or other network and system problems, and replace defective components when necessary.
- He may take decision to buy, install, or upgrade computer components and software; automate routine tasks like perform data backups and disaster recovery operations and provide technical support.
- Plan, coordinate, and implement network security measures to protect data, software, and hardware.
- Configure, monitor, and maintain email applications or virus protection software. Coordinate computer network access and use monitor network performance to determine whether adjustments need to be made.
- Install with SQL, Postgresql and Lotus Notes databases.

In the same letter, the petitioner reaffirms that it intends to employ the beneficiary on a full-time basis at the proffered salary of \$53,269. The petitioner reaffirms that the beneficiary will work at the petitioner's Miami location, and that the beneficiary "will not perform services at a third-party worksite." The petitioner concludes: "At all times during his employment, we will have the right of control over his work and work product."

The petitioner submits its business plan, entitled "Strategy for products and services, human resources justification, marketing and analysis cost." This document states that the petitioner was created in the United States "for the purpose of marketing products and services from [redacted] to customers in Latin America."⁵ It further states that [redacted] "decided to empower the processes of sales and customer service in USA and [Latin America] using [the petitioner], but keeping development costs in [redacted]. The benefits of this strategy are projected to include "[facilitating] trips of our personnel to [Latin America] to attend new implementations as well as support, training and service contracts" and "[m]oving our operations from [redacted] to [the petitioner] in the next 2 years." The document lists the services of the petitioning company as including "[t]echnical services in local networks, maintenance of enterprise hardware platforms and Services of Scanning and storing images on a large scale." It further states: "Our initial strategy is to invest in an operational headquarters to enable us contact with our existing customers in [Latin America] to continue meeting their requirements, make new business proposals and conduct on-site counseling [*sic*]."

The above document then goes on to state the petitioner's need for a Network Systems Administrator, describing the position's "normal duties" as including: "Local or remote implementation of our software products either in the client platform or through the cloud service;" "Diagnosis and maintenance of LANs, authentication services profiles, backup and restore databases and documents either locally or remotely;" and "Maintain support and maintenance

⁵ This document briefly explains [redacted] reasons for forming the U.S. petitioning company as the Venezuelan government's restrictions on foreign currency exchanges imposed in 2010, "serious problems to travel outside Venezuela" since 2013, and the Venezuelan economic crises in the last three years. However, we note that the petitioner was formed in 2006, not in the past three or four years as suggested by the petitioner's statements above.

contracts with current [Latin American] customers of 2014 onwards and the implementation of our new versions of our products on-site."

In a section entitled "Cost Analysis," the business plan lists [redacted] costs for: development and maintenance; quality control; customer support; software tools; and office services. It then lists the petitioner's costs as follows: Headquarter (Miami-FL-USA): \$2,400.00; FSCC Payroll Cost (System Network Administrator): \$53,219.00; and Administrative Costs: \$3,600.00. The document contains the following note at the end of the document: "We must keep low-costs in development to support [the petitioner's] sell strategies in [Latin America] and USA and that's why [redacted] remains in Venezuela [sic]."

Finally, the petitioner submits, *inter alia*:

- Quotations between the petitioner and third-party clients for [redacted] and [redacted] dated February 28, 2014, January 14, 2014, November 28, 2013, and December 12, 2013, all bearing the following notation: "The expenses for travel expenses, transportation, lodging and meals incurred by the staff of [the petitioner] consultancy work will be covered by the customer by prior arrangement [sic];"
- [redacted] User Guide created by [redacted] accompanied by an English translation on the petitioner's letterhead; and
- [redacted] User Guide created by [redacted] accompanied by an English translation on the petitioner's letterhead.

II. STANDARD OF PROOF

As a preliminary matter and in light of counsel's references to the requirement that U.S. Citizenship and Immigration Services (USCIS) apply the "preponderance of the evidence" standard, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In pertinent part, that decision states 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.

* * *

The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.

* * *

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.

Id.

As footnoted above, we conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that the director's determinations in this matter were correct. Upon our review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that the petitioner has not established that its claims are "more likely than not" or "probably" true. As the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads us to believe that the petitioner's claims are "more likely than not" or "probably" true.

III. SPECIALTY OCCUPATION

The primary issue to be discussed is whether the petitioner has established that the proffered position is 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. Upon review, we affirm that the evidence of record fails to establish that the proffered position is a specialty occupation.

A. The Law

To meet its burden of proof in establishing the proffered position as a specialty occupation, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [(1)] 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 requires [(2)] the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act 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), 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 rely simply upon a proffered position's title. The specific duties of the 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 beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 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.

B. Material Findings

We have reviewed the record of proceeding in its entirety, and find that the petitioner has not provided sufficient evidence to establish eligibility for the benefit sought under the applicable statutory and regulatory provisions. We will make some preliminary findings that are material to the determination of this appeal, particularly, whether the petitioner has made a *bona fide*, credible offer of employment to the beneficiary. For purposes of the H-1B adjudication, the issue of *bona fide* employment is viewed within the context of whether the petitioner has offered the beneficiary a position that is determined to be a specialty occupation. In this matter the record does not support such a finding.

When determining whether a position is a specialty occupation, we 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, 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."

For H-1B approval, the petitioner must demonstrate a legitimate need for an employee exists and to substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. It is incumbent upon the petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or the equivalent, to perform duties at a level that requires 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 period specified in the petition.

Upon review of the record of proceeding, there are numerous inconsistencies and discrepancies in the petition and supporting documents which 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 errors and discrepancies, those inconsistencies raise serious concerns about the veracity of the petitioner's assertions. In turn, these inconsistencies undermine the legitimacy of the petitioner's offer of employment to the beneficiary.

First, there are significant inconsistencies and discrepancies regarding the size, scope, and nature of the petitioner's business. As previously noted, the petitioner reported on the Form I-129 petition that it is a two-employee company, established in 2006, with a gross annual income of \$229,219 and a net annual income of \$18,109. However, there is no evidence in the record of proceeding to corroborate the petitioner's claim that it employs two individuals. To the contrary, the petitioner's 2010, 2011, and 2012 federal tax returns all reflect that the petitioner paid \$0 in compensation of officers, salaries, and wages, thus indicating that the petitioner has had no employees for at least the past three years. Likewise, the petitioner's document entitled "Strategy for products and services, human resources justification, marketing and analysis cost" lists the petitioner's payroll costs as simply the salary of the proffered position, \$53,219.00. This document not only indicates that the petitioner has no employees, but it also indicates that the petitioner does not intend to hire any employees other than the beneficiary.

It is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position.⁶ 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

⁶ It is noted that counsel references *Young China Daily v Chappell*, 742 F. Supp. 552 (N.D. Cal. 1989), for the proposition that a determination of "specialty occupation" depends on the nature of the specific work of a proffered position and not irrelevant factors such as size of the company. We concur that USCIS should not limit its review to the size of a petitioner and must consider the actual responsibilities of the proffered position. However, as will be discussed, the record of proceeding lacks sufficient credible evidence to demonstrate what duties the beneficiary will actually perform and what role the beneficiary will occupy within the petitioner's organization.

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, we review 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 that may be obtained only through a baccalaureate degree or higher in or its equivalent in a specific specialty. Additionally, when a petitioner employs relatively few people, it may be necessary for the petitioner to establish how the beneficiary will be relieved from performing non-qualifying duties.

Considering the petitioner's lack of staffing, it is necessary to question how the petitioner will employ the beneficiary in a specialty occupation and relieve him from performing non-qualifying duties. In this respect, it is important to note the wide range of services purportedly offered by the petitioner, including technical support of the company's products, marketing, and sales.⁷ Here, we also note that, on the Form I-129, the petitioner provided a NAICS Code of 423430, "Computer and Computer Peripheral Equipment and Software Merchant Wholesalers," thus representing that the petitioner is "primarily engaged in the merchant wholesale distribution of computers, computer peripheral equipment, loaded computer boards, and/or computer software."⁸ It is thus necessary to question how the U.S. petitioner will realistically provide such a range of services with no current employees, and how the beneficiary will be relieved from performing non-qualifying duties. Alternatively, it is necessary to question the actual scope and nature of the petitioner's services. In either case, we must question the validity of the petitioner's claims regarding the beneficiary's actual, primary duties.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence; any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

In addition, the petitioner's most recent federal tax return reflects that the petitioner earned \$4,161 in gross and net income in 2012. The petitioner's tax returns reflect a total income of \$18,109 in 2011, and \$22,274 in 2010. To prove its job offer is *bona fide*, the petitioner must demonstrate that it is

⁷ For instance, in support of the initial petition, the petitioner referenced the petitioner's current position and indicated it would promote him to the same position in Miami, Florida "in order to market [its] Software's [redacted] in the United States." In response to the RFE, the petitioner (through counsel) asserted that the petitioner provides support of the products, receives inquiries, makes improvements or customizes products per customer requests, and remotely installs and provides training. In the petitioner's business plan, the petitioner states that the petitioning U.S. company was created for the purpose of marketing and sales of the products developed by [redacted]

⁸ U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "423430, "Computer and Computer Peripheral Equipment and Software Merchant Wholesalers," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited August 21, 2014).

capable of employing the beneficiary in the position claimed at the time of the petition is filed. We must question, absent evidence demonstrating the petitioner's realistic ability to comply with the law and pay at least the prevailing wage to the instant beneficiary, whether the petitioner has made a *bona fide* offer of employment to the beneficiary.

There are also significant inconsistencies and deficiencies with the petitioner's descriptions of the proposed duties. For example, the record of proceeding lacks sufficient information and documentary evidence of the specifics of the proposed in-house employment. That is, the record of proceeding lacks sufficient, credible information and documentary evidence that [REDACTED] are proprietary products of the petitioner, and even if so, that the petitioner will be providing in-house support services for [REDACTED]. The petitioner did not provide any evidence of patents for [REDACTED] which it claims are its proprietary systems.⁹ Further, while the petitioner provided its business plan (i.e., the document entitled "Strategy for products and services, human resources justification, marketing and analysis cost"), this document is not credible based on the discrepancies previously discussed.¹⁰ The record is also devoid of credible licensing or service agreements between the petitioner and third-party clients for [REDACTED] the petitioner submitted a single software licensing agreement between the petitioner and a third-party client which is not signed by the client.

While we acknowledge the petitioner's submission of internally generated invoices, quotations, and product user guides, these documents have little probative value. With respect to the invoices, the numbers are out of sequence. For example, invoice number 1 is dated July 16, 2011, while invoice numbers 30 and 31 are dated October 22, 2008. Also, although the dates of the invoices range from October 22, 2008 through September 19, 2013, they uniformly list the petitioner's business address as [REDACTED] Miami, Florida. However, the petitioner's current address is, and has been since at least February 1, 2013, [REDACTED], Miami, Florida (according to the Form I-129 and the petitioner's lease). The petitioner's prior address from 2011 to 2012 was [REDACTED] Florida address (according to the petitioner's federal tax returns). With respect to the petitioner's quotations, these documents were all created well after the instant petition was filed, and they are not accompanied by evidence of actual purchase contracts or similar documentation. Notably, these quotations state that the customer will pay for travel expenses incurred by the petitioner for consultancy work, undermining the petitioner's assertion that the beneficiary will work exclusively on-site. With respect to the product user guides, these guides

⁹ Regarding [REDACTED] we note that the petitioner submitted documentation generally describing [REDACTED] which was printed on November 26, 2013 from [REDACTED]. However, w[REDACTED] is not a known website of the petitioner or [REDACTED]. Notably, this documentation contains no specific reference to the petitioner or [REDACTED] nor any other information, such as the same contact information, to suggest that [REDACTED] is a product of the petitioner or [REDACTED].

¹⁰ As discussed above, the petitioner's business plan indicates that the petitioner will engage in technical support, marketing, and sales, but it is unclear how these functions will be fulfilled considering the petitioner's lack of staffing. It also indicates that the beneficiary will perform off-site services, while the petitioner maintains that the beneficiary will not work off-site.

identify [REDACTED] as the entity that developed and owns the systems; the petitioner merely provided the English translations for the user guides.¹¹ For these reasons, we do not find the petitioner's invoices, quotations, and user guides to be credible evidence demonstrating its in-house product(s) and any employment associated with the in-house product(s).

Accordingly, there is no probative evidence that [REDACTED] are proprietary products of the petitioner, and that the petitioner will be providing support services for these systems. Accordingly, we question the actual scope and nature of the petitioner's services, as well as the validity of the petitioner's claims and the beneficiary's claimed duties.

Upon review of the record, we find insufficient probative documentation to substantiate the petitioner's claims regarding its business activities and the actual work that the beneficiary will perform to establish eligibility for this benefit. That is, there is a lack of substantive, documentary evidence that the petitioner has made a *bona fide* offer of employment to the beneficiary. The record of proceeding lacks substantive, documentary evidence that the petitioner is a business that is able to provide H-1B caliber work for the beneficiary in the manner and period of employment requested in the petition.

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).

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

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

¹¹ While the petitioner initially submitted a [REDACTED] User Guide purportedly developed by the petitioner in July 2012, on appeal the petitioner submits a [REDACTED] User's Manual that is virtually identical in content. However, the User's Manual clearly identifies [REDACTED] as having developed the document and as being the current owner of the system. In any case, the [REDACTED] User Guide could not have been developed by the petitioner in July 2012 as initially indicated, as the petitioner had no employees in the United States for at least the past three years.

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).

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 employ the beneficiary at the level required for the H-1B petition to be granted for the entire period requested. In other words, the petitioner failed to establish that the petition was filed on the basis of definite and non-speculative H-1B employment for the entire period specified in the Form I-129. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). For this reason, the petition may not be approved.

C. Position Description

Next, we find that the petitioner described the proposed duties in terms of generalized and generic functions that fail to convey sufficient substantive information to establish the relative complexity, uniqueness and/or specialization of the proffered position or its duties.

For example, in support of the initial petition, the petitioner listed duties such as: "[o]rganize, install, and support customer systems;" "[i]nstall and implement [redacted]" "[d]ocument management under quality norms, manufacturing good practices;" "[a]ctive partaking in the functional analysis for performance improvement and incorporation of new technological aids and their integration into [redacted] systems;" and "[a]dvisory of [redacted] websites, as well as other websites developed for its clients." The petitioner does not explain the beneficiary's specific roles (e.g., what is meant by "support [of] customer systems," "document management," and "[a]ctive partaking"), and how such roles will be performed within the scope of the petitioner's business operations and the proffered position.

Similarly, on appeal the petitioner lists duties such as "[a]dministration and configuration of the main functions of a computer platform," "upkeep, configuration and reliable operation of computer systems," and "provide technical support." Again, the petitioner does not explain with any specificity the beneficiary's exact role (e.g., what is meant by "administration . . . of the main functions," "reliable operation of computer systems" and "provid[ing] technical support"), and how such role will be performed within the scope of the petitioner's business operations and the proffered position. As so generally described, the descriptions do not illuminate the substantive application of knowledge involved to perform the duties or that any particular educational attainment is required to perform the duties.

Furthermore, the petitioner reports that the beneficiary will "supervise project personnel" appointed by [REDACTED] or the client. However, the petitioner has not explained how the beneficiary would exercise supervisory duties over employees in Venezuela or at third-party clients. Again, we note that the petitioning U.S. entity has no documented employees. The petitioner has not explained how this particular job duty relates to the petitioner's business operations and the proffered position.¹²

On appeal, the petitioner asserts that the proffered position satisfies the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) because "the nature of the specific duties of the position are so 'specialized and complex' that it requires the attainment of a baccalaureate degree or its equivalent. Specifically, counsel emphasizes that the petitioner works with proprietary software that requires "specific knowledge of the proprietary functioning of the software in addition to in-depth Information Technology (IT) analysis concepts crucial to the implementation and maintenance of the product within various web platforms." Counsel further emphasizes the complex nature of the duties, stating that a candidate must have "a high level of specialized knowledge related to the functioning of [REDACTED] and how they interact with various web browsers."

However, counsel's assertions are not persuasive. Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. While counsel describes the position as requiring "specific knowledge of the proprietary functioning of the software in addition to in-depth Information Technology (IT) analysis concepts," counsel does not explain in any factual detail what specific knowledge and what in-depth analysis concepts are required to perform the proffered position.¹³ Going on record without supporting documentary

¹² Despite the proffered position's claimed supervisory duties, the petitioner has designated the proffered position as a Level I position on the submitted Labor Condition Application (LCA), indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. See U.S. Dep'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. It is not credible that the position is one with supervisory duties yet only requires an employee with a basic understanding of the occupation. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92

¹³ Counsel asserts on appeal that the proffered position qualifies as a specialty occupation on the basis that its duties are so specialized and complex. However, we again note that the petitioner has designated the proffered position as a Level I position on the submitted Labor Condition Application (LCA), indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. See U.S. Dep'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. Therefore, it is not credible that the position is one with specialized and complex duties, as such a higher-level position would be classified as a Level IV position, requiring a significantly higher prevailing wage. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any

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)). Further, counsel's citations to unpublished AAO decisions are unpersuasive and unsupported by evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision.¹⁴

Moreover, as discussed earlier in this decision, the record of proceeding does not contain credible evidence establishing that [REDACTED] are the petitioner's proprietary products, and that the petitioner will be providing services for these products. Even if, assuming *arguendo*, that they are, the petitioner lists numerous other duties for the proffered position that do not specifically involve [REDACTED]. In fact, the majority of the proffered duties listed on appeal do not specifically involve [REDACTED], and [REDACTED]. Neither counsel nor the petitioner has made any assertions regarding the nature of the proffered duties not involving [REDACTED].

In short, the overall responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's business operations.

Such generalized information does not in itself establish a necessary 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. Therefore, 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 by the petitioner, we find that 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 three-year 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 demands of the proffered position.

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

attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

¹⁴ While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this additional reason.

IV. CONCLUSION AND ORDER

As set forth above, the evidence of record does not demonstrate that the petition was filed on the basis of definite and non-speculative employment for the entire period specified in the Form I-129. The evidence also does not establish that the proffered position qualifies for classification as a specialty occupation. Accordingly, the director's decision will not be disturbed.

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

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