

(b)(6)

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



U.S. Citizenship  
and Immigration  
Services



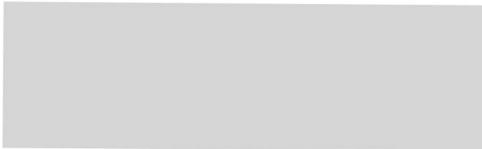
DATE: **MAY 26 2015**

PETITION RECEIPT #:

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:



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](http://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,

Ron Rosenberg  
Chief, Administrative Appeals Office

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

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a "Software Company" with 133 employees established in [REDACTED]. In order to employ the beneficiary as a "Software Engineer," the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director expressly specified two separate and independent grounds for denying the petition, namely: (1) that the evidence of record does not demonstrate the existence of an employer-employee relationship between the petitioner and the beneficiary; and (2) that the evidence of record does not establish that the proffered position qualifies for classification as a specialty occupation and that the petitioner has sufficient work for the requested period of intended employment. On appeal, the petitioner asserts that the director's basis for denial was erroneous and contends that it has satisfied all evidentiary requirements.

The record of proceeding contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B, a brief, and supporting documentation.

We find that, upon review of the entire record of proceeding, the evidence of record does not overcome the director's grounds for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

#### I. FACTUAL AND PROCEDURAL HISTORY

As indicated above, the petitioner seeks to employ the beneficiary in a position that it describes as a "Software Engineer" on a full-time basis. The Labor Condition Application (LCA) that the petitioner submitted in support of the petition was certified for use with a job prospect within the "Computer Systems Analysts" occupational classification, SOC (O\*NET/OES) Code 15-1121, and a Level II prevailing wage rate. The LCA also reflects that, as mentioned above, the petitioner assigned "Software Engineer" as the position's job title.

In an attachment to the Form I-129, the beneficiary's specific duties were provided as follows:

The duties of the position are to provide application design, development, implementation, integration, testing, and production support of systems. The Software Engineer will also be tasked with development, testing and technical support of complex application services that are developed and virtualized in either both synchronous or asynchronous formats and provides communication between different backend systems. The applications will use technologies including Java, J2EE, .NET, apache Axis, Rampart, CXF frameworks, Websphere, and related tools

to allow communication to be consumed by different application channels. The duties also include configuring application services, implementing the security policies, deployment of code, support for unit testing, system, integration testing, and performance tests. The Software Engineer will also be responsible for performance tuning devices, technical support, and documentation during all phases of the SDLC. The Software Engineer applies the theories and principles of computer science and mathematical analysis to create, test, and evaluate software applications and systems. The engineer analyzes and defines system requirements and then converts those requirements into technical specifications. The engineer prepares and maintains complete programming specifications, functional design and technical design documents. The engineer analyzes, codes, tests and debuts the programs.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 6, 2014. The director requested, *inter alia*, evidence that, if the visa petition were approved, the petitioner would have an employer-employee relationship with the beneficiary and that it would have sufficient specialty occupation work available to which it could assign the beneficiary throughout the entire period of requested employment. The director outlined some of the types of specific evidence that could be submitted.

In response, the petitioner submitted, *inter alia*, (1) a document entitled "Summary of Terms of Agreement Under Which Beneficiary Will be Employed"; (2) a document entitled "Itinerary of Service Covering H-B Employment of [the beneficiary]"; a document entitled "Task Order"; a previously submitted copy of the offer of employment letter from the petitioner's managing director to the beneficiary, dated March 21, 2014; a previously submitted lease agreement pertaining to the petitioner; and a Master Consulting Services Agreement between the petitioner and [REDACTED]

The director denied the petition on October 3, 2014, finding, as was noted above, (1) that the evidence of record does not demonstrate the existence of an employer-employee relationship between the petitioner and the beneficiary; and (2) that the evidence of record does not establish that the proffered position qualifies for classification as a specialty occupation.

On appeal, the petitioner submitted, *inter alia*, the following: a brief from the petitioner's counsel; duplicate copies of documents previously submitted; an October 23, 2014 employment verification letter for the beneficiary from [REDACTED] HR Manager, [REDACTED] an October 23, 2014 letter from the petitioner's managing director requesting H-1B approval for the petitioner and further noting that he is "willing to accept a one-year H-1B Visa Approval"; two blank time reports pertaining to the petitioner; the petitioner's blank "Performance Management Process Key Job Elements"; the petitioner's organizational chart; excerpts from the *Occupational Outlook Handbook* and O\*Net Online pertaining to "Software Developers"; job postings for the position of Software Engineer; and "copies of the degree of current and prospective employees who perform in the same or similar job position. . . also attached are copies of recent pay stubs as evidence of their employment (for those currently employed with the Petitioner"; copies of select H-

1B approval notices issued to the petitioner<sup>1</sup>; and a letter from the petitioner describing the role and responsibilities of the proffered position.

We note that the beneficiary's duties have been expanded by the petitioner on appeal. The following duties of the proffered position were provided:

- Validate business requirements, review technical designs, and develop test cases
- Participate in object oriented analysis and design using UML and RUP tools
- Develop and support multi-tier web applications using J2EE
- Configure contact center modules and applications
- Develop interfaces for enterprise wide integration of heterogeneous systems using XML and related technologies
- Utilize expertise in software engineering for solving problems and troubleshooting issues
- Design, develop, implement, integrate, test and provide production support for software applications
- Develop, test and provide technical support for complex application services
- Configure application services
- Implement security policies
- Deploy code

---

<sup>1</sup> We are not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). If any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, they were approved in error. It would be "absurd to suggest that [USCIS] or any agency must treat acknowledged errors as binding precedent." *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990).

- Support unit, system, integration and performance testing as well as assurance testing scenarios
- Analyze and define system requirements and convert requirements into technical specifications
- Prepare and maintain complete programming specifications, functional design and technical design documents
- Analyze, code, test and debug programs
- Assist in requirements gathering and documentation of application needs from business stakeholders
- Assist in application design sessions, application architecture sessions, development of enterprise applications and development of quality front end, middle tier and application integration code
- Participate in workflow and application modeling meetings
- Assist in documenting database requirements, database design sessions, database architecture sessions and development of quality back end database code

In addition to expanding the beneficiary's duties on appeal, as detailed above, counsel made the following statement on appeal:

The Beneficiary's position is that of a **Software Engineer [O\*Net 15-1132.00 – Software Developers, Applications.]**

We find that, upon review of the entire record of proceeding, the evidence of record does not overcome the director's grounds for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

## II. EVIDENTIARY STANDARD ON APPEAL

As a preliminary matter, we affirm that, in the exercise of our appellate review in this matter, as in all matters that come within its 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.*

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, we find that upon review of the entire record of proceeding, and with close attention and due regard to all of the evidence submitted in support of this petition, we find that the record does not contain sufficient relevant, probative, and credible evidence to lead us to believe that it is "more likely than not" or "probably" true that the proffered position qualifies for classification as a specialty occupation and that a valid employer-employee relationship will exist between the petitioner and the beneficiary.

### III. FINDINGS MADE BEYOND THE DIRECTOR'S DECISION

Upon review of the file, we note that there are obvious inconsistencies and inaccuracies in the information provided by the petitioner that call into question the accuracy of the petitioner's assertions overall. Moreover, we note substantive inconsistencies in the information that the petitioner has provided about the nature of the work that the petitioner claims that the beneficiary would perform. We therefore make the following findings:

#### A. The LCA does not Correspond to the Proffered Position

Upon review of the record of proceeding and beyond the decision of the director, we find that the petitioner (1) did not submit a Labor Condition Application (LCA) that corresponds to the petition;

and (2) has not established that it would pay an adequate salary for the beneficiary's work, as required under the applicable statutory and regulatory provisions. The petition cannot be approved for these reasons, and they will be considered independent and alternative bases for denial of the petition.

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. § 103.2(a)(1) in pertinent part as follows:

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions . . . and such instructions are incorporated into the regulations requiring its submission.

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from the U.S. Department of Labor (DOL) in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. §§ 214.2(h)(4)(i)(B) and 214.2(h)(4)(iii)(B)(1). The instructions that accompany the Form I-129 also specify that an H-1B petition must be filed with evidence that an LCA has been certified by DOL.

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

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

The regulation at 20 C.F.R. § 655.705(b) therefore requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary.

More specifically, with the initial Form I-129, the petitioner submitted an LCA certified for a job prospect located within the occupational category of "Computer Systems Analysts" - SOC (ONET/OES) code 15-1121.<sup>2</sup> On appeal, counsel for the petitioner maintains that the proffered

<sup>2</sup> It must be noted that the petitioner has designated the proffered position as a Level II position on the submitted Labor Condition Application (LCA), indicating that it is a position for an employee who has a good understanding of the occupation but who will only perform moderately complex tasks that require limited judgment. *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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf). Therefore, it does

position of Software Engineer falls under the occupational category of "Software Developers, Applications"- SOC (ONET/OES) code 15-1132. In support, counsel submitted a copy of the O\*NET Online Summary Report for the occupational category "Software Developers, Applications" as well as the *Occupational Outlook Handbook's* excerpt regarding Software Developers, and claimed that both excerpts are relevant in this matter.

With respect to the LCA, the DOL provides specific guidance for selecting the most relevant Occupational Information Network (O\*NET) classification code. 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 determiner] 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 determiner] shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

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](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf).

At the time of filing this petition, the prevailing wage for the occupational category "Computer Systems Analysts" – SOC (ONET/OES Code) 15-1121, at a Level II was \$62,525 per year.<sup>3</sup> Further, the prevailing wage for the occupational category "Software Developers, Applications" SOC (O\*NET/OES) Code 15-1132 at a Level II was \$76,357 per year.<sup>4</sup> If the petitioner believed that the proffered position was a combination of occupations ("[the] work of a computer systems analyst is the same as that of software developer, applications"), then according to DOL guidance the petitioner should have chosen the relevant occupational category for the highest paying occupation, in this case "Software Developers, Applications."

---

not appear that the position is one with specialized and complex duties, as such a higher-level position would be classified as a Level III or Level IV position, requiring a significantly higher prevailing wage.

<sup>3</sup> For more information regarding the prevailing wage for "Computer Systems Analysts" – SOC (ONET/OES Code) 15-1121, see <http://flcdatacenter.com/OesQuickResults.aspx?code=15-1121&area=16974&year=14&source=1> (last visited May 20, 2015).

<sup>4</sup> For more information regarding the prevailing wage for "Software Developers, Applications" SOC (ONET/OES) Code 15-1132, see <http://flcdatacenter.com/OesQuickResults.aspx?code=15-1132&area=16974&year=14&source=1> (last visited May 20, 2015).

When submitting an appeal, a petitioner cannot offer a new position to the beneficiary, materially change a position's associated job responsibilities, or alter the claimed occupational category of a position. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

Here, the petitioner has provided inconsistent information regarding the occupational category for the proffered position and, consequently, the nature of the 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 is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for entry into 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. Thus, the record of proceeding does not establish that the proffered position satisfies any of the applicable provisions. For this reason also, the petition cannot be approved.

#### B. The Nature of the Employment is Speculative

Based upon a complete review of the record of proceeding, we also find that the evidence does not establish that, at the time the petition was submitted, the petitioner 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 petition must also be denied.

On the Form I-129, the petitioner requested H-1B classification for the beneficiary for the period of October 1, 2014 to September 18, 2017. In the document entitled "Task Order," signed by both the petitioner and [REDACTED] the beneficiary is listed as a consultant for a project entitled "Data Warehouse" which has a start date of October 1, 2014 and an end date of December 31, 2015. In an October 23, 2014 letter submitted on appeal, the HR Manager at [REDACTED] stated the following regarding the project:

[The beneficiary] will be working at our vendor's office location at [REDACTED] [REDACTED] as a Software Engineer. The project is expected to last through 2015 and we anticipate the need for her services through completion.

The petitioner's managing director further noted in an October 23, 2014 letter submitted with the appeal that the Task Order for the company's project with [REDACTED] will last from October 1, 2014 to December 31, 2015 and that "our client expects the project to be a long

ongoing project. However, as [the beneficiary's] petitioner and her employer, we are willing to accept a one-year H-1B Visa Approval."

The documentation provided does not establish that, at the time of the instant H-1B filing, there was sufficient specialty occupation work to be done by the beneficiary were the H-1B approved for the intended employment dates. The aforementioned documentation establishes that the project for which the beneficiary will be assigned will last only through December 31, 2015.

Additionally, as noted in the LCA, the beneficiary may only work at the petitioner's office in [redacted] Michigan. However, the petitioner did not provide evidence of any projects and associated job duties the beneficiary would perform once the project for [redacted] is completed by December 31, 2015, as referenced in the record. Therefore, it is not clear what the substantive nature of the work would be for the entire period of employment requested on the Form I-129.

Thus, we conclude that the record of proceeding provides an inadequate factual basis for us to even 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.

U.S. Citizenship and Immigration Services (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.<sup>5</sup> Moreover, the burden of proving eligibility for the benefit sought

---

<sup>5</sup> 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

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.

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

##### Specialty Occupation

For ease of reading, we will first address whether the proffered position qualifies for classification as a specialty occupation. Into our analysis of each of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), we hereby incorporate all of our earlier comments and findings regarding the inconsistencies, conflicts, and deficiencies in the information provided by the petitioner. The combined effect of these features of this record of proceeding fatally undermines the petitioner's attempt to establish the proffered position as a specialty occupation.

Based upon a complete review of the record of proceeding, we agree with the director and find that the evidence does not establish that the position as described constitutes a specialty occupation.

##### A. Legal Framework

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

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

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

---

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. . ."

*Specialty occupation* means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See*

*Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

## B. Analysis

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

Moreover, when determining whether a position is a specialty occupation, USCIS 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."

When determining whether a proffered position qualifies as a specialty occupation, USCIS must determine, *inter alia*, whether the petitioner has (1) provided sufficient evidence to establish that the beneficiary will perform the duties of the proffered position as stated in the petition; and (2) established that, at the time of filing, it had secured non-speculative work for the beneficiary that is in accordance with the petitioner's claims about the nature of the work that the beneficiary would perform in the proffered position.

Here, as previously discussed, the petitioner has not established that the petition was filed for non-speculative work for the beneficiary that existed as of the time the H-1B petition was filed. The petitioner did not submit sufficient, probative evidence corroborating that, when the petition was filed, the beneficiary would be assigned to perform services pursuant to any specific contract(s),

work order(s), and/or statement(s) of work (or other probative evidence) for the requested validity period and/or that the petitioner had a need for the beneficiary's services during the requested validity dates. There is insufficient documentary evidence in the record corroborating what the beneficiary would do and the availability of work for the beneficiary for the requested period of employment. 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) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). 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).

Thus, based upon a complete review of the record of proceeding, we find that the petitioner has not established (1) the substantive nature and scope of the beneficiary's employment; (2) the actual work that the beneficiary would perform; (3) the complexity, uniqueness and/or specialization of the tasks; and/or (4) the correlation between that work and a need for a particular educational level of highly specialized knowledge in a specific specialty (or its equivalent). Consequently, this precludes a determination that the petitioner's proffered position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions.

That is, the fact that the petitioner has not established the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for entry into 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. Thus, the petitioner has not established that the proffered position is a specialty occupation under the applicable provisions.

Based upon a complete review of the record of proceeding, we agree with the director and find that the evidence does not establish that the position as described more likely than not constitutes a specialty occupation. The petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition will be denied for this reason.

#### Employer-Employee Relationship

Finally, we will briefly address the issue of whether or not the petitioner qualifies as a United States employer with standing to file the H-1B petition. As detailed above, the record of proceeding lacks sufficient documentation evidencing what exactly the beneficiary would do for the period of time requested or where exactly and for whom the beneficiary would be providing services. Given this

specific lack of evidence, the petitioner has not established who has or will have actual control over the beneficiary's work or duties, or the condition and scope of the beneficiary's services. In other words, the petitioner has not established whether it has made a bona fide offer of employment to the beneficiary based on the evidence of record or that the petitioner, or any other company which it may represent, will have and maintain an employer-employee relationship with the beneficiary for the duration of the requested employment period. See 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer" and requiring the petitioner to engage the beneficiary to work such that it will have and maintain an employer-employee relationship with respect to the sponsored H-1B nonimmigrant worker). As previously discussed, there is insufficient evidence detailing what the beneficiary will be doing, the specific projects to be performed by the beneficiary, or for which company the beneficiary will ultimately perform these services. Therefore, the director's decision is affirmed, and the appeal is dismissed for this reason.

#### V. CONCLUSION AND ORDER

An application or petition that does not comply with the technical requirements of the law may be denied by us even if the service center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that we conduct appellate review on a *de novo* basis).

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of the enumerated grounds. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 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.<sup>6</sup> 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.

---

<sup>6</sup> As these matters preclude approval of the petition, we will not address any of the additional issues we have observed on appeal.