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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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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FILE: WAC 08 149 54110 Office: CALIFORNIA SERVICE CENTER Date: OCT 21 2009

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:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

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

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner states that it engages in software consulting and development, that it was established in 2003, employs 24 persons, and has an estimated gross annual income of $6,070,000. It seeks to employ the beneficiary as a programmer analyst from October 1, 2008 to September 19, 2011. Accordingly, 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).

On August 12, 2008, the director denied the petition, determining that the petitioner failed to establish that: (1) it meets the regulatory definition of an intending United States employer at 8 C.F.R. § 214.2(h)(4)(ii); (2) it meets the definition of "agent" at 8 C.F.R. § 214.2(h)(2)(i)(F); (3) it submitted a valid labor condition application (LCA) for all locations; (4) the proffered position is a specialty occupation; or (5) it is in compliance with the terms and conditions of employment.

On appeal, the petitioner submits a statement and documentation in support of the Form-I-290B, and contends that the director's decision is erroneous.

The record includes: (1) the Form I-129 and supporting documentation filed with United States Citizenship and Immigration Services (USCIS) on April 14, 2008; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial decision; and, (5) the Form I-290B and the petitioner's brief and documentation submitted in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

When filing the Form I-129 petition, the petitioner averred in its April 1, 2008 letter appended to the petition that it "offers services ranging from custom application development, deployment, and integration to corrective maintenance, new releases management, and back-up recovery management."

The petitioner noted that the beneficiary would be involved in "Software design, development, and testing for specific applications and develop GUI to meet user requirements. Develop detailed program specifications, coding and testing. Plan data conversion activities and implement systems to meet user needs." The petitioner provided an overview of the beneficiary's essential duties and responsibilities as follows:

- Analyzes software requirements/user problems to determine feasibility of design within time and cost constraints. Formulate and define scope and objectives through research and fact-finding to develop or modify complex software programming applications or information systems – 25%
- Consult with hardware engineers and other engineering staff to evaluate interface between hardware and software, and operational and performance requirements of overall system – 5%

- Formulates and designs software system, using scientific analysis and mathematical models to predict and measure outcome and consequences of design. Includes preparation of functional specifications and designing of software programs. Builds detailed design specifications and programs for scientific, engineering, and business application. Design data conversion software programs – 35%
- Develops and directs software systems testing procedures, programming and documentation. Also includes testing units and computer software systems – 35%

In a second similar letter also dated April 1, 2008, the petitioner emphasized that it is not a job shop or a personnel company and that the "Programmer Analyst[s]" work for the petitioner and are its direct employees. The petitioner stated that it normally requires a degree or its equivalent for the proffered position and listed its current employees, their job titles, their qualifications, and the petitioner's education requirements. The list identified the educational requirements for the various job titles as "baccalaureate degree." The petitioner provided the typical functions for several positions within the company including that of programmer analyst. The petitioner also listed several of its clients and identified different projects for each client, as well as provided copies of its agreements with each of the clients listed.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 19, 2008. In the request, among other things, the director: asked that the petitioner submit copies of signed contracts between the petitioner and the beneficiary; requested that the petitioner submit a complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested; requested that the petitioner submit copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed that specifically lists the beneficiary by name on the contracts and provides a detailed description of the duties the beneficiary will perform; and requested copies of the petitioner's state and federal quarterly wage reports. The director noted that the evidence must show specialty occupation work for the beneficiary with the actual end-client company where the work will ultimately be performed.

In a response dated July 25, 2008, the petitioner listed the same or similar information previously submitted.[1] The petitioner again emphasized that it is not a job shop or a personnel company and that the "Programmer Analysts" work for the petitioner and are its direct employees. The petitioner asserted that because the position of programmer analyst is involved "in a software environment [that] is a blend of computer-related technology and sophisticated engineering principles, the duties of this position can only be satisfactorily discharged by an individual having knowledge of the

[1] The petitioner's July 25, 2008 response to the director's RFE is the same letter as the second letter submitted in support of the petition, except that it adds paragraphs that appear to relate more specifically to the beneficiary.

Software industry and the equivalent of a Bachelor's degree in Computer Science, Information Systems, Engineering, Mathematics, or a related analytic or scientific discipline, as well as experience with information systems." The petitioner stated: "[i]n order to properly plan, design and implement software development and programming activities, the Programmer Analyst must possess not only a thorough knowledge of the technical requirements of engineering concepts, but also must have analytical and technical expertise to be able to develop software as per the requirements of the customer."

The petitioner also noted that advertisements placed on popular job websites also indicated that the minimum requirements for a programmer analyst position is a bachelor's degree. The record before the director did not provide evidence in support of the petitioner's claim.

The petitioner added a section in the July 25, 2008 letter identified as the beneficiary's itinerary of employment listing a "IFE Service Data Automation" project for a third party company with which the petitioner had entered into a contract on December 7, 2007. The petitioner provided a brief description of the IFE Service Data Automation project and indicated that the project would commence on November 3, 2008 with final deployment planned in November 2009 and that the beneficiary would "be working on this requirement for the client, [redacted]" primarily at the petitioner's offices but would travel to the client site when needed. The petitioner added that the beneficiary's job responsibilities for this project would include:

- Gather Requirements for the new application, understand various file formats of the new engineering system[.]
- Process files and design architecture to support multiple file formats.
- Design class diagrams, Develop classes, database tables and required programs[.]
- Develop VB.Net, C#, programs and SQL Stored Procedures for the new application[.]
- Test and deploy new programs on the Test Environment and on live server upon approval of Client.
- Package the new application to various Airline Customers
- Troubleshoot production Issues[.]

As noted above, the director denied the petition on August 12, 2008. The director noted the number of contracts the petitioner had provided including the [redacted] contract and observed that none of the contracts requested the services of the beneficiary and the petitioner had not provided evidence that the contracts had not expired. The director found that the petitioner subcontracts workers with a variety of computer skills to other companies that need computer programming services. The director concluded that, without complete valid contracts relating to the beneficiary, the petitioner had not established that it had control of the beneficiary's actual work and the record did not contain sufficient information regarding the nature and scope of the beneficiary's services. The director found that the petitioner had not established that it is the beneficiary's employer and that it met the definition of United States employer or agent. Moreover, the director determined that without an itinerary or documentation establishing the validity of the submitted contracts, the director could not determine the beneficiary's actual work location; thus, the submitted LCA could

not be determined valid. The director further determined that it was impossible to determine that the beneficiary would be employed in a specialty occupation based on the lack of valid unexpired contracts detailing the beneficiary's ultimate duties. Finally, the director found that the record raised questions regarding the petitioner's compliance with the terms and conditions of employment in other petitions and thus USCIS could not expect that the petitioner would comply with the terms and conditions of employment in this petition.

The AAO finds that the primary issue in this matter is whether the petitioner has established that it is offering a specialty occupation position to the beneficiary. Thus, the AAO affirms the director's decision on the issues of whether an employer-employee relationship exists, the validity of the LCA, and whether the petitioner complied with the terms and employment in other petitions, but will not discuss these issues as the petition is not approvable on the crucial issue of failure to establish that the proffered position is a specialty occupation. The AAO also observes that the crux of the failure to establish eligibility for this benefit is not whether the petitioner has established that it has an ongoing business with numerous clients, but whether the proffered position has been sufficiently described by the company that is utilizing the beneficiary's services to establish the position as a specialty occupation. In that regard, the AAO will examine the various descriptions of the proffered employment in an effort to ascertain the beneficiary's actual duties and whether those duties comprise the duties of a specialty occupation.

The AAO observes that the petitioner again includes an "itinerary" in its September 10, 2008 statement submitted on appeal. In the section identified as the beneficiary's itinerary, the petitioner identifies a new project, the Fault Reporting Analysis tool (FRAT 2.0), and re-names the IFE Service Data Automation project to ISEDIS I DAD Data Automation project. The petitioner states that the beneficiary "will be working on this requirement" and that the project will commence in January 2009, with the final deployment planned in January 2010 and that "[t]hereafter, further enhancements have been planned for these two applications, which is likely to extend until September 2010." The petitioner also indicates that the beneficiary will work on this requirement in its offices and will travel to offices in Irvine, California when needed. The petitioner further includes an August 25, 2008 letter from stating: "[the petitioner] is currently involved in Information Technology projects in the areas of fault reporting and component maintenance. In addition, [the petitioner] has been contracted to provide on-going production support and application software enhancements as needed." The petitioner also provides a statement of work for the ISEDIS Data Automation I-DAD project and a scope of work statement regarding FRAT 2.0. The statement of work identifies the team composition for the ISEDIS Data Automation I-DAD project as project manager, project lead & business analyst, three senior developers, and a test engineer. The statement of work does not identify the position of programmer analyst. The scope of work for the FRAT 2.0 project identifies a project manager but does not include the position of programmer analyst in the statement of work. In addition to the statement of work and scope of work for the two projects, the record also includes a document titled "Addendum to Letter from [redacted]" The addendum provides a list of the petitioner's proposed employees on projects for [redacted] The list includes the name of the beneficiary and the project name as [redacted]

Also on appeal, the petitioner reiterated its belief that the position of programmer analyst requires a theoretical and practical application of highly specialized knowledge and asserts that a degree is common to the industry in parallel positions among similar organizations. The petitioner provided copies of five Internet advertisements to establish that a bachelor's degree is the minimum requirement for the proffered position. The five advertisements are for: (1) a programmer analyst position for an agribusiness with over 3000 employees that indicates a bachelor's degree or equivalent in Internet development with 3 to 5 years professional experience preferred; (2) a programmer analyst for a research center at a university that indicates a bachelor's degree in computer science, information systems, software engineering or related area or any equivalent combination of education and full-time work experience are the preferred qualifications; (3) a programmer analyst for a medical care foundation that indicates a four-year degree in computer science or a related field and/or equivalent training and/or experience are required; (4) a programmer analyst for a technology staffing firm that indicates that a bachelor of science degree is required; and (5) a .Net programmer analyst for a staffing company that indicates a bachelor's degree in information systems or a related field or equivalent education and experience are required. The petitioner also informs that it normally requires a bachelor's degree in a field related to the field of work and provides a list of its employees indicating that a bachelor's degree is the educational requirement for all of its listed positions including, operations manager, lead programmer analyst, programmer analyst, systems administrator, network administrator, president, SAP business process analyst, technical consultant, director of projects and recruiter.

The petitioner asserts that a specialty occupation exists for the beneficiary and that the proffered position satisfies the requirement for a specialty occupation.

Preliminarily, the AAO finds that despite the director's RFE requesting contracts and statements of work from the ultimate end user of the beneficiary's services, the petitioner failed to fully comply with the request and submits for the first time on appeal, an August 25, 2008 letter from Thales Avionics with attachments and an addendum. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO is reluctant to accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). In this matter, however, even if considering the outline of the beneficiary's duties and assuming the outline of duties relates to the ISEDIS Data Automation I-DAD and FRAT project, the AAO does not find the description sufficiently comprehensive to establish that the actual position is a specialty occupation.

For purposes of the H-1B adjudication, the issue of *bona fide* employment is viewed within the context of whether the petitioner has offered the beneficiary a position that is determined to be a specialty occupation. Therefore, the AAO will specifically review whether the petitioner has provided sufficient evidence to establish that the services to be performed by the beneficiary are those of a specialty occupation.

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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

> An occupation which 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 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.

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). 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), 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. 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 professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category. To determine whether a particular job qualifies as a specialty occupation, USCIS does not 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, to determine whether the position qualifies as a specialty occupation. *Defensor v. Meissner*, 201 F. 3d 384.

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, the regulation at 8 C.F.R. § 214.2(h)(4)(iv)(A)*(1)* specifically lists contracts as one of the types of evidence that may be required to establish that the services to be performed by the beneficiary will be in a specialty occupation.

The petitioner's initial evidence submitted in support of the petition provided an overview of the duties of a programmer analyst. In response to the director's RFE, the petitioner included a basic outline of duties for a position of programmer analyst. The petitioner also indicated its belief that the position of a programmer analyst required the equivalent of a bachelor's degree in computer science, information systems, engineering, mathematics, or a related analytic or scientific disciple, as well as experience with information systems. The petitioner briefly described two projects for a

third party company and indicated that the beneficiary would perform the generally described duties for the project.

On appeal, the petitioner again identifies two projects and provides a statement of work and a scope of work for each of the projects. Neither of these documents identifies a programmer analyst position as necessary for the project. As noted above, the petitioner also includes an August 25, 2008 letter from [redacted] stating: "[the petitioner] is currently involved in Information Technology projects in the areas of fault reporting and component maintenance. The document titled "Addendum to Letter from [redacted]" is undated and although the addendum lists the beneficiary and the projects to which he will be assigned, the addendum does not provide further information regarding the beneficiary's actual duties as those duties relate to the ISEDIS I DAD & FRAT projects. Thus, the record on appeal also fails to include the detailed information necessary to establish that the programmer analyst working on the referenced projects for [redacted] will perform duties that comprise the duties of a specialty occupation.

The AAO acknowledges the petitioner's assertion that the position of programmer analyst requires a theoretical and practical application of highly specialized knowledge. However, an assertion without the underlying description of actual duties and evidence from the actual user of the beneficiary's services of the proposed duties is insufficient. General statements and vague descriptions of an occupation do not establish that a specific proffered position is a specialty occupation. 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)).

The only information in the record regarding the beneficiary's actual duties is the outline provided in response to the director's RFE and again on appeal. This outline is insufficient to establish that the beneficiary's actual duties as they relate to the proposed projects comprise the duties of a specialty occupation. The description is broadly stated and vague regarding details of the level of support and actual actions that the beneficiary will be expected to perform. The AAO observes that the Department of Labor's *Occupational Outlook Handbook* (*Handbook*) reports that a bachelor's degree commonly is required for computer programming jobs, but also recognizes that a two-year degree or certificate may be adequate for some positions. The *Handbook* also notes that "[e]mployers favor applicants who already have relevant programming skills and experience" and that "[s]killed workers who keep up to date with the latest technology usually have good opportunities for advancement." The petitioner has not provided sufficient evidence to establish that the general outline of duties set out in its description would require a degree beyond that of an associate degree and/or certifications in a particular programming language. The description shows, at most, that the beneficiary should have a basic understanding of particular computer programs, an understanding that could be attained with a lower-level degree or certifications in the programs.

The AAO also acknowledges the five job advertisements the petitioner submitted that relate to the position of a programmer analyst and the petitioner's note that the job advertisements require the successful applicant to have a bachelor's degree. Upon review of the five job announcements, the AAO does not find that the advertisements indicate that a bachelor's degree is necessarily required.

The advertisements indicate generally that a bachelor's degree or some unspecified work equivalent is preferred or in three instances is required. The advertisements do not all indicate that the bachelor's degree must be in a specific discipline. Upon review of the advertisements, the AAO finds that these advertisements do not establish an industry standard for programmer analysts in parallel positions in organizations similar to the petitioner. The AAO observes first that the petitioner has not established that the organizations listed in the advertisements are similar to the petitioner, as the job announcements do not provide sufficient information to enable the AAO to conclude that the businesses advertising the positions are similar to the petitioner in size, number of employees, level of revenue, or nature of business. Second, the broadly stated descriptions for the petitioner's position and those in the advertisements are insufficient to establish that the actual duties of the positions are indeed parallel. Finally, the AAO finds that the information in the advertisements underscores the fact that a broadly-defined programmer analyst is not a specialty occupation, as the advertisements do not all indicate that a degree in a specific discipline is required.

Similarly, the petitioner's indication that it only hires individuals with bachelor's degrees to perform a myriad number of positions from president to programmer analyst is insufficient to establish that the proffered position is a specialty occupation. The AAO observes that the petitioner has not established that it has previously employed a programmer analyst to perform the generally stated duties the petitioner indicates will be performed for the Thales Avionics project or that it requires a degree in a specific discipline for the proffered position, or that any of its generally described positions require bachelor's degrees in specific disciplines. The AAO notes that the education of specific individuals does not establish that the duties of their positions comprise the duties of a specialty occupation; rather it is the actual detailed job description that must be analyzed to determine whether a position is a specialty occupation. In this regard, the critical element is not the title of the position or 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. To interpret the regulations any other way would lead to absurd results. If USCIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate degrees or higher degrees. As the record does not include a detailed description of the beneficiary's actual duties for the petitioner or its client, the petitioner has not established the proffered position is a specialty occupation.

The record is without the underlying evidence of the actual work to be performed or other evidence to support the petitioner's claim that the proffered position is a specialty occupation. As the record in this matter does not include a comprehensive description of the beneficiary's actual duties and the specific duties that the beneficiary will perform as they relate to the listed project(s) the beneficiary will work on for the duration of the requested employment period, the petition must be denied. To establish that a specific position in the computer field is a specialty occupation, the petitioner must provide evidence of the nature of the employing organization, the particular projects planned, a comprehensive description of the beneficiary's duties from the ultimate user of the beneficiary's services, and evidence that the duties described require the theoretical and practical application of a

body of highly specialized knowledge attained through a baccalaureate program in a specific discipline. In this matter, the petitioner has failed to provide such evidence. Without evidence of work orders or statements of work describing the specific duties the petitioner and/or the end use company requires the beneficiary to perform, USCIS is unable to discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program. Again, going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. at 165. Without a meaningful job description, the petitioner may not establish any of the alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In support of this analysis, USCIS routinely cites *Defensor v. Meissner,* 201 F.3d 384 (5th Cir. 2000), in which an examination of the ultimate employment of the beneficiary was deemed necessary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources (Vintage), was a medical contract service agency that brought foreign nurses into the United States and located jobs for them at hospitals as registered nurses. The court in *Defensor* found that Vintage had "token degree requirements," to "mask the fact that nursing in general is not a specialty occupation." *Id.* at 387.

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 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 the legacy 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.*

In this matter, the petitioner provides generic descriptions of computer-related positions such as operations manager, programmer analyst, SAP technical consultant, systems administrator, and network administrator in its letter in support of the petition. In response to the RFE, the petitioner provided an outline of the duties of a programmer analyst. Without the underlying statements of work that comprehensively describe the work to which the beneficiary will be assigned and describe the beneficiary's actual duties as those duties relate to the specific projects, the AAO is unable to analyze whether the beneficiary's duties require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the position meets any of the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)*(1)*.

The AAO also notes that the petitioner indicated in response to the RFE that the project(s) to which the beneficiary would apparently be assigned would commence on November 3, 2008 with final deployment planned in September 2009 and on appeal that the project to which the beneficiary

would apparently be assigned would commence on January 2009, with the final deployment planned in January 2010. The petitioner does not explain the discrepancy in the commencement dates. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In addition, the petition for the beneficiary's services was filed April 14, 2008. The AAO observes that a petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The petition will be denied and the appeal dismissed for the above stated reason. In visa petition proceedings, the 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.