



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **MAY 12 2015**

PETITION RECEIPT #: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

NO REPRESENTATIVE OF RECORD

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

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

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as an "Information Technology" business established in [REDACTED] with "100+" employees. In order to employ the beneficiary in what it designates as a full-time "Computer User Program Analyst/Support" 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 on the ground that the evidence of record did not establish that there is specialty occupation work available for the beneficiary, and therefore, that the proffered position qualifies for classification as a specialty occupation.

The record of proceeding contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the Director's notice of intent to deny (NOID); (3) the petitioner's response to the NOID; (4) the Director's notice of decision; and (5) the petitioner's Notice of Appeal or Motion (Form I-290B) and supporting documentation. We have reviewed the record in its entirety before issuing our decision.

Upon review of the entire record of proceeding, we find that the evidence of record does not overcome the Director's ground for denying this petition. Accordingly, the appeal will be dismissed.

I. FACTUAL AND PROCEDURAL BACKGROUND

As noted above, the petitioner indicated on the Form I-129 that it is an information technology business established with "100+" employees. On the Form I-129, the petitioner listed its address as [REDACTED], Georgia. The petitioner indicated that the beneficiary will be employed as a full-time Computer User Program Analyst/Support at the address of [REDACTED] Georgia, and that he will not work off-site. The petitioner stated that the dates of intended employment are from October 1, 2014 to September 16, 2017.

The Labor Condition Application (LCA) submitted to support the petition states that proffered position is a Computer User Program Analyst/Support, and that it corresponds to Standard Occupational Classification (SOC) code and title "15-1151, Computer User Support Specialists," from the Occupational Information Network (O*NET). The LCA states that the proffered position is a Level II position.

In a letter of support dated March 30, 2014, the petitioner identified itself as "[REDACTED]" hereinafter [REDACTED] [which] is an information technology wing of [REDACTED]. The petitioner stated that "[REDACTED], another entity under the [REDACTED] umbrella is our Information Technology Management wing primarily based in the metro, [REDACTED] Georgia area, [sic] through this platform we provide competitive services for designing IT products, consulting,

technology and outsourcing.¹ The petitioner explained that [REDACTED] has many in-house projects and its own products, which are maintained and managed by its employees." The petitioner further explained that "[REDACTED] GA is [the petitioner's] development and engineering center" and that "[REDACTED] has multiple office locations," including the above. With respect to the duties of the proffered position, the petitioner stated:

We need the services of a Computer User Program Analyst/Support who will be responsible for administration of Application servers Read technical manuals, confer with users, or conduct computer diagnostics to investigate and resolve problems or to provide technical assistance and support. Install and perform minor repairs to hardware, software, or peripheral equipment, following design or installation specifications. Maintain records of daily data communication transactions, problems and remedial actions taken, or installation activities. Enter commands and observe system functioning to verify correct operations and detect errors. Identify the causes of networking problems, using diagnostic testing software and equipment. Install new hardware or software systems or components, ensuring integration with existing network systems.

He will also develop, configure, deploy, test, load-balance and programmatically automate the maintenance of J2EE based distributed systems for our in-house environments like Dev, SIT, UAT and Prod. He will be responsible for computer application programming and computer application developing the automation architecture in a scalable way to support our suite of web portals/services in an upward-scalable way. The goal of this ongoing position is to constantly develop computer application programs that facilitate controlled automation and cross-technology integration for scaling our applications to support our increasing users/customers; by using J2EE based technologies like Oracle Weblogic, JBoss, GlassFish, Aqualogic Service Bus, Websphere and Java Messaging Service (JMS).

He will be responsible for customizing and scripting the operating system server environment for UNIX based OS like Red Hat Linux 5/6, Sun Solaris 9/10, HP/UX and Windows based environments like Windows 2003/2008. Each of our servers contain heavily customized operating system start-up scripts and non-vendor supported kernel modifications. So [the beneficiary] must own these scripts, maintain them and re-code/re-program them as needed to support our in-house new application integration projects or migration projects.

¹ It is unclear who the petitioner is in the instant matter, i.e., whether it is [REDACTED] as stated on the Form I-129, or [REDACTED] as stated in the petitioner's support letter, or whether they are one and the same corporate entity. The petitioner stated in its support letter that [REDACTED] is both a "wing" and "another entity." Nevertheless, for the sake of simplicity, we will assume that [REDACTED] and [REDACTED] are the same corporate entity, and we will refer to them collectively as "the petitioner."

The petitioner asserted that the beneficiary will be working on one or more of its internal projects.² To "demonstrate what the beneficiary's internal project will be focused on and how his continued work will bring in revenue for the company," the petitioner referred to a document entitled "FRS – Functional Requirement Specification," which the petitioner claims "indicat[es] the duties and the internal projects the beneficiary will be assigned to." The petitioner asserted that "[t]he FRS proves that the petitioner has its own internal projects and many of its employees are assigned to these internal projects." The petitioner asserted that the proffered position requires "a person who has attained a degree in the field of Computer Engineering, or Computer Science or related field."

The petitioner submitted, *inter alia*, its quarterly tax and wage reports for the fourth quarter of 2013 for the states of Georgia (27 employees), New York (5 employees), California (2 employees), Colorado (1 employee), South Carolina (3 employees), Texas (1 employee), and Massachusetts (2 employees). These reports show that the petitioner has a total of 41 employees.

The petitioner submitted the U.S. Department of Labor (DOL) *Occupational Outlook Handbook* (*Handbook*) chapter on "Computer Support Specialists."

The petitioner submitted its "Employment Employee Agreement" with the beneficiary ("Employee"). In pertinent part, the employment agreement describes the beneficiary's duties as follows:

Employees will be responsible for administration of Application servers Responsibilities will include maintaining the existing environments and creating new ones as need arises, troubleshooting if server is down, deploying new applications onto the servers to make them available to the public and troubleshooting if there are deployment issues of any kind.

Besides the above full time responsibilities, Employee will be responsible for working with infrastructure engineering team, new application development components and on-going content development on our portals / suite of web services. These requirements are on-going throughout the years as the engineers are required on multiple in-house development efforts.

The petitioner submitted a document entitled "[REDACTED]" dated January 2014. This document provides a broad, "top level" overview of the services provided by the petitioner, as follows: (1) Application Development services, such as creating online sites for clients; (2) Application Design services, focused on "setting apart the client's current or future website from the rest"; (3) E-Commerce services, such as

² It is not clear whether the beneficiary will be assigned to one or more projects. The petitioner has stated both that the beneficiary will work on an "internal project" (in the singular) and "internal projects" (in the plural).

advising clients on best industry practices and providing secure solutions; (4) Internet Marketing services, including Search Engine Optimization; (5) Corporate Identity services to assist in corporate branding; (6) Resellers (Referral Program), which is a partnership program between the petitioner and businesses/individuals to advertise the petitioner's services; and (7) Certification services to provide computer-related training programs. This document further discusses the different categories of employees involved in providing these services, as follows: (1) Application Development Team, responsible for "taking the end user client's needs and developing or designing a solution for them"; (2) Coordinator, responsible for supervising the on-going projects; (3) Trainer, responsible for providing training for clients requesting a certification; and (4) Support Team, responsible for helping the Client with issues. The document identified the "Computer User Program Analyst" as a "non development position" within the Application Development Team.

The petitioner submitted a document entitled "[REDACTED]" dated February 15, 2014. This document describes the [REDACTED] as "an on-going in-house project being developed by [REDACTED] – at our in-house development office in [REDACTED] Georgia. This enterprise web based application would provide medium to large-scale data ingestion and archival services to major industries in the service sector." The document provides a broad overview of the [REDACTED] project and the team structure dedicated to this "on-going project," which includes a Development Team, Release Engineering Team, Operations Engineering Team, and Infrastructure Engineering Team. This document does not specifically address the role of the proffered position or the beneficiary with respect to the [REDACTED] project.

The petitioner submitted a document entitled "[REDACTED]" dated January 15, 2014, which purports to "show the marketing analysis of four of [the petitioner's] ongoing application portal projects," namely: (1) [REDACTED] an online application portal through which people can apply for the petitioner's various training and employment programs; (2) [REDACTED] for which no description was provided; (3) [REDACTED] which includes several coupon and deal applications; and (4) [REDACTED] a "place to find digital print services." This document refers to the Computer User Program Analyst/Support position as part of an unidentified "team." It does not further describe the role of the proffered position or the beneficiary with respect to these four projects.

The petitioner submitted its organizational chart and company brochures.

The Director issued a NOID requesting the petitioner to submit, *inter alia*, evidence that the petitioner has specialty occupation work available for the beneficiary.

In response to the NOID, the petitioner submitted a letter dated July 17, 2014 explaining its services of developing, maintaining, and supporting in-house applications, which include "online coupon sites, social networking and online deal web portals." The petitioner emphasized that the beneficiary "will be assigned to Petitioner's In-House projects," although the petitioner did not specify any particular projects. The petitioner elaborated:

Petitioner product is more than just a website. Petitioner's services go beyond just uploading a page accessible to users on the internet. Petitioner's team consists of Computer User Support Analysts like Beneficiary who provide their knowledge and expertise in developing its web portals, maintaining them around the clock, continuously updating and modifying them to ensure their sustainability and security. See **Exhibit 4: Web Applications Operations Diagram**. In fact, it is also the responsibility of these Computer User Support Analysts to check application and server vulnerability by consistently scanning these applications to make sure users [sic] have secure usage experiences. . . .

In addition to providing services to advertisers/vendors, Petitioner also develops and maintains in-house products such as an internal VPN client, a customized ticketing system to track and communicate the status of projects, shared drives and a web portal where Petitioner's cultural exchange program participants apply and monitor their training and internship program. Finally, please note that Petitioner's projects run on Petitioner's internal servers, on a very complex model; thus requiring engineers and the technical expertise of specialists to build and maintain an *infrastructure* on the other hand, where an application can run, is where Beneficiary's role as a Computer User Program Analyst/Support is necessary.

In a footnote, the petitioner stated:

Since late 2012, the SOC code 15-1150 was redefined and divided into two separate codes: 15-1151 (Computer User Support Specialists) and 15-1152 (Computer Network Support Specialists); Petitioner is using the most up to date code with the understanding that it encompasses prior utilized SOC code of 15-1150. Due to the nature of the Petitioner's complex duties and speciality of job description Petitioner chose this category in OOH, as it more closely matched Petitioner's job description.

In response to the NOID, the petitioner submitted, *inter alia*, the *Handbook* chapter on "Computer System Analysts."

The petitioner also submitted a document entitled "[REDACTED]" dated April 2014. Under "Scope," this document states that the petitioner "is looking to have its own open-source communication and network tools, as well as VPN, Email, and Change Management Control servers." It further states that "[t]he new network architecture consists of three main projects: the master network, the mail server, and the ticketing system." This document does not specifically address the role of the proffered position or the beneficiary with respect to these projects.

The petitioner submitted a chart entitled "[REDACTED] Management – Web Applications Operations Diagram." In part, this chart depicts "Computer User Program Analyst/Systems Admins" positions as providing the following services: (1) "Support and maintenance training" during the "Final Preparation" portion of the "Development" phase; and (2) "Handle and resolve client requests" and

"Initiate bug fix request" under the "Support and Continuous Improvement" portions of the "Operations" phase. With respect to the duty of "Initiate bug fix request," the chart elaborates that this duty involves "higher complexity" processes including programming and internal testing.

The petitioner submitted an "Evaluation of Internal Project: Specialty Occupation Requirements for Information Technology Positions" from Dr. [REDACTED] a Professor of Hospitality Management at the School of Hotel Administration at [REDACTED].

The petitioner submitted an "Expert Opinion Evaluation" from Dr. [REDACTED] Professor of Computer Science, [REDACTED].

The petitioner submitted its quarterly tax and wage reports for the first quarter of 2014 for the states of Georgia (36 employees), New York (4 employees), California (2 employees), Colorado (1 employee), Illinois (1 employee), South Carolina (3 employees), Texas (2 employees), and Massachusetts (2 employees). These reports show that the petitioner has a total of 51 employees.

The petitioner submitted vacancy announcements posted by the petitioner as well as other companies.

The Director denied the petition on the ground that the petitioner did not establish that there is specialty occupation work available for the beneficiary, and therefore, that the proffered position qualifies for classification as a specialty occupation. In particular, the Director found that the petitioner had not demonstrated that it has an internal "online deals and coupons" project to which the beneficiary will be assigned.

The petitioner filed the instant appeal. On appeal, the petitioner contends that the Director misunderstood the nature of its products and services. Petitioner explains that its services consist of designing and developing web portals and applications, and its products are these web portals and applications which provide online access to various services including "online deals and coupons." The petitioner states that it "owns the technology behind the web portals and its Computer User Program Analyst/Supports, like Beneficiary, provide the technical expertise to run them." Specifically, the petitioner states that "[i]t is the role of Petitioner's Computer User Program Analysts to develop, design, run, and maintain these websites as these are the *products* for which Petitioner generates and maintains in order to earn its revenue." The petitioner emphasizes that it has several "sophisticated internal work projects" which the petitioner's employees will develop, monitor, and maintain on an "infinite" and "ongoing" basis. The petitioner further highlights the complexity of its internal servers and architecture, again stating that "maintaining and building an *infrastructure* . . . where an application is run, is where Beneficiary's role as a Computer User Program Analyst/Support is necessary." The petitioner states that "in order to keep running these portals, Petitioner requires a team of IT specialists including Computer User Program Analyst/Supports, like Beneficiary, to be responsible for configuration, support, deployment and tuning of the application." The petitioner concludes that it has provided "evidence of internal projects that incorporate Beneficiary's duties and responsibilities, and that provided USCIS with an indication of where Beneficiary's role is necessary for these internal projects directed for in-house

use." In support of the appeal, the petitioner resubmits copies of evidence already contained in the record.

II. THE LAW

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.

III. PRELIMINARY FINDINGS

Based upon a complete review of the record of proceeding, we will make some preliminary findings that are material to the determination of the merits of this appeal.

We will first address the Director's concern that the petitioner has not established that it has specialty occupation work available for the beneficiary. Although not articulated by the Director, this concern relates to the issue of whether the petitioner has made a bona fide, credible offer of employment to the beneficiary. This consideration is necessarily preliminary to, and logically even more foundational and fundamental than, the issue of whether a proffered position qualifies as a specialty occupation. In this matter, the evidence of record does not support a finding that the petitioner has made a bona fide, credible offer of employment to the beneficiary.

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.

More specifically, the petitioner submitted an LCA in support of the instant petition that designated the proffered position under the SOC (ONET/OES) code and category "15-1151, Computer User Support Specialists." The petitioner stated in the LCA that the wage level for the proffered position was a Level II position with a prevailing wage of \$38,917 per year. The LCA was certified on March 24, 2014 and signed by the petitioner on March 29, 2014.

According to O*NET, Computer User Support Specialists "[p]rovide technical assistance to computer users," "[a]nswer questions or resolve computer problems for clients in person, or via telephone or electronically," and "[m]ay provide assistance concerning the use of computer hardware and software, including printing, installation, word processing, electronic mail, and operating systems." *Id.* at <http://www.onetonline.org/link/summary/15-1151.00> (last visited April 28, 2015). Specifically, O*Net lists the following tasks for Computer User Support Specialists:

- Oversee the daily performance of computer systems
- Answer user inquiries regarding computer software or hardware operation to resolve problems.
- Enter commands and observe system functioning to verify correct operations and detect errors.
- Set up equipment for employee use, performing or ensuring proper installation of cables, operating systems, or appropriate software.

- Install and perform minor repairs to hardware, software, or peripheral equipment, following design or installation specifications.
- Maintain records of daily data communication transactions, problems and remedial actions taken, or installation activities.
- Read technical manuals, confer with users, or conduct computer diagnostics to investigate and resolve problems or to provide technical assistance and support.
- Refer major hardware or software problems or defective products to vendors or technicians for service.
- Develop training materials and procedures, or train users in the proper use of hardware or software.
- Confer with staff, users, and management to establish requirements for new systems or modifications.

Id.

Similarly, the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*) sub-chapter on "What Computer Support Specialists Do," which the petitioner submitted a copy of with the petition, describes the duties of Computer Support Specialists as follows:³

Computer user support specialists typically do the following:

- Pay attention to customers when they describe their computer problems
- Ask customers questions to properly diagnose the problem
- Walk customers through the recommended problem-solving steps
- Set up or repair computer equipment and related devices
- Train users to work with new computer hardware or software, such as printers, word-processing software, and email
- Assist users in installing software
- Provide others in the organization with information about what gives customers the most trouble and about other concerns customers have

Computer user support specialists, also called help-desk technicians, usually provide technical help to non-IT computer users. They respond to phone and email requests for help. Sometimes they make site visits so that they can solve a problem in person.

Help-desk technicians may solve a range of problems that vary with the industry and the particular firm. Some technicians work for large software companies or for

³ We recognize the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. All our references to the *Handbook* are to the 2014 – 2015 edition available online.

support service firms and must give instructions to business customers on how to use complex programs. Sometimes they work with other technicians to resolve a problem.

Others work in call centers, answering simpler questions from consumers. Some technicians work for organizations and help non-IT workers with their computer problems.

Id. at <http://www.bls.gov/ooh/computer-and-information-technology/computer-support-specialists.htm#tab-2> (last visited April 28, 2015).

In the instant matter, some of the duties the petitioner has described for the proffered position are consistent with, and at times identical to, the duties of Computer User Support Specialists as described in O*NET and the *Handbook*.⁴ However, many of the other duties of the proffered position fall outside of the scope of duties for Computer User Support Specialists. For example, in the petitioner's support letter dated March 30, 2014, the petitioner stated that the beneficiary will "be responsible for computer application programming and computer application developing." The petitioner even asserted that "[t]he goal of [the proffered] position is to constantly develop computer application programs." The petitioner's Employment Employee Agreement with the beneficiary specifically states that he is required for "multiple in-house development efforts" and will be responsible for "new application development components and on-going content development." On appeal, the petitioner highlights the proffered position's duties of developing and designing the petitioner's websites. Neither O*NET nor the *Handbook* lists any duties related to application development, programming, or website design for Computer User Support Specialists.

Another aspect of the proffered position which the petitioner repeatedly emphasizes is the beneficiary's role with respect to the petitioner's internal servers and architecture. Specifically, the petitioner stated in its May 30, 2014 letter that the beneficiary will be "responsible for administration of Application servers." The petitioner also asserted that he "will be responsible for customizing and scripting the operating system server environment," which further includes re-coding and re-programming duties. In response to the NOID and on appeal, the petitioner highlighted the beneficiary's "necessary" role in building, maintaining, and continually improving the petitioner's "*infrastructure*." Neither O*NET nor the *Handbook* lists any duties related to the

⁴ Specifically, the following proffered duties are identical to the duties listed in O*NET: (1) Read technical manuals, confer with users, or conduct computer diagnostics to investigate and resolve problems or to provide technical assistance and support; (2) Install and perform minor repairs to hardware, software, or peripheral equipment, following design or installation specifications; (3) Maintain records of daily data communication transactions, problems and remedial actions taken, or installation activities; and (4) Enter commands and observe system functioning to verify correct operations and detect errors. *Id.* at <http://www.onctonline.org/link/summary/15-1151.00> (last visited April 28, 2015).

building and administration of a company's computer architecture for Computer User Support Specialists.

Upon review, some of the less complex tasks related to administration and maintenance of the petitioner's internal architecture directly correspond to the SOC (ONET/OES) code and category of "15-1152, Computer Network Support Specialists."⁵ In fact, two of the proffered duties, namely, "[i]dentify the causes of networking problems, using diagnostic testing software and equipment" and "[i]nstall new hardware or software systems or components, ensuring integration with existing network systems," are identical to the duties listed in O*NET for positions located within the Computer Network Support Specialists occupational category. *Id.* at <http://www.onetonline.org/link/summary/15-1152.00> (last visited April 28, 2015).

Notably, the petitioner expressly acknowledged that some of the proffered duties encompass the duties for the SOC (ONET/OES) code and category of "15-1152, Computer Network Support Specialists." Despite this acknowledgement, the petitioner did not submit an LCA certified for this occupational classification.⁶ Moreover, the petitioner failed to credibly explain why it did not choose the 15-1152 code (Computer Network Support Specialists) over to the selected code of 15-1151 (Computer User Support Specialists). Specifically, the petitioner claimed that it did not utilize the 15-1152 code because of its "understanding" that the selected code of 15-1151 "encompasses prior utilized SOC code of 15-1150," which included both the current 15-1151 (Computer User Support Specialists) and 15-1152 (Computer Network Support Specialists) codes. The petitioner's explanation, however, is undermined by its own acknowledgement that "[s]ince late 2012, the SOC code 15-1150 was redefined and divided into two separate codes: 15-1151 (Computer User Support

⁵ O*NET describes the general duties of Computer Network Support Specialists as to "[a]nalyze, test, troubleshoot, and evaluate existing network systems" and "[p]erform network maintenance to ensure networks operate correctly with minimal interruption." *Id.* at <http://www.onetonline.org/link/summary/15-1152.00> (last visited April 28, 2015).

⁶ Where a petitioner seeks to employ a beneficiary in two (or more) distinct occupations, the petitioner should file separate petitions, requesting concurrent, part-time employment for each occupation. While it is not the case here, if a petitioner does not file two separate petitions and if only one aspect of a combined position qualifies as a specialty occupation, USCIS would be required to deny the entire petition as the pertinent regulations do not permit the partial approval of only a portion of a proffered position and/or the limiting of the approval of a petition to perform only certain duties. *See generally* 8 C.F.R. § 214.2(h). Furthermore, and as is the case here, the petitioner would need to ensure that it separately meets all requirements relevant to each occupation and the payment of wages commensurate with the higher paying occupation. *See generally* 8 C.F.R. § 214.2(h); 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. Thus, filing separate petitions would help ensure that the petitioner submits the requisite evidence pertinent to each occupation and would help eliminate confusion with regard to the proper classification of the position being offered.

Specialists) and 15-1152 (Computer Network Support Specialists)." As noted above, the LCA was certified on March 24, 2014 and signed by the petitioner on March 29, 2014. Thus, the petitioner did not "us[e] the most up to date code" as claimed. The petitioner's acknowledgment that the proffered duties encompass the duties for the SOC (ONET/OES) code and category of "15-1152, Computer Network Support Specialists," combined with its failure to select this occupational code classification, create further confusion with regards to the proper classification of the proffered position.

With respect to the LCA, DOL provides clear guidance for selecting the most relevant O*NET occupational code classification.⁷ The "Prevailing Wage Determination Policy Guidance" states the following:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification If the employer's job opportunity has worker requirements described in a combination of O*NET occupations, the SWA should default directly to the relevant O*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the SWA shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

Here, the petitioner provided a Level II wage for "Computer User Support Specialists" which is \$38,917 per year and indicated that it would pay the beneficiary \$43,500 per year. In contrast, the prevailing wage for a Level II Computer Network Support Specialist position is \$51,688 per year. Thus, the petitioner should have defaulted directly to the SOC code and category of "15-1152, Computer Network Support Specialists" or another appropriate code which represents the highest paying occupation. The significantly higher prevailing wage for Computer Network Support Specialists undermines the petitioner's assertion that it chose the 15-1151 code (Computer User Support Specialists) "[d]ue to the nature of the Petitioner's complex duties and specialty of job description."

Notwithstanding the above, the more complex tasks of the proffered position involving *building* the petitioner's actual infrastructure go above and beyond the duties for Computer Network Support Specialists, which O*NET indicates are limited to analyzing, testing, troubleshooting, evaluating, and maintaining "existing network systems." *Id.* at <http://www.onetonline.org/link/summary/15-1152.00> (last visited April 28, 2015). To confuse matters more, in response to the NOID the

⁷ 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.

petitioner submitted the *Handbook* chapter for another occupational classification altogether - Computer Systems Analysts - which directly corresponds to SOC (ONET/OES) code and category of "15-1121.00 - Computer Systems Analysts." Overall, the record contains significant, unresolved discrepancies regarding the proper classification of the proffered position. These discrepancies prevent us from comprehending the substantive nature of the proffered position and its constituent duties, and raise doubt as to the credibility of the petitioner's job offer to the beneficiary.

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 to the above discrepancies, the petitioner has not sufficiently identified and documented which internal project or projects it will assign to the beneficiary. Nor has the petitioner articulated and documented in sufficient detail the beneficiary's specific duties with respect to each assigned project. For instance, the "Functional Requirements Specification for [REDACTED]" lists seven types of "services" offered by the petitioner, and the different categories of employees needed to provide these services. While this document contains a few brief references to the role of the Computer User Program Analyst as part of a multi-member "Application Development Team" or "Development Team" (assuming these are the same teams), this document does not discuss in detail the specific duties to be performed by each Computer User Program Analyst.⁸ Likewise, the "Market & Cost Analysis Report" provides broad overviews of the petitioner's projects and lists the Computer User Program Analyst/Support as part of an unidentified "team" involved in these projects, but it does not discuss the actual duties of the Computer User Program Analyst/Support. The other two "Functional Requirements Specification" documents do not specifically mention the proffered position at all. None of the documents specifically mention the beneficiary.

In fact, none of the above documents contain any detailed information showing what work has actually been performed on each of the petitioner's claimed internal projects, when such work was performed, what work remains, when such work is scheduled to be performed, and by whom. The evidence of record contains only broad, generalized descriptions of the petitioner's projects and the overall resources needed for them. While the petitioner has repeatedly claimed that its internal projects are "ongoing" and "infinite," the continuous nature of these projects does not, however, overcome the lack of specific information on each project. Overall, the evidence of record is insufficient to establish what internal project(s) the beneficiary will be assigned to, what the beneficiary's specific duties will be with respect to each project, and that the petitioner has specialty

⁸ This document confusingly characterizes the Computer User Program Analyst position as a "non development position" within the "Application Development Team" that is tasked with "developing or designing" client solutions.

occupation work available for the beneficiary. Merely asserting that the beneficiary will be assigned to one or more internal projects, without more, is insufficient to establish that the petitioner has secured, definite, specialty occupation work for the beneficiary.

Here, we will briefly address the petitioner's "online deals and coupons" project. We agree with the petitioner that the Director misunderstood the petitioner's claims regarding the nature of this project. The petitioner has consistently stated that its products are the web portals through which these online coupons may be accessed, not the concept of online coupons as described by the Encyclopedia of Business. Nevertheless, we do not find this error to be significant, in that the petitioner has not articulated the specific internal project or projects it will assign to the beneficiary or the duties he will perform on each project. We agree with the Director's ultimate conclusion that the evidence is insufficient to establish that the petitioner has specialty occupation work available for the beneficiary.⁹

Finally, the record contains inconsistencies with respect to the petitioner's actual size and staffing. On the Form I-129, the petitioner states that it has "100+" employees. However, the petitioner's quarterly tax and wage reports reflect that the petitioner had 51 employees as of the first quarter of 2014, and 41 employees in the previous quarter. The petitioner's brochures state that [REDACTED] itself has "200+ Employees Nationwide." The petitioner has not submitted any explanation, corroborated by objective evidence, resolving these discrepancies. Again, 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. *Matter of Ho*, 19 I&N Dec. at 591-92.

In this matter, the inconsistent characterizations of the proffered position, the lack of clarity regarding the beneficiary's actual tasks and job responsibilities, and the lack of credible evidence corroborating the petitioner's claims regarding its in-house projects and operations, all fail to support the conclusion that the petitioner has a bona fide, credible offer of employment to the beneficiary. We conclude that the record of proceeding provides an inadequate factual basis for us to

⁹ While we agree that the Director misunderstood the nature of the petitioner's claims, we do note additional questions with respect to the petitioner's "online deals and coupons" project. Specifically, we note that the petitioner's brochures identify "[REDACTED]" and "[REDACTED]" as online portals "own[ed] and develop[ed]" through [REDACTED], which is described as a "subdivision" of [REDACTED]. The brochures specifically state that the above portals were "designed by [REDACTED] very own highly skilled and technically sound employees." However, [REDACTED] is not specifically mentioned in any of the petitioner's letters or other supporting documentation, e.g., the "Functional Requirements Specification" documents, the "Market & Cost Analysis Report," and the company's organizational chart. We also observe that the brochures quote two individuals identified as employees of [REDACTED] but that neither of these individuals is listed in the petitioner's quarterly wage and tax reports.

determine that, at the time of the petition's filing, the petitioner had secured for the beneficiary definite, non-speculative work conforming to the petition's description of the proffered position.¹⁰

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. Moreover, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has thus not established that, at the time the petition was submitted, it had secured work for the beneficiary that would entail performing the duties as described in the petition and that was reserved for the beneficiary for the duration of the period requested. For this reason, the appeal will be dismissed.

IV. SPECIALTY OCCUPATION

As discussed above, the record contains significant discrepancies and deficiencies with respect to the proper classification of the proffered position. Consequently, the evidence of record is insufficient to establish the substantive nature of the work to be performed by the beneficiary.

¹⁰ The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. *See* section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

The regulation at 8 C.F.R. § 214.2(h)(9)(i)(B) also contemplates that speculative employment is not permitted stating that a "petition may not be filed. . . earlier than 6 months before the date of **actual need** for the beneficiary's services or training. . ."

The failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines: (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

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.

Even if the proffered position were established as being that of a Computer User Support Specialist, a review of the *Handbook* does not indicate that such a position categorically qualifies as a specialty occupation. The *Handbook* does not state a normal minimum requirement of a U.S. bachelor's or higher degree in a specific specialty or its equivalent for entry into the occupation. In pertinent part, the *Handbook* states that "[e]ducation requirements for computer support specialists vary" and that "[c]omputer user support specialist jobs require some computer knowledge, but not necessarily a postsecondary degree. Applicants who have taken some computer-related classes are often qualified." *Id.* at <http://www.bls.gov/ooh/computer-and-information-technology/computer-support-specialists.htm#tab-4> (last visited April 28, 2015). We withdraw the Director's unsupported statement that "the position of computer user program analyst and/or support is traditionally considered a specialty occupation."

Finally, we will briefly address why we decline to regard the advisory opinions from Dr. [REDACTED] and Dr. [REDACTED] as probative evidence of proffered position as a specialty occupation. Neither Dr. [REDACTED] nor Dr. [REDACTED] has indicated that they were aware of and fully considered the numerous discrepancies and deficiencies with respect to the proper classification of the proffered position, as we have outlined in this decision. We consider this to be significant omissions, in that it suggests an incomplete review of the position in question and a faulty factual basis for the writers' ultimate conclusions. Furthermore, the petitioner has not explained how Dr. [REDACTED] a Professor of Hospitality Management, can be considered an expert and therefore qualified to provide an opinion of the proffered position.

We may, in our discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

V. CONCLUSION

An application or petition that fails to comply with the technical requirements of the law may be denied by this office 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 1037, *aff'd*, 345 F.3d 683; *see also BDPCS, Inc. v. Fed. Communications Comm'n*, 351 F.3d 1177, 1183 (D.C. Cir. 2003) ("When an agency offers multiple grounds for a decision, we will affirm the agency so long as any one of the grounds is valid, unless it is demonstrated that the agency would not have acted on that basis if the alternative grounds were unavailable.").

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.¹¹ 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.

¹¹ As these issues preclude approval of the petition we will not address any of the additional deficiencies we have identified on appeal.