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

U.S. Citizenship
and Immigration
Services

[redacted]

D2

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: OCT 04 2010

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a corporation that provides information technology (IT) solutions to both public and private organizations. To employ the beneficiary in what it designates a Computer Programmer position, the petitioner endeavors to classify the beneficiary 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 three independent grounds, namely, his findings that the evidence in the record of proceeding failed to (1) provide the itinerary that the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) requires when a proffered H-1B position is to be performed at more than one location; (2) establish that the Labor Condition Application (LCA) submitted with the petition encompasses all of the locations where the petitioner intended to employ the beneficiary; and (3) establish the proffered position as a specialty occupation as that term is defined by section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), and the implementing regulations at 8 C.F.R. § 214.2(h)(4).

Based upon its review of the entire record of proceeding as supplemented by the Form I-290B, the accompanying brief, and the documents filed in support of the appeal, the AAO finds that the director was correct in denying the petition on each of the three grounds that he cites as the bases for his decision. Therefore, the appeal will be dismissed, and the petition will be denied.

While fully affirming the director's separate determinations that denial of the petition is also required by the petitioner's failures to provide the itinerary required by the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) and to submit an LCA encompassing all of the locations where the beneficiary would work, the AAO will further address in detail only the specialty occupation basis of the director's decision, as establishing specialty occupation status (along with the requisite beneficiary qualifications) is paramount to the successful adjudication of any H-1B petition, regardless of the locations where the proffered position would be performed.

In deciding whether a proffered position qualifies as a specialty occupation, the AAO analyzes the evidence of record according to the statutory and regulatory framework below.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a 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, 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, 8 U.S.C. § 1184(i)(1), 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) (hereinafter referred to as *Defensor*.) To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

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.

The Form I-129 and the LCA submitted with it assert that the beneficiary will work and be compensated as a computer programmer.

The AAO recognizes the U.S. Department of Labor's *Occupational Outlook Handbook* (*Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.[1] The *Handbook's* observations about the computer-programmer occupational category appear in its "Computer Software Engineers and Computer Programmers" chapter.[2] However, that chapter's section on Training, Other Qualifications, and Advancement indicates that computer programmers do not constitute an occupational group that categorically requires either a bachelor's or higher degree, or the equivalent, in a specific specialty, or knowledge usually associated with the attainment of such a degree. This section states, in pertinent part:

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[1] Unless otherwise indicated, hereinafter all references to the *Handbook* are to its 2010-2011 edition, which may be accessed at the Internet site *http://www.bls.gov/OCO/.*

[2] The *Handbook* notes, in part:

> As software design has continued to advance, and some programming functions have become automated, programmers have begun to assume some of the responsibilities that were once performed only by software engineers. As a result, some computer programmers now assist software engineers in identifying user needs and designing certain parts of computer programs, as well as other functions.

It is important to note, however, that, as evident in the rest of the chapter's narrative, in the different Standard Occupational Classification (SOC) codes assigned to them in DOL's *O*Net* (cited in the chapter's "O*NET-SOC Code Coverage" section), and in the separate statements regarding their earnings, the Department of Labor (DOL) regards Computer Software Engineers and Computer Programmers as separate and distinct occupational categories. Further, the Earnings section of the *Handbook's* Computer Software Engineers and Computer Programmers chapter indicates that the annual wages of software engineers are considerably higher than those of computer programmers.

A bachelor's degree commonly is required for software engineering jobs, although a master's degree is preferred for some positions. A bachelor's degree also is required for many computer programming jobs, although a 2-year degree or certificate may be adequate in some cases. Employers favor applicants who already have relevant skills and experience. Workers who keep up to date with the latest technology usually have good opportunities for advancement.

Education and training. For software engineering positions, most employers prefer applicants who have at least a bachelor's degree and broad knowledge of, and experience with, a variety of computer systems and technologies. The usual college majors for applications software engineers are computer science, software engineering, or mathematics. Systems software engineers often study computer science or computer information systems. Graduate degrees are preferred for some of the more complex jobs.

Many programmers require a bachelor's degree, but a 2-year degree or certificate may be adequate for some positions. Some computer programmers hold a college degree in computer science, mathematics, or information systems, whereas others have taken special courses in computer programming to supplement their degree in a field such as accounting, finance, or another area of business.

Employers who use computers for scientific or engineering applications usually prefer college graduates who have a degree in computer or information science, mathematics, engineering, or the physical sciences. Employers who use computers for business applications prefer to hire people who have had college courses in management information systems and business, and who possess strong programming skills. A graduate degree in a related field is required for some jobs.

In addition to educational attainment, employers highly value relevant programming skills and experience. Students seeking software engineering or programming jobs can enhance their employment opportunities by participating in internships. Some employers, such as large computer and consulting firms, train new employees in intensive, company-based programs.

As identification as a computer programmer position is not sufficient to establish the educational credentials normally required for performance of that position, and thus to establish that it qualifies as a specialty occupation, it is incumbent on the petitioner to provide sufficient evidence to establish not only that the beneficiary would perform the services of a computer programmer for the period specified in the petition, but also that he would do so at a level requiring the theoretical and practical application of at least a bachelor's degree level of knowledge in a computer related specialty. As will now be discussed, the petition has failed on both counts.

The petitioner's letter of support filed with the Form I-129 includes this description of the proffered position:

> The functions of Computer Programmer for [the petitioner] include analysis of existing systems, planning and design of new systems, and configuration and integration of new functionality, as well as coordination of all essential requirements of the end-user. [The beneficiary] will be required to consult with other engineering staff to evaluate interfaces between hardware and software, as well as overall operational and performance requirements of an existing system. Additionally, [the beneficiary] must assist with the development of software system testing procedures, programming, documentation, and repairs. He will implement quality and cost control practices in the software, and may consult with the customer regarding software system maintenance.

The AAO finds that neither the above comments nor any other comments by counsel or the petitioner establish a nexus between the proffered position and a requirement for at least a bachelor's degree or its equivalent in a specific specialty. Further, neither counsel nor the petitioner provides documentary evidence that supports the proffered position as a specialty occupation.

The AAO notes that the record of proceeding establishes that the petitioner is a client-oriented firm whose specific operations are determined by contracts with other entities for its IT services.[3] Consequently, the substantive nature (and, therefore, the educational requirements) of the work serving as the basis of the petition would be determined by the specific IT-services specified in the contracts and allied documents existing at the time the petition was filed.[4]

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[3] For instance, in its March 28, 2008 letter of support, filed with the Form I-129, the petitioner states, in part:

> [W]e have determined that we have a greater need for the services of a Computer Programmer due to the increased volume of programming contracts that have been awarded to our company. Specifically, while under the direct control and supervision of the Project/Manager/Engineer, [the beneficiary's] services are still required to develop, create and modify general computer applications software programs. He will continue to assist with the design or customization of software for client use, with the aim of optimizing operational efficiency.

[4] Where, as here, the specific and substantive nature of the work to be performed is determined not by the petitioner but by its clients [or its client's clients], the AAO focuses on whatever documentary evidence the business entities generating the work have issued or endorsed about it, such as specifications, performance timelines, contract amendments, work orders, and correspondence about performance expectations, to name a few examples.

In support of this approach, USCIS routinely cites *Defensor v. Meissner*, 201 F.3d 384, in which an examination of the ultimate employment of the beneficiary was deemed necessary to determine whether the position constitutes a specialty occupation. The court in *Defensor* held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is

The service center's request for additional evidence (RFE) specifically requested contracts, allied documents (for example, work orders and statements of work), and client letters to substantiate the work that the beneficiary would perform, thus providing the petitioner the opportunity to so supplement the record as to establish the substantive work that the beneficiary would perform through the period requested in the petition.

In its response to the RFE's request for documentation of the work that the beneficiary would perform, the petitioner, through its counsel, provided only one document. This is a Statement of Work (SOW) (hereinafter referred to as the Buyer/Supplier SOW), signed on December 5, 2007 by the Sinew Management Group (SMG) as Buyer, and the petitioner as Supplier. According to counsel, this document "details the project upon which the beneficiary will work"; but the document contains no definite terms of performance required of the petitioner, and no terms requiring SMG to purchase any specific services of the petitioner at any specific time. As such, the Buyer/Supplier SOW provides no details about any project upon which SMG has engaged or will engage the petitioner. The AAO finds that this SOW is not probative of any particular work that the beneficiary would perform, as it neither mentions the beneficiary nor commits SMG to utilize any particular number of the petitioner's personnel for any specific time or in any specified work assignment. Further, as such, this SOW is not indicative of the substantive nature of any work that would be performed under it, or, for that matter, that any work would in fact be generated by it.

The AAO further finds that the language of the Buyer/Supplier SOW does not support counsel's claim that the beneficiary would be employed in its performance. Aside from the earlier noted lack of specificity regarding any particular work or workers to be utilized under the SOW, the Buyer/Supplier SOW indicates that SMG has no obligation to utilize the beneficiary, or any other particular person, at any time. While the SOW states that the petitioner would provide "a list of Supplier Personnel that possess demonstrated Websphere and Testing experience at least equivalent to [the] Skills and Experience outlined in Section 6 Resource qualifications," the Buyer/Supplier SOW does not obligate SMG to utilize anyone on such list for any period of time. Further, the Buyer/Supplier SOW's Scope of Work section indicates that the nature and the extent of work encompassed by this Buyer/Supplier SOW would be determined in the future by SMG's "sole discretion" determinations as to the "number of resources and the mix of skill levels" that it would need the petitioner to provide as "off site services to [SMG's] Customers in support of [SMG's]

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merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." *Id.* at 388. The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The *Defensor* court held that legacy INS [Immigration and Naturalization Service (INS)] 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.* In *Defensor*, the court found that that evidence of the client companies' job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

Java/Dot Net/IBM AS/400 and WebSphere projects," projects which are delineated neither in this SOW nor anywhere else in the record of proceeding.

Such evidence of speculative and indefinite work does not provide a sufficient basis for the AAO to discern where and when the beneficiary would be employed and the substantive work that he would perform. A position may be awarded H-1B classification only on the basis of evidence of record establishing that, at the time of the petition's filing, definite, non-speculative work would exist for the beneficiary for the period of employment specified in the Form I-129. The record of proceeding does not contain such evidence. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

On appeal, counsel submits (1) a "General Teaming Agreement" (GTA) between the petitioner and SMG committing both parties to work together in a "joint proposal effort" to prepare and submit a proposal to the Department of Interior, Bureau of India Affairs (BIA) for award of a contract regarding "technical assistance, data analysis, and software enhancement services" concerning (a) the Native American School Information System (NASIS) data management program, and (b) the Indian School Equalization Program (ISEP) student count program; (2) an SOW (Attachment B to the GTA) which generally describes the scope of work and "work-share allocations" that would govern the relationship between SMG as the prime contractor and the petitioner as the subcontractor under the GTA; (3) an SOW Amendment, which apparently applies to the Buyer/Supplier SOW submitted in response to the RFE, which adds "3 more resources for the HR module," changing the project's target completion date, and adding two tasks to the SOW's Resource Pooling section; (4) a 30-page compilation of various documents and document excerpts, which counsel submits as the "Contract between [SMG] and [BIA];" and (5) an undated document which counsel submits as "Task Order for the Beneficiary," which apparently outlines tasks and a job description relating to the beneficiary's role in the performance of the BIA contract awarded to SMG in response to a joint proposal submitted under the GTA. As will now be discussed, these documents do not provide an evidentiary basis for overturning the director's decision on the specialty occupation issue.

The GTA (signed on August 18, 2008) and the later-generated SMG-BIA contract documents, including the Task Order for the Beneficiary under the SMG-BIA contract, were all created after the petition's filing date of April 1, 2008. As such, they are not probative of work upon which the petition was filed. As already noted, 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; *Matter of Katigbak*, 14 I&N Dec. 45, 49. Further, the GTA is outside the scope of this appeal, as it is the type of document encompassed by the RFE but was not submitted as part of the RFE reply. Evidence requested in an RFE but not included in the petitioner's RFE

response will not be considered if later submitted. *See* 8 C.F.R. §§ 103.2(b)(8)(iv) and (b)(11). *See* also *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The AAO finds that the "Amendment to the [SOW]" document does not indicate a binding commitment by any entity to assign the beneficiary any H-1B caliber work during any part of the period specified in the petition. As with the SOW that it amends, this document does not identify the beneficiary for any specific project, and whatever educational credentials may be necessitated by performance requirements of possible additional work under the Resource Pooling section of the amendment are not self-evident.

Additionally, the AAO finds that neither the duty descriptions nor any other evidence of record distinguishes the proffered position from computer programmer positions which do not require at least a bachelor's degree or the equivalent in a specific specialty closely related to their duties. The record's duty descriptions are generalized and generic, and they are not supplemented by any documentation establishing that, as practiced in actual performance in the proffered position, they would require at least a bachelor's degree or its equivalent n a specific specialty. Additionally, as reflected in this decision's earlier comments on the absence of documentary evidence of actual work that the beneficiary would definitely perform during the period requested in the petition, the AAO finds that the petitioner has even failed to establish that the petition was filed for work that was reserved for the beneficiary as of the time of the petition's filing.

For the reasons discussed above, the evidence of record does not indicate that this petition's particular position is one that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty. Thus, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), which assigns specialty occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The first alternative prong assigns specialty occupation status to a proffered position whose asserted requirement for at least a bachelor's degree in a specific specialty is common to positions in the petitioner's industry that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO here reiterates that the degree requirement set by the statutory and regulatory framework of the H-1B program is not just a bachelor's or higher degree, but such a degree in a specific specialty that is directly related to the specialty occupation claimed in the petition.

As reflected in this decision's earlier comments, the relevant chapter of the *Handbook* does not indicate that a computer programmer position as described in this petition would require at least a bachelor's degree in a specific specialty. Thus, the *Handbook* does not support a favorable finding under this criterion. The AAO also notes that the record does not include submissions from a professional association or from individuals or other firms in the petitioner's industry attesting to routine employment and recruiting practices.

The petitioner also has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), which provides that "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." The petitioner has not submitted evidence distinguishing the proffered position as unique from or more complex than the range of computer programmer positions for which the *Handbook* indicates that there is no requirement for a bachelor's or higher degree or its equivalent in a specific specialty. In fact, as reflected in earlier comments about the deficiencies in the documentary evidence, the petitioner has not even established that the petition was filed on the basis of any actual computer-programming work for the beneficiary. Therefore, elements of complexity or uniqueness in any work that may have been assigned to the beneficiary if this petition were approved could not be ascertained at the time the petition was filed.

Next, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), by establishing that the employer normally requires a degree or its equivalent in a specific specialty for the position. To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position.[5]

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[5] To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of 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. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. As reflected in this decision's earlier comments regarding the documentary evidence, the record of proceeding fails to establish actual work that the beneficiary would perform for the period specified in the petition, let alone the relative specialization and complexity of any specific duties that would be involved.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision to deny the petition shall not be disturbed.

As previously noted, the AAO will not address the itinerary and LCA issues at length, because its determination on the specialty occupation issue is itself dispositive of this appeal. The AAO, however, will identify the decisive aspects of the record of proceeding leading it to affirm the director's determinations on the itinerary and LCA issues.

The AAO affirms the director's denial of the petition on the itinerary issue, because it finds that the totality of the evidence before the director indicated that the beneficiary would be subject to assignment at work locations outside the petitioner's offices, and that the record of proceeding before the director lacked documentary evidence sufficient to corroborate the claim that the beneficiary will be serving solely as an in-house computer programmer for the period sought in the petition. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, the AAO notes that the claim that the beneficiary would work in-house conflicts with the entry at the Service, Schedule, and Price section at page 5 of the Standard Form 1449 submitted on appeal that "Contractor shall provide IT Support and Services at various locations within the Bureau of Indian Education." For these same reasons, the AAO also affirms the director's determination regarding the LCA issue, as the just discussed aspects of the record of proceedings suggests that the beneficiary would be subject to assignment to work locations beyond the one specified in the LCA.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the

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could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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