



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF CGIT-A-S- INC.

DATE: MAY 4, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, an information technology and business process services firm, seeks to temporarily employ the Beneficiary as an “applications developer” under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director, California Service Center, denied the petition. The Director concluded that the proffered position is not a specialty occupation. The Petitioner then filed a motion to reopen and reconsider the Director’s decision, which the Director denied.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred in denying its motion to reopen and reconsider. Upon *de novo* review, we will dismiss the appeal.

## I. LEGAL FRAMEWORK

### A. Overarching Requirement for Motions by a Petitioner

The provision at 8 C.F.R. § 103.5(a)(1)(i) includes the following statement limiting USCIS’s authority to reopen the proceeding or reconsider the decision to instances where “proper cause” has been shown for such action: “[T]he official having jurisdiction may, for proper cause shown, reopen the proceeding or reconsider the prior decision.”

Thus, to merit reopening or reconsideration, the submission must not only meet the formal requirements for filing (such as submission of a Form I-290B, Notice of Appeal or Motion, properly completed and signed, and accompanied by the correct fee), but the Petitioner must also show proper cause for granting the motion. As stated in the provision at 8 C.F.R. § 103.5(a)(4), “Processing motions in proceedings before the Service,” “[a] motion that does not meet applicable requirements shall be dismissed.”

## B. Requirements for Motions to Reopen

The regulation at 8 C.F.R. § 103.5(a)(2), “Requirements for motion to reopen,” states: “A motion to reopen must [(1)] state the new facts to be provided in the reopened proceeding and [(2)] be supported by affidavits or other documentary evidence.”

This provision is supplemented by the related instruction at Part 4 of the Form I-290B, which states: “**Motion to Reopen:** The motion must state new facts and must be supported by affidavits and/or documentary evidence that establish eligibility at the time the underlying petition or application was filed.”<sup>1</sup>

Further, the new facts must possess such significance that, “if proceedings . . . were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case.” *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992); *see also Maatougui v. Holder*, 738 F.3d 1230, 1239-40 (10th Cir. 2013).

## C. Requirements for Motions to Reconsider

The regulation at 8 C.F.R. § 103.5(a)(3), “Requirements for motion to reconsider,” states:

[A] motion to reconsider must [(1)] state the reasons for reconsideration and [(2)] be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must [(3)], [(a)] when filed, also [(b)] establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

These provisions are augmented by the related instruction at Part 4 of the Form I-290B, which states: “**Motion to Reconsider:** The motion must be supported by citations to appropriate statutes, regulations, or precedent decisions and must establish that the decision was based on an incorrect application of law or policy, and that the decision was incorrect based on the evidence of record at the time of decision.”

A motion to reconsider contests the correctness of the prior decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new facts. *Compare* 8 C.F.R. § 103.5(a)(3) and 8 C.F.R. § 103.5(a)(2).

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<sup>1</sup> The regulation at 8 C.F.R. § 103.2(a)(1) states in pertinent part : “Each benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, and such instructions are incorporated into the regulations requiring its submission.”

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A motion to reconsider should not be used to raise a legal argument that could have been raised earlier in the proceedings. *See Matter of Medrano*, 20 I&N Dec. 216, 219 (BIA 1990, 1991) (“Arguments for consideration on appeal should all be submitted at one time, rather than in piecemeal fashion.”). Rather, any “arguments” that are raised in a motion to reconsider should flow from new law or a de novo legal determination that could not have been addressed by the affected party. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006) (examining motions to reconsider under a similar scheme provided at 8 C.F.R. § 1003.2(b)); *see also Martinez-Lopez v. Holder*, 704 F.3d 169, 171-72 (1st Cir. 2013). Further, the reiteration of previous arguments or general allegations of error in the prior decision will not suffice. Instead, the affected party must state the specific factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision. *See Matter of O-S-G-*, 24 I&N Dec. at 60.

#### D. Preponderance of the Evidence Standard

On appeal, the Petitioner states that the “preponderance of the evidence” standard is relevant to this matter, and that it established through credible and uncontested evidence that the proffered position is a specialty occupation. The “preponderance of the evidence” standard requires that the evidence demonstrate that the Petitioner’s claim is “probably true,” where the determination of “truth” is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm’r 1989)). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* Thus, in adjudicating the petition 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 “probably true” or “more likely than not,” the Petitioner has satisfied the standard of proof. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). 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 petition. *Id.*

## II. PROFFERED POSITION

According to the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner is located in [REDACTED] Virginia. The itinerary submitted with the petition stated: “The Beneficiary will work full-time at the office of *our client*, [REDACTED] located at [REDACTED] CA [REDACTED] (emphasis added).”

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According to the Petitioner's support letter, dated March 31, 2015, the Beneficiary would be employed as a full-time applications developer "in one or more technical areas of the application." The Petitioner stated that the Beneficiary would:

[b]e charged with reviewing and analyzing change requests to determine the scope of work and estimate the level of effort for application changes, writing detailed technical specifications for changing application components based on business requirements and high-level designs, applying Object Oriented Programming (OOP) concepts (including UML use cases, class diagrams, and interaction diagrams). The Beneficiary will provide problem resolution support, specific to application issues; identify and resolve problems in application software; and coordinate with application users to determine symptoms and ensure accurate problem definition. Moreover, the Beneficiary will develop unit and unit integration test plans and procedures while validating that developed classes and components meet application requirements and performance goals. The Beneficiary will create and execute unit and unit integration regression test scripts; create personal and common test data, track actual vs. expected results, and evaluate quality of the created modules. Further, the Beneficiary will design, code, unit test, unit integration test, and maintain application components based on detailed design specifications solutions to meet user requirements. Additionally, the Beneficiary will follow configuration control procedures over application source libraries at pre-release levels and assist in the development and improvement of application maintenance plans, processes, procedures, standards, and quality standards.

The Petitioner stated that it requires at least "a bachelor's degree or its equivalent in Computer Science, Engineering, Information Systems, or a directly related field." The submitted labor condition application (LCA) indicates that the Petitioner has designated the position in the LCA as a Level I position (the lowest of four assignable wage-levels) relative to others within the same occupational category.<sup>2</sup>

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<sup>2</sup> The Petitioner classified the proffered position at a Level I wage (the lowest of four assignable wage levels). We will consider this selection in our analysis of the position. The "Prevailing Wage Determination Policy Guidance" issued by the DOL provides a description of the wage levels. A Level I wage rate is generally appropriate for positions for which the Petitioner expects the Beneficiary to have a basic understanding of the occupation. This wage rate indicates: (1) that the Beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; (2) that he will be closely supervised and his work closely monitored and reviewed for accuracy; and (3) that he will receive specific instructions on required tasks and expected results. U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://flcdatcenter.com/download/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://flcdatcenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf). A prevailing wage determination starts with an entry level wage and progresses to a higher wage level after considering the experience, education, and skill requirements of the Petitioner's job opportunity. *Id.*

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### III. ANALYSIS

The issue here is whether the Director's decision to deny the Petitioner's motion to reopen and reconsider was correct. The submission constituting the motion consists of the following: (1) the Form I-290B; (2) the Petitioner's brief; (3) an opinion letter from [REDACTED] of the [REDACTED] (4) vacancy announcements placed by other companies; (5) U.S. Department of Labor's *Occupational Outlook Handbook* (the *Handbook*)'s subchapter on "Computer Programmers"; and (6) O\*NET OnLine Summary Report for Computer Programmers.

Applying the preponderance of the evidence standard, we find that the Director correctly denied the Petitioner's motion to reopen and reconsider.

#### A. The Motion to Reopen

First, we will consider the Director's determination that the Petitioner did not state any new facts that would likely change the result of the decision if it was reopened to consider them. While the Petitioner provided some documents as described above, the Petitioner did not present any evidence that could have been considered "new facts." Further, even if the documents could be considered as "new facts," the Petitioner has not established that the new facts possess such significance that they could change the outcome of the adjudication as these documents do not demonstrate that the proffered position qualifies as a specialty occupation.

##### 1. The Advertisements Placed by Other Companies

The advertisements included with the motion were not new facts for purposes of the Petitioner's motion to reopen. We note that the Petitioner previously provided other job postings. Further, the Petitioner's reliance on the job announcements was misplaced. In the Form I-129, the Petitioner described itself as an information technology and business process services company established in [REDACTED] with 69,000 employees. The Petitioner designated its business operations under the North American Industry Classification System (NAICS) code 541512, which is described as "Computer Systems Design Services."<sup>3</sup>

For the Petitioner to establish that an organization is similar, it must demonstrate that they share the same general characteristics. Without such evidence, documentation submitted by a petitioner is generally outside the scope of consideration for this criterion, which encompasses only organizations that are similar to the Petitioner. When determining whether the Petitioner and the organization share the same general characteristics, such factors may include information regarding the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of

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<sup>3</sup> According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last visited Apr. 29, 2016).

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revenue and staffing (to list just a few elements that may be considered). Notably, it is not sufficient for the Petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

However, the advertisements included [REDACTED] and [REDACTED], for which little information regarding the employers was provided. The Petitioner also provided advertisements from a university, a consulting firm, biotech firms, and a consumer data company. The Petitioner did not provide sufficient information to establish that it shares the same general characteristics, as well as information regarding which aspects or traits (if any), it shares with the advertising organizations.

Moreover, the record of proceedings does not establish that the advertisements were for parallel positions. For example, the basic qualifications for the position at [REDACTED] included a "B.S. in Computer Science, Business or related degree" and "5+ years of experience supporting IT operations and applications." As discussed above, the Petitioner designated the proffered position as an entry-level position on the LCA. The advertised position appears to be for a more senior position than the proffered position. Additionally, the Petitioner had not sufficiently established which primary duties of the advertised positions were parallel to the duties of the proffered position.

## 2. The Petitioner's Advertisements

Likewise, the Petitioner's own advertisements included with the motion were also not new facts for purposes of the Petitioner's motion to reopen because the Petitioner previously provided other job postings it had placed. Further, the minimum requirements in the Petitioner's advertisements were not the same as those stated in support of this petition. As mentioned above, the proffered position is for an entry level (Level I as determined by the wage in the LCA) applications developer requiring a bachelor's degree or its equivalent in computer science, engineering, information systems, or a directly related field. However, the advertisements the Petitioner placed were for applications developers requiring, for example, a "[b]achelor's degree in computer science, software engineering or mathematics" plus two to five years of experience. We reviewed each of the Petitioner's advertisements submitted with the motion and found that they did not appear to be for entry level applications developer positions. Most of the advertisements required a bachelor's degree plus three to five years of experience. The other advertisements placed by the Petitioner required a bachelor's degree plus two years of experience, however these were for applications developers appearing to perform different duties than those proffered in this petition as they were not developing the [REDACTED] application. Additionally, the Petitioner had not stated that it requires any experience for the position proffered here. Therefore, the Petitioner had not established that the positions in its advertisements were parallel to the proffered position.

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### 3. The Opinion Letter

As mentioned above, the Petitioner submitted a letter from [REDACTED] to assert that the proffered position is a specialty occupation. [REDACTED] stated:

It should be noted that positions such as Applications Developer at [the Petitioner] require collaboration with other individuals from a wide range of engineering and computing disciplines. While a Bachelor's Degree is the standard minimum requirement for such positions, owing to the technical complexity of the role and the importance of a shared educational foundation among all team members, it is often to the employer's benefit to employ individuals from a range of qualifying fields, rather than employing only Computer Science majors as these other fields bring to the table different perspectives that improve overall project quality. Such perspectives may result in the identification of more efficient approaches to software development or to the identification of potential issues that might be overlooked by an overly homogenous team. As an Applications Developer, [the Beneficiary's] particular background will bring valuable perspective to the development team at [the Petitioner].

As noted above, [the Beneficiary] is qualified for the position of Applications Developer at [the Petitioner] by virtue of his Bachelor's Degree studies in Electronics and Telecommunication Engineering and his Master's Degree studies in Telecommunication Networks. In both of these programs, [the Beneficiary] gained valuable experience planning software systems, writing original computer code, testing that code for bugs and defects, and ensuring a high level of software performance and reliability.

However, [REDACTED] did not relate any personal observations of the Petitioner's operations or the work that the Beneficiary will perform, nor did he state that he has reviewed any projects or work products related to the proffered position. Further, [REDACTED] did not seem to be aware that the Beneficiary will be working on a project at the site of the end-client. Therefore, [REDACTED] opinion did not relate his conclusions to specific, concrete aspects of this Petitioner's business operations and its projects to demonstrate a sound factual basis for his conclusions about the duties of the proffered position and its educational requirements.

Moreover, there was also no indication that the Petitioner advised [REDACTED] that it characterized the proffered position as a low, entry-level position for a beginning employee who has only a basic understanding of the occupation (as indicated by the wage-level on the LCA). It appears that [REDACTED] would have found the wage-level information relevant for his opinion letter. Moreover, without this information, the Petitioner had not demonstrated that [REDACTED] possessed the requisite information necessary to adequately assess the nature of the proffered position.

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discussion of the Beneficiary's qualifications is not probative for these proceedings as we cannot determine if a particular job is a specialty occupation based on the qualifications of a beneficiary. A beneficiary's credentials to perform a particular job are relevant only when the job is first found to qualify as a specialty occupation. USCIS is required instead to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether the beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

Further, we note that, even if we did accept his opinion as persuasive, finding that a degree in a "range of qualifying fields" is a sufficient minimum requirement for entry into the proffered position would be inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. There must be a close correlation between the required specialized studies and the position; thus, the mere requirement of a degree, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. at 560. Thus, while a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

For all of these reasons, we find that letter did not change the result of the Director's opinion as it holds little probative value toward establishing the proffered position as a specialty occupation. We may, in our discretion, use opinion statements submitted by the Petitioner as advisory. *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). 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. *Id.*

#### 4. The Articles

Finally, regarding the *Handbook* and the O\*NET OnLine Summary Report for Computer Programmers, these documents did not constitute new evidence as they contain general information that was available prior to the motion being filed. Further, they do not support the Petitioner's assertion that the computer programmers qualify as specialty occupations. Specifically, the *Handbook* states that the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty. The *Handbook* states that some employers hire workers who have an associate's degree. Furthermore, while the *Handbook's* narrative indicates that most computer programmers obtain a degree (either a bachelor's degree or an associate's degree) in computer science or a related field, the *Handbook* does not report that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the occupation. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook, 2015-16 ed., "Computer Programmers," <http://www.bls.gov/ooh/computer-and->

information-technology/computer-programmers.htm#tab-4 (last visited Apr. 29, 2016). The *Handbook* therefore would not support the proposition that the position is a specialty occupation.

Likewise, O\*NET OnLine also does not state a requirement for a bachelor's degree for this occupation. Rather, it assigns this occupation a Job Zone "Four" rating, which groups it among occupations for which "most . . . require a four-year bachelor's degree, but some do not." O\*NET OnLine Summary Report for "15-1131.00 – Computer Programmers," <http://www.onetonline.org/link/summary/15-1131.00> (last visited Apr. 29, 2016); O\*NET OnLine Help – Job Zones, <http://www.onetonline.org/help/online/zones> (last visited Apr. 29, 2016). Further, O\*NET OnLine does not indicate that four-year bachelor's degrees required by Job Zone Four occupations must be in a specific specialty directly related to the occupation. Therefore, O\*NET OnLine information is not probative of the proffered position being a specialty occupation.

We further note that the Petitioner filed the LCA as a Level I (entry) wage, which is the lowest of four assignable wage levels. Without further evidence, the record of proceedings does not indicate that the proffered position is complex or unique as such a position falling under this occupational category would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage.<sup>4</sup> For example, a Level IV (fully competent) position is designated by DOI for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."<sup>5</sup> Here, the Petitioner did not establish that its particular position is so complex or unique that it can only be performed by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

Overall, it is not readily apparent how the newly submitted documentation would change the outcome of this case if the proceeding were reopened. *See Matter of Coelho*, 20 I&N Dec. at 473 (the new facts must possess such significance that, "if proceedings . . . were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case"); *see also Maatougui v. Holder*, 738 F.3d at 1239-40.

"There is a strong public interest in bringing [a case] to a close as promptly as is consistent with the interest in giving the [parties] a fair opportunity to develop and present their respective cases." *INS v. Abudu*, 485 U.S. 94, 107 (1988). Motions for the reopening of immigration proceedings are

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<sup>4</sup> The Petitioner's designation of this position as a Level I, entry-level position undermines its claim that the position is particularly complex, specialized, or unique compared to other positions *within the same occupation*. Nevertheless, a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation, just as a Level IV wage-designation does not definitively establish such a classification. In certain occupations (e.g., doctors or lawyers), a Level I, entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty, or its equivalent. That is, a position's wage level designation may be a relevant factor but is not itself conclusive evidence that a proffered position meets the requirements of section 214(i)(1) of the Act.

<sup>5</sup> For additional information regarding wage levels as defined by DOL, 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.flcdatacenter.com/download/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf).

disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. at 94). A party seeking to reopen a proceeding bears a “heavy burden” of proof. *INS v. Abudu*, 485 U.S. at 110. With the current motion, the Petitioner has not met that heavy burden.

#### B. The Motion to Reconsider

The next issue to consider is whether the Director’s decision to deny the motion to reconsider was incorrect. We find that the Director properly concluded that the Petitioner had not established that the proffered position is not a specialty occupation. However, we will withdraw the Director’s discussion of whether a computer programmer position is a specialty occupation because we find that the Petitioner did not establish the substantive nature of the position; and, did not establish that the proffered position is a computer programmer position. Therefore, the Director did not err as a matter of law in concluding that the proffered position is not a specialty occupation, as will be discussed in more detail below.

When determining whether a position is a specialty occupation, we must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the Director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that “[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation.”

Moreover, we note that, as recognized by the court in *Defensor v. Meissner*, where the work is to be performed for entities other than the Petitioner, evidence of the client companies’ job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-88. The court held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary’s services. *Id.* at 384. In other words, as the nurses in that case would provide services to the end-client hospitals and not to the petitioning staffing company, the petitioner-provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination. *See id.*

While we acknowledge that the Petitioner submitted a letter from its end-client, dated March 23, 2015, this letter does not establish that the proffered position is a specialty occupation as it is not supported by objective evidence. For example, the letter referenced a contract between itself and the Petitioner, but a copy of that contract, and any corresponding Statement of Work (SOW) if one exists, were not provided.

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Further, the end-client letter stated:

Please accept this letter as confirmation that [the Beneficiary] has been working onsite at the [REDACTED] California since October 2012 as a Sub-Contractor to the Prime Contract Vendor, [REDACTED] [REDACTED] contracted [the Beneficiary] from his employer [the Petitioner].

While the Petitioner referred to the [REDACTED] as "our client," it appears from this letter that the [REDACTED] is not the Petitioner's direct client, but is instead a client of [REDACTED].

We note that the record contains no contracts, service agreements, work orders, or other agreements executed between the vendor and the end-client. In other words, the record contains no evidence of any binding obligation on the part of the end-client, or [REDACTED], to provide the work opportunity upon which the entire petition is based. Absent such evidence delineating the contractual terms of the project to which the Beneficiary is assigned, including the duties and the requirements for the position, we are unable determine the substantive nature of the proffered position.

In addition, the record does not establish that the Beneficiary will be employed for the duration of the requested H-1B employment period. The end-client stated "[w]e currently consider this assignment to be open-ended," but, as discussed previously, the Beneficiary's assignment would be determined by contract terms, copies of which were not provided. Further, the letter does not indicate [REDACTED] Program's role (if any) in determining the length of this or other of the Petitioner's projects or its authority (if any) to make such a declaration about the duration of a project. It is not supported by independent, objective evidence demonstrating the manner in which the conclusion was reached. For instance, the statement is not corroborated by documentation indicating that an ongoing project exists that will generate employment for the Beneficiary's services (e.g., documentary evidence regarding the project scope, staging, or time and resource requirements; supporting contract negotiations; documentation regarding the business analysis and planning for specific work). Without copies of the contracts to corroborate the end-client's claims, we cannot confirm that the Beneficiary actually would be able to work at the end-client site for the duration of the petition.

Further, the offer letter provided from the Petitioner to the Beneficiary gave the Beneficiary the position title of "consultant" and stated that the Beneficiary's worksite will be at an address in [REDACTED] California, which is not listed as a worksite in the petition. Further, although the Beneficiary's worksite will be in [REDACTED] California, the offer letter also states that "as a consulting organization, we must remain flexible in terms of our clients' work locations." As the record of proceeding does not contain sufficient evidence establishing that the Beneficiary would be assigned to work for the end-client for the entire validity period requested, the Petitioner has not

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demonstrated that it has secured definitive, non-speculative H-1B caliber work for the beneficiary for the entire period of employment requested in the petition.<sup>6</sup>

We also note discrepancies between the proffered position title and the duties. For example, while the end-client letter stated that the Beneficiary functions as a “developer” and the proffered title in the petition is “applications developer,” the LCA was certified for the occupational category of “computer programmers.” Computer programmers and software application developers are separate occupational categories with different prevailing wage rates. The Petitioner has not explained this discrepancy. 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. 582, 591 (BIA 1988).

The Petitioner has not provided sufficient information regarding the nature and scope of the Beneficiary’s employment or substantive evidence regarding the specialty occupation work that the Beneficiary would perform. Without a meaningful letter from the end-client, copies of contracts, work orders, or any documentation from [REDACTED] the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor’s or higher degree in the specific specialty, or its equivalent, as a minimum for entry into the occupation.

The failure to establish the substantive nature of the work to be performed by the Beneficiary consequently 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

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<sup>6</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 individual 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 individual 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 individual 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 individual will engage in a specialty occupation upon arrival in this country.

Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30,419, 30,419-20 (proposed June 4, 1998) (to be codified at 8 C.F.R. pt. 214).

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 did not establish that the proffered position is a specialty occupation. As the Petitioner did not establish how the decision misapplied any pertinent statutes, regulations, or precedent decisions based on the previous factual record, we find that the Director was correct in denying the Petitioner's motion to reconsider.<sup>7</sup>

#### IV. CONCLUSION

For the above-stated reasons, the Director did not err in denying the Petitioner's motion to reopen and reconsider. 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.

Cite as *Matter of CGIT-A-S- Inc.*, ID# 16302 (AAO May 4, 2016)

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<sup>7</sup> Although the Director stated in her September 7, 2015, decision that she denied the Petitioner's motion to reconsider, she actually did consider the Petitioner's claim that her prior decision to deny the petition was incorrect as a matter of law. However, in reviewing the Petitioner's evidence, the Director found that the Petitioner did not establish that the proffered position is a specialty occupation.