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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

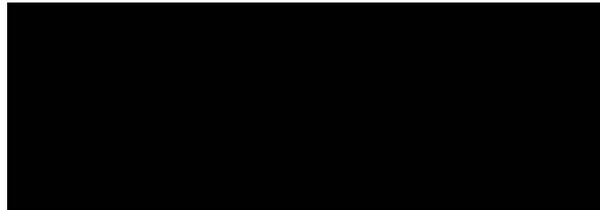


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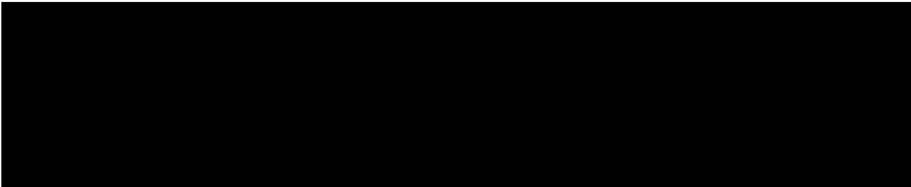
FILE: WAC 07 124 52200 Office: CALIFORNIA SERVICE CENTER Date:

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:



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, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director 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.

The petitioner is a corporation doing business as an information technology (IT) consulting firm in Irving, Texas. In order to employ the beneficiary in what it has designated a computer software engineer position, the petitioner endeavors to extend the classification of 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).

This decision involves a situation where the petitioner, located in Irving, Texas, has assigned the beneficiary to perform work for a client firm, Great Rivers Technologies (GRT), pursuant to a referral of a particular GRT project, named GRT XLE, from the vendor TVS International.¹ The Form I-129 and the related Labor Condition Application (LCA) identify the beneficiary's work location as Irving, Texas. However, based upon information in a letter from the petitioner responding to the service center's request for additional information (RFE), the director determined that the beneficiary was actually working at GRT's location in Iowa, which is outside the area covered by the LCA.

The director denied the petition on two independent grounds, namely, that: (1) the LCA is invalid because it does not list all of the beneficiary's work locations; and (2) the petitioner has failed to establish that the beneficiary's work qualifies as a specialty occupation. The director found the LCA defective because it identified the petitioner's Irving, Texas address as the beneficiary's only work location, but the director found that the beneficiary was actually performing work in DuBuque, Iowa, the location of the client GRT. The director based her second adverse conclusion, failure to establish a specialty occupation, upon her finding that the evidence of record does not establish the specific duties that the beneficiary would perform for the petitioner's clients.

On appeal, counsel contends that the LCA filed with the petition is not defective. Counsel asserts that the LCA correctly identifies the only location (Irving, Texas) where the beneficiary is to work in producing the product for which the Iowa client, GRT, hired the petitioner. Counsel explains that the beneficiary travels to Iowa "only for technology related meetings and discussions on the projects." Counsel also contends that, contrary to the director's finding, the proffered position is a specialty occupation.

The AAO bases its decision upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the RFE; (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, counsel's brief on appeal, and copies of the following documents submitted in support of the brief: (a) three pages of an Independent Contractor Agreement between the petitioner and TVS International, Inc. of San

¹ Counsel describes the relationships among the petitioner, GRT, and TVS International at page 3 of his brief.

Jose California, with an effective date of March 5, 2007; (b) a copy of information on Computer Software Engineers, Applications, from the Internet site of the Department of Labor (DOL) Foreign Labor Certification Online Wage Library & Data Center; (c) page 1 of the Summary Report for Computer Software Engineers, Applications, from DOL's *O*Net Online* Internet site; and (d) expense reports, with appended expense receipts, pertaining to the beneficiary's visits to Dubuque, Iowa with the client GRT for the period April 13, 2007 to September 30, 2007.

The AAO will first address the LCA issue.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) states that, when filing an H-1B petition, the petitioner must submit with the petition “[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary.” Thus, in order for a petition to be approvable, the LCA must have been certified before the H-1B petition was filed. The submission of a certified LCA certified subsequent to the filing of the petition satisfies neither 8 C.F.R. § 214.2(h)(4)(i)(B)(1) nor 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). Further, U.S. Citizenship and Immigration Services (USCIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12).

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

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

[Italics added]

Relevant submissions in response to the RFE

The petitioner's letter offering employment to the beneficiary indicates that his work would be at a client-project site to be announced. Specifically, it states in pertinent part: “Your appointment will

come into effect from your arrival at our project site *as applicable on the joining date.*" [Italics added.]

In his letter responding to the RFE, counsel states, in part:

The beneficiary will be placed on the clients' site from time to time. In fact, he is currently being placed at DuBuque, IA, on a project. A letter from the client to verify this participation is enclosed as **Tab 5**. The beneficiary reports to the petitioner and sends the work orders to the petitioner every 15 days to receive his compensation from the petitioner. **TAB 6**.

The letter from the client GRT, at Tab 5 and dated August 28, 2007, states that the beneficiary, as an employee of the petitioner, "is currently on a team to work on a project for [GRT], at the location of [REDACTED]." The letter also states: "We understand that [the beneficiary] is compensated by [the petitioner] and he reports to his employer his work schedule and work orders."

Read in context with counsel's letter of reply to the RFE and the GRT letter of August 28, 2007, the bi-monthly timesheets' workhours entries and instructions to email or fax them to the petitioner's HR office, indicate that the beneficiary was working at GRT in Dubuque during every one of the 44 workdays covered by the time sheets during the period from July 1, 2007 to August 31, 2007.

Relevant submissions on appeal

The relevant submissions on appeal are the Expense Report spreadsheets and related receipts for reimbursable expenses claimed by the beneficiary in relation to GRT work for April 13, 2007 to May 31, 2007 and the monthly periods from June 2007 through September 2007.² The spreadsheets' entries for the periods of July and August 2007 overlap and are consistent with the 44 Iowa workdays reported in the bi-monthly timesheets submitted in response to the RFE. The Expense Report spreadsheets indicate that the beneficiary was working in the DuBuque area, on the GRT project, for the following number of workdays during the period April 13, 2007 to June 30, 2007: 12 (April); 22 (May); 21 (June). The Expense Report spreadsheet for September 2007 indicates that the beneficiary worked in the Dubuque area 19 days that month.

On appeal, counsel submits excerpts from 20 C.F.R. § 655.715 to support the argument that the beneficiary complied with the regulatory limitations upon working at a location other than that specified on the LCA. The portions of that regulation which are pertinent to this proceeding are as follows:

² The petitioner does not submit the related lodging receipts, which would detail the dates and places of lodging. However, the lodging-costs and dates-paid entries and their chronological placement on the spreadsheets are sufficient to indicate the beneficiary's workdays in the DuBuque area.

Place of employment means the worksite or physical location where the work actually is performed.

(1) The term does not include any location where either of the following criteria--paragraph (1)(i) or (ii)--is satisfied:

(i) *Employee developmental activity.* An H-1B worker who is stationed and regularly works at one location may temporarily be at another location for a particular individual or employer-required developmental activity such as a management conference, a staff seminar, or a formal training course (other than “on-the-job-training” at a location where the employee is stationed and regularly works). For the H-1B worker participating in such activities, the location of the activity would not be considered a “place of employment” or “worksite,” and that worker's presence at such location--whether owned or controlled by the employer or by a third party--would not invoke H-1B program requirements with regard to that employee at that location. However, if the employer uses H-1B nonimmigrants as instructors or resource or support staff who continuously or regularly perform their duties at such locations, the locations would be “places of employment” or “worksites” for any such employees and, thus, would be subject to H-1B program requirements with regard to those employees.

(ii) *Particular worker's job functions.* The nature and duration of an H-1B nonimmigrant's job functions may necessitate frequent changes of location with little time spent at any one location. For such a worker, a location would not be considered a “place of employment” or “worksite” if the following three requirements (i.e., paragraphs (1)(ii)(A) through (C)) are all met--

(A) The nature and duration of the H-1B worker's job functions mandates his/her short-time presence at the location. For this purpose, either:

(1) The H-1B nonimmigrant's job must be peripatetic in nature, in that the normal duties of the worker's occupation (rather than the nature of the employer's business) requires frequent travel (local or non-local) from location to location;
or

(2) The H-1B worker's duties must require that he/she spend most work time at one location but occasionally travel for short periods to work at other locations;
and

(B) The H-1B worker's presence at the locations to which he/she travels from the “home” worksite is on a casual, short-term basis, which can be recurring but not excessive (i.e., not exceeding five consecutive workdays for any one visit by a

peripatetic worker, or 10 consecutive workdays for any one visit by a worker who spends most work time at one location and travels occasionally to other locations); and

(C) The H-1B nonimmigrant is not at the location as a “strikebreaker” (i.e., the H-1B nonimmigrant is not performing work in an occupation in which workers are on strike or lockout).

(2) Examples of “non-worksites” locations based on worker's job functions: A computer engineer sent out to customer locations to “troubleshoot” complaints regarding software malfunctions; a sales representative making calls on prospective customers or established customers within a “home office” sales territory; a manager monitoring the performance of out-stationed employees; an auditor providing advice or conducting reviews at customer facilities; a physical therapist providing services to patients in their homes within an area of employment; an individual making a court appearance; an individual lunching with a customer representative at a restaurant; or an individual conducting research at a library.

(3) Examples of “worksites” locations based on worker’s job functions: A computer engineer who works on projects or accounts at different locations for weeks or months at a time; a sales representative assigned on a continuing basis in an area away from his/her “home office”; an auditor who works for extended periods at the customer's offices; a physical therapist who “fills in” for full-time employees of health care facilities for extended periods; or a physical therapist who works for a contractor whose business is to provide staffing on an “as needed” basis at hospitals, nursing homes, or clinics.

(4) Whenever an H-1B worker performs work at a location which is not a “worksites” (under the criterion in paragraph (1)(i) or (1)(ii) of this definition), that worker's “place of employment” or “worksites” for purposes of H-1B obligations is the worker's home station or regular work location. The employer's obligations regarding notice, prevailing wage and working conditions are focused on the home station “place of employment” rather than on the above-described location(s) which do not constitute worksites(s) for these purposes. However, whether or not a location is considered to be a “worksites”/“place of employment” for an H-1B nonimmigrant, the employer is required to provide reimbursement to the H-1B nonimmigrant for expenses incurred in traveling to that location on the employer's business, since such expenses are considered to be ordinary business expenses of employers (Sec. Sec. 655.731(c)(7)(iii)(C); 655.731(c)(9)). In determining the worker's “place of employment” or “worksites,” the Department will look carefully at situations which appear to be contrived or abusive; the Department would seriously question any situation where the H-1B nonimmigrant's purported “place of employment” is a location other than where the worker spends most of his/her work time, or where the purported “area of employment” does not include the location(s) where the worker spends most of his/her work time.

Counsel's interpretation of the regulation's application to the present petition is premised upon this statement in his brief on appeal:

[T]he LCA only listed the petitioner's address as the work location, because the work was done by the petitioner's employee/the alien worker at the petitioner's premises, not at the Dubuque, IA [location]. The alien worker was given remote connection access to the project from the petitioner's site to facilitate the project and spent most of the work hours at the petitioner's site to perform the tasks. He traveled to the client's location only for technology related meetings and discussions on the projects [sic].

The AAO accords no weight to counsel's statement. It is not supported by documentary evidence anywhere in the record, and counsel provides no discussion of how the documentary evidence supports counsel's assertions about the beneficiary's work. 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).

The AAO further notes that counsel provides no explanation to resolve the apparent contradiction between his statement above on appeal and his letter replying to the RFE, in which he related that the beneficiary was "being placed at DuBuque, IA, on a project," from which "he reports to the petitioner and sends the work orders to the petitioner every 15 days to receive his compensation from the petitioner." Counsel also fails to address the letter from the GRT Project Manager, which counsel submitted in the RFE reply, that states that the beneficiary "is currently on a team to work on a project for [GRT], at the location of [GRT][,] [REDACTED] and that GRT understands "that [the beneficiary] is compensated by [the petitioner] and he reports to his employer his work schedule and work orders." 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).

The AAO also finds that the totality of the evidence regarding the locations of the beneficiary's work and time spent there indicates that the beneficiary has been working in DuBuque for at least the period covered by submitted records, April 13, 2007 to September 30, 2007. For the purposes of the application of 20 C.F.R. §§ 655.705(b) and 655.751, the AAO finds that the documentary evidence establishes that the beneficiary has worked in Iowa on the GRT project on a substantial basis and in excess of 60 days during the April 13, 2007 to September 30, 2007 period covered by the submitted Expense Report spreadsheets and bi-monthly timesheets. The AAO also finds no evidence of record

establishing that the beneficiary maintains an office or workstation at the Irving, Texas location designated as the employment location on the LCA.³

Counsel asserts that under the facts as presented by him “the client’s location of Dubuque IA is not considered as ‘the place of employment,’ which triggers the employer’s various obligations under the DOL rules and regulations.” In the above reviewed evidentiary context of this proceeding, counsel’s reliance on 20 C.F.R. § 655.715 is misplaced. The beneficiary does not qualify under the discussion at (1)(i), as his work in DuBuque is not an employee developmental activity, and he does not qualify under the discussion at (1)(ii), as he is not the type of worker addressed in that section, namely, one for whom the nature and duration of his job functions “may necessitate frequent changes of location with little time spent at any one location.”

By application of 20 C.F.R. § 655.735 to this finding, the petitioner has exceeded the time allowed to assign the beneficiary to work in Dubuque, Iowa without a separate LCA covering that location. The decisive regulatory sections are at 20 C.F.R. §§ 655.735(c) and 655.735(f), which state:

(c) An employer's short-term placement(s) or assignment(s) of H-1B nonimmigrant(s) at any worksite(s) in an area of employment not listed on the employer's approved LCA(s) shall not exceed a total of 30 workdays in a one-year period for any H-1B nonimmigrant at any worksite or combination of worksites in the area, except that such placement or assignment of an H-1B nonimmigrant may be for longer than 30 workdays but for no more than a total of 60 workdays in a one-year period where the employer is able to show the following:

- (1) The H-1B nonimmigrant continues to maintain an office or work station at his/her permanent worksite (e.g., the worker has a dedicated workstation and telephone line(s) at the permanent worksite);
- (2) The H-1B nonimmigrant spends a substantial amount of time at the permanent worksite in a one-year period; and
- (3) The H-1B nonimmigrant's U.S. residence or place of abode is located in the area of the permanent worksite and not in the area of the short-term worksite(s) (e.g., the worker's personal mailing address; the worker's lease for an apartment or other home; the worker's bank accounts; the worker's automobile driver's license; the residence of the worker's dependents).

* * *

³ As earlier noted, counsel’s assertions about the beneficiary’s work locations carry no weight, as they are not supported by documentary evidence indicating their accuracy. *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).

(f) Once any H-1B nonimmigrant's short-term placement or assignment has reached the workday limit specified in paragraph (c) of this section in an area of employment, the employer shall take one of the following actions:

(1) File an LCA and obtain ETA certification, and thereafter place any H-1B nonimmigrant(s) in that occupational classification at worksite(s) in that area pursuant to the LCA (i.e., the employer shall perform all actions required in connection with such LCA, including determination of the prevailing wage and notice to workers); or

(2) Immediately terminate the placement of any H-1B nonimmigrant(s) who reaches the workday limit in an area of employment. No worker may exceed the workday limit within the one-year period specified in paragraph (d) of this section, unless the employer first files an LCA for the occupational classification for the area of employment. Employers are cautioned that if any worker exceeds the workday limit within the one-year period, then the employer has violated the terms of its LCA(s) and the regulations in the subpart, and thereafter the short-term placement option cannot be used by the employer for H-1B nonimmigrants in that occupational classification in that area of employment.

Based upon the evidentiary and regulatory analysis discussed above, the AAO finds that the LCA does not support the present petition as the LCA was not certified for the geographical area which is the beneficiary's actual place of employment. Consequently, the director's determination to dismiss the petition on the basis of the LCA filed with it is correct. For this reason, the appeal will be dismissed and the petition will be denied.

Next, the AAO will address the director's denial of the petition on the basis that it failed to establish the proffered position as a specialty occupation.

The AAO applies the following statutory and regulatory framework in analyzing whether a proffered position qualifies as a specialty occupation.

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)(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.

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 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.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), United States 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 AAO notes that in the Form I-129, the LCA, and its letter to the beneficiary, the petitioner refers to the proffered position as that of a computer software engineer. To determine whether a particular job qualifies as a specialty occupation, USCIS does not 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 the factors to be considered. USCIS must examine the ultimate employment of the alien to

determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384, 387-388 (5th Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The court in *Defensor v. Meissner* held that for the purpose of determining whether a proffered position is a specialty occupation, a 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.” 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 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.

As will be discussed below, the evidence of record is insufficient to convey the substantive nature of the work the beneficiary would perform in the execution of his duties, and whether the performance of those duties would require him to use both theoretical and practical applications of at least a bachelor's degree level of highly specialized computer-related knowledge. Consequently, the record presents an insufficient evidentiary basis for the AAO to reasonably determine that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The circumstances of the present petition involve three separate business entities. TVS International is a vendor providing GRT with persons to perform computer services for its project GRT XLE. TVS International has contracted with the petitioner to provide persons to perform those services for its client GRT. Therefore, GRT, not the petitioner, will determine the beneficiary's duties, the matters upon which they will be performed, the work that their execution will entail, and, ultimately, the performance requirements of the proffered position.

In its March 10, 2007 letter filed with the Form I-129, the petitioner indicated that the beneficiary will be required to perform the following job duties “to aid the company in meeting client needs”:

- The analysis and evaluation of work load and computer system specifications to determine the feasibility of expanding client computer operations.
- The assignment and coordination of work projects including the conversation [sic] of software/hardware, the designation of staff assignments, the establishment of work priorities and the evaluation of cost and time requirements.
- Quality control, review of test programs, and computer systems designed to determine criticality and component loss.

- The review of existing software/hardware capabilities, workflow, and scheduling limitations to determine if requested program changes are feasible given the client[']s existing framework or system;
- Regular review of technical journals pertaining to software/hardware industry developments project report drafting and documentation of new and modified software/hardware and
- Analysis and research relating to the development of new information systems to meet current and projected needs.

The AAO notes that the above list is restricted to generalized duties stated in the abstract, without reference to any particular client, project, or contractual requirements. Further, while the duties indicate a need for some computer-related knowledge, they are too broadly described to indicate that their performance would require any particular educational level of highly specialized knowledge in a computer-related discipline. Moreover, there is no evidence that GRT, the entity actually defining the particular duties to be performed, has endorsed these duties as applying to the work that it requires. Further, as will be discussed below, the record lacks evidence establishing whatever nature those duties would take under the work defined for the position by GRT. Accordingly, the AAO finds that the list of duties is not probative of either the specific duties that the beneficiary is to perform or the educational requirements for their performance.

Where, as in the present petition, an entity other than the petitioner determines the specific nature and performance requirements of the beneficiary's work, it is incumbent upon the petitioner to provide sufficient documentary evidence from the work-determining entity client to establish that, as actually performed for it, the proffered position satisfies at least one of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). This the petitioner has failed to do.

The Independent Contractor Agreement submitted into the record is incomplete. It is not accompanied by the document that it references as "Work Order 1 to this agreement," which, according to the agreement, describes the services to be performed, and the body of the agreement does not reference the petitioner, the beneficiary, or state the services that the beneficiary or other workers assigned by the petitioner would perform for GRT. As such, this document has no evidentiary value in establishing either the duties that the beneficiary is to perform or their educational requirements.

The August 28, 2007 letter from GRT's Project Manager provides this information about the beneficiary:

[The beneficiary's] role is a Software Engineer. His main responsibilities are: Analysis of client requirements, architecture and design of application, lead the software development and implementation.

The AAO notes that the Project Manager's statement is generic and generalized, uninformative about the substantive content of the beneficiary's responsibilities, and presented in a record that includes no information about the project upon which the beneficiary is working, no description of the "client

requirements” that the beneficiary analyzes, no information about the application involved, nothing about the architecture and design referenced by the Project Manager, and nothing about the software being developed. As such, the Project Manager’s statement has little evidentiary value.

Further, the record contains no explanations correlating the beneficiary’s GRT work with a need for a particular level of highly specialized knowledge in a specific specialty. In this regard, the AAO also notes that neither the GRT Project Manager’s letter, the Independent Contractor Agreement, nor any other document from GRT or its vendor, TVS International, specifies a particular educational background as a requirement for persons to be assigned by the petitioner to GRT work.

Where, as here, GRT, an entity other than the petitioner, will define the nature of the position by the work orders that it generates for the beneficiary, a determination under the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) that the proffered position is one normally requiring at least a bachelor’s degree, or its equivalent, in a specific specialty cannot be made in the absence of evidence sufficiently detailed to establish the particular type of specialized work that GRT requires and what such work normally entails in terms of the theoretical as well as practical application of highly specialized knowledge in the claimed specialty. The record in the present case lacks such evidence.

By failing to establish the specific type of work that GRT requires from the proffered position, the record lacks a sufficient factual basis for reasonable determinations as to similarity with other, degree-requiring positions in the industry. Therefore, the record does not support an affirmative finding under the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A), by proving that the degree requirement asserted by the petitioner is common to its industry in parallel positions among similar organizations. The AAO also notes that assertion of such a degree requirement would be undermined by the lack of evidence from GRT asserting any particular educational credentials required for the work to be performed by the beneficiary.

With regard to the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A), the record does not adequately develop any aspects of the position as rendering it so complex or unique that it can be performed only by a person with at least a bachelor’s degree in a specific specialty.

The record does not support an affirmative finding under the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), for situations where the petitioning employer establishes that it normally requires at least a bachelor’s degree, or its equivalent, in a specific specialty. The evidence of record does not establish the petitioner’s recruiting and hiring history for the proffered position. However, even if it did, that history would be insufficient because the nature of the proffered position is not sufficiently developed to establish that any degree requirement imposed by the petitioner is necessitated by the actual performance requirements of the position. The lack of substantive evidence from GRT as to the beneficiary’s specific duties and their performance requirements would preclude an AAO determination that the position itself supports the need for a specialty degree.

The record’s lack of substantive evidence about the specific duties set by GTR for the proffered position precludes the AAO from reasonably determining their level of specialization and complexity.

Therefore, the record does not support a finding that performance of the specific duties requires knowledge usually associated with the attainment of a bachelor's or higher degree in a specific specialty.

For the reasons detailed above, the AAO concurs with the director's assessment that the record is fatally lacking in documentary evidence about the actual work to be performed by the beneficiary. Accordingly, the director's decision to deny the petition for failure to establish a specialty occupation will not be disturbed.

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 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.