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FILE: WAC 07 145 51558 Office: CALIFORNIA SERVICE CENTER Date: NOV 03 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:



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).

Perry Prew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. Although a subsequent motion to reopen and reconsider was granted, the director affirmed her initial decision to deny the 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 software development and consulting firm. To employ the beneficiary in what it designates a programmer analyst 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).

On August 24, 2007, the director issued a decision denying the petition on two independent grounds, namely, the petitioner's failures to establish: (1) that it is a U.S. employer as defined at 8 C.F.R. § 214.2(h)(4)(ii), and (2) that the petition is based upon a credible offer of employment in a specialty occupation. The petitioner filed a timely motion to reopen and reconsider, which the director granted. On October 9, 2007, the director issued a new decision in which she acknowledges that the petitioner is a U.S. employer and withdraws the director's earlier determination that the petitioner had not established that status. However, the director affirmed her initial decision to deny the petition based upon her finding that the evidence of record was not sufficient to establish that the proffered position is a specialty occupation. As in the initial decision denying the petition, the director phrased the failure to establish a specialty occupation in terms of insufficiency of evidence that the petitioner's offer of H-1B caliber employment is credible.

In pertinent part, counsel's brief on appeal contends that, contrary to the director's decisions, the record establishes a *bona fide* offer of specialty occupation employment. The brief reiterates the petitioner's assertions earlier in the record that the beneficiary will be assigned to an in-house project, the petitioner's own ProServe Application Project (PSA Project), but may also be assigned, on a short-term basis, to work at clients' locations on clients' projects that may generate work requiring the beneficiary's services. Counsel resubmits the list of the beneficiary's PSA Project duties included in the petitioner's response to the request for evidence (RFE), and counsel also resubmits another list of duties previously submitted by the petitioner as a summary of the "set of technical duties and functions" that the beneficiary would routinely perform during the period of H-1B employment.

It must be noted that for purposes of adjudication of an H-1B petition, 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. As will be discussed below, the AAO finds that the petitioner has not provided sufficient evidence to establish that the services that the beneficiary will perform in the proffered position are those of a specialty occupation. Thus, the AAO agrees with the director's determination that the record does not establish a credible, or *bona fide*, offer of H-1B caliber employment.

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

service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter of August 24, 2007; (5) the Form I-290B and the matters constituting the petitioner's motion; (6) the director's denial letter, dated October 9, 2007; and (7) the Form I-290B submitted on appeal, counsel's brief, and the other documents submitted in support of the appeal.

THE ANALYTICAL FRAMEWORK

To determine whether a petitioner has established a specialty occupation, the AAO applies the following statutes and regulations to the evidence of record about the proffered position.

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.

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), 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. 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.

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.”

ANALYSIS

The petitioner asserts that there are two major components to the proffered position, namely: (1) the work that the beneficiary will perform on the petitioner's PSA Project, and (2) whatever non-PSA-Project work the petitioner's clients may generate for the beneficiary.

The AAO notes that the record indicates that the PSA Project will first concentrate on the petitioner's development of the ProServe Application for the petitioner's own in-house use. After the application is developed for in-house use, the petitioner will focus on marketing it. The record indicates that customers who purchase the ProServe Application will receive a license for its use and the petitioner's assistance in customizing the application to their particular business operations. As will be discussed below, the record also indicates that the petitioner expects that it will be in the product marketing phase by the beginning of the October 1, 2007 to September 30, 2010 employment period requested in the petition.

The record contains two major descriptions of the duties to be performed by the beneficiary. The first description appears to be submitted as applying to all of the work to be performed by the beneficiary during the H-1B employment period, whether or not performed as part of the PSA Project. This description consists of the following list which is presented as a summary of the "set of technical duties and functions" that the beneficiary would routinely perform during the period of employment sought in the petition:

- a. Analyze business requirements processes and convert requirements to specific program specifications;
- b. Design software codes and operational scripts for business applications using programming languages, operating systems, business and data objects, and systems; develop procedures to automate processing and improve computer components and systems;
- c. Gathering and evaluating business requirements, functional specifications; study and analyze business processes; convert the business rules to program logic and develop program specifications and standards;
- d. Evaluate requirements for software programs and determine compatibility with current systems and computer components;
- e. Implement programming and software applications and business and functional specifications for specified applications and packages adapted to meet specific client or project needs;
- f. Review and modify software programs to ensure technical accuracy and reliability of programs, operating systems and web platforms; review and modify parameters to define system scope and objective;
- g. Formulate procedures for data extraction and filtering[,] and assist in system designing and directing programmers on requirements and functionality of systems;

- h. Execute product optimization and ensure security, transaction ease and user efficiency; install and enhance vendor based systems and manage customer requests and vendor specifications;
- i. Troubleshoot applications and provide technical support for end users of developed products; conduct technical discussions and meetings with team members to analyze current operational procedures, problems and solutions.

The petitioner's July 27, 2007 letter replying to the RFE described the PSA Project as "embod[ying] an integrated application, which can automate the total business process including timesheet submission, leaves and loans approvals, auto invoice generation to the clients, and to [sic] generate the auto payroll based on the leaves, loans, hours worked at the client, etc." As documentary evidence of the PSA Project, the petitioner submitted an 11-page Project Plan, which includes a statement that it was created by the petitioner's application development team on March 9, 2006 and updated on June 27, 2007. The second major description of the beneficiary's duties appears in the PSA Project Plan as a two-page outline, entitled "Itinerary of Services and Role of [the Beneficiary] in the Project." The outline reads:

1. System Requirements Analysis (SRA) – 9 Months

Analyze business and system requirements.

- Evaluate requests for new or modified programs to determine feasibility and estimate the effort required.
- Provide Systems expertise input, including systems dependencies and grouping items for a release.
Participate in review meetings with the end user to understand user expectations about system.
Attend project core meeting to understand the key elements in developing.

2. Documentation – 6 Months

Provide expertise in writing user and operational manuals describing accessing the system, installation, and operating procedures respectively.

Write system documentation with complete details of the sequence of programs and access flow.

3. Requirements Definition – Final – 3 Months

Prepare Technical requirement documents from business requirements.

- Help identify the key requirement on focusing end users and system process.
- Develop Use Case Diagrams, Class Diagrams, Sequence Diagrams to document proposed for development as per the system requirements.
- Participate in SRA final review discussions and [be] involve[d] in documenting and updating the requirements.

- Document the information as per SDLC and route for review or authorization to the core team.
- Research and consult with resources and/or industry experts to ensure the effectiveness and efficiency of software systems and applications.
- Preparation of Delivery Checklist.

4. User-Interface Prototyping – 6 Months

- Install and configure Windows 2003 OS/Linux on Web and Application servers.
- Provide problem-solving expertise including the formulation and testing of hypothesis and the complex analysis of data.
- Develop User Interface using C++, Java, J2EE, SQL, XML, JSP Servlets, EJB, JMS, Web Services, Java Application Server, Oracle, SQL Server, My SQL, MS Access, ASP, WML, HTML, Java Script and other relevant technologies.
- Document the information as per SDLC and route for review and route for review or authorization to the core team.
- Develop security components needed for UI prototype using C#.
- Test and implement the prototype.
- Participate in walkthroughs and reviews.

5. Architecture, Design and Development – 12 Months

- Specify the system architecture and design using OOAD utilizing the UML Analysis and Design Models.
- Participate in design reviews discussions and involve in DB design.
- Design and develop the core business model and business rules within the application.
- Document the information as per SDLC and route for review or authorization to the core team.
- Advises on proper programming techniques and assists in programming of complex problems; checks programs for logical sequence of operations and possible errors.
- Develop programs as per program specifications.
- Alter programs for operational efficiency.
- Act as configuration manager and take care of version control.
- Develop automatic invoice generation, time sheet trackers, and other modules.
- Develop configuration files and deploying the application on test environment.
- Coordinating the business people and testing team in testing the application in test environment.
- Write SQL scripts and batch programs for taking the backups of log files on weekly basis for analysis.
- Document the information as per SDLC and route for review or authorization to the core team.

6. Integration, System & Acceptance Testing - 2 Months

- Participate in peer and QA code reviews.
- Responsible for integrating the various modules.
- Resolve key process issues due to programming logic.
- Research and fix the defects and issues [which] arise during the testing phase.
- Participate in analyzing the log file and events during the system and acceptance.
- Document the information as per SDLC and route for review or authorization to the core team.

7. Implementation - 1 Month

- Deploy middleware components and user interface screens onto web servers and application servers.
- Support to implementation during the production deployment.
- Schedule and monitor the jobs during implementation.
- Perform system checkout and regression test.
- Document the information as per SDLC and route for review or authorization to the core team.

8. Operation and Maintenance – Continuous and Ongoing

- Assist users to solve operating problems.
- Implement scheduled jobs to monitor logs and take needed action when server goes down or application is having a problem.
- Responsible for ongoing system maintenance until transition to the Support Team as per SLA.

A substantial number of the duties in the above quoted “set of technical duties and functions” and excerpt from the PSA Project plan are consistent with the Programmer Analyst occupational category as discussed in the 2008-2009 edition of the Department of Labor’s *Occupational Outlook Handbook (Handbook)* in its chapters entitled “Computer Programmers” and “Computer Systems Analysts.” However, as will now be discussed, the record does not establish that the beneficiary would actually be performing those duties for the period of employment requested in the petition.

Qualification of a position as a specialty occupation is not determined by its title or how closely a petitioner’s descriptions of the position approximate the *Handbook’s* narrative about an occupational category. Rather, specialty occupation status must be substantiated by evidence of record about the actual performance requirements of the position in the context of the petitioner’s particular business. To determine whether a particular job qualifies as a specialty occupation, USCIS focuses on the evidence of the specific duties of the proffered position as performed within the context of the petitioner’s business operations. *See generally Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer’s self-imposed standards, but

whether the evidence of record establishes that the actual performance of the position 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. In consonance with section 214(i)(1) of the Act, 8 U.S.C. § 1184 (i)(1), and the H-1B implementing regulations at 8 C.F.R. § 214.2, the evidence of record must establish that the actual performance of the proffered position requires the theoretical application of a body of highly specialized computer-related knowledge and the attainment of at least a bachelor's degree in a specific specialty that signifies the attainment of such knowledge. In the context of the present petition, where the nature and extent of the beneficiary's work will partly depend upon requirements generated by customers, it is essential that the petitioner provide documentary evidence of whatever contractual documents existing at the time the petition was filed called for the beneficiary's work as a programmer analyst for clients or customers of the petitioner. This the petitioner has not done.

Lack of evidence of non-PSA-Project work

According to the petitioner's July 27, 2007 letter responding to the RFE, the beneficiary will be "directly assigned as part of the core team working on the [petitioner's] ProServe Application Project," but "in the event when the beneficiary's expertise is needed for completion or support of a specific client's project, he may be given a short-term assignment on the client's site to assist in the successful completion of the project."

The AAO finds that the petitioner has not specified any existing non-PSA-Project work for the beneficiary to perform. Likewise, the petitioner has not provided documentation demonstrating the substantive nature of any such non-PSA-Project work and the periods that the beneficiary would spend on such work. In this regard, the AAO acknowledges the copies of contract documents that the petitioner submitted as Attachment 13 to its letter of reply to the RFE. However, they are not probative of the proffered position being a specialty occupation, as neither these documents nor any other evidence of record establishes that the contracts relate to any work that the beneficiary would perform. Further, the AAO notes that the contract documents submitted do not contain terms sufficient to establish that their performance requires work at a specialty occupation level.

Because the petitioner has not provided documentary evidence of any non-PSA-Project work that would be assigned to the beneficiary, the AAO accords no weight to the assertions of the petitioner and counsel that the beneficiary would perform such work. Without evidence of contracts, work orders, or statements of work describing the duties the beneficiary would perform and for whom, the petitioner fails to establish that the duties that the beneficiary would perform are those of a specialty occupation. Providing a generic job description that speculates what the beneficiary may or may not do at each worksite is insufficient. 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). 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 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).

Also, as the petition indicates that the beneficiary's work would include projects whose specifications and work requirements would be determined by clients of the petitioner, in support of this analysis, the AAO cites to *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 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 *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.*

In summary, the evidence of record establishes neither the existence nor performance requirements of any non-PSA-Project work to be performed by the beneficiary.

Lack of evidence of PSA Project work for the beneficiary during the employment period requested in the petition

The AAO will now discuss how it arrives at the finding that, due to the absence of contractual documents from customers for the ProServe Application, the evidence of record does not establish that the beneficiary will be performing the duties outlined in the PSA Project Plan's "Itinerary of Services and Role of [the Beneficiary] in the Project," quoted earlier in this decision.

The section of the PSA Plan entitled "Project Development and Financial Plan for Next 3 Years" states that the petitioner "is expecting a time frame of more than 3 years to develop this application in all three phases with all of the identified modules," that continuous enhancements and support of

the application will be essential for its success, and that the following timelines are expected to develop the application:

Phase 1:

- Identifying the requirement and analysis.
- System GAP analysis and customizations to fill the identified GAPS.
- Designing the object model and database modeling.
- Developing the application with the module Expenses, Timesheets, Loans, Leaves.
- Unit testing, Integrated system testing.

Phase 2:

- Developing the auto invoice and automation of the payroll modules.
- Unit testing, Integrated System Testing.

Phase 3:

- Customizing the open interface to meet each client's business requirement.
- Post-production Support for the clients.
- Bug tracking and patch management.

The Longterm Plan section of the PSA Project Plan states:

[The petitioner] has plans to extend this application to provide the total financial system. Depending upon the clients and popularity of the applications, it can be extended to supply management.

The Summary of the Plan section of the PSA Project plan states:

[The petitioner] is planning to launch this total application by *September 2007* to the customers. [The petitioner] will start using this application as and when the modules are developed and tested. This way [the petitioner] will be saving money by automating the business process. And once the total application is developed, [the

petitioner] markets with a pricing structure. [The petitioner] is mainly focusing [on] the service provider companies for this application.

(Emphasis added.)

The Form I-129 specifies the period of intended employment as October 1, 2007 to September 30, 2010. According to the petitioner's July 27, 2007 letter responding to the RFE, the petitioner was "currently developing the project" as of the end of July 2007, and intended to "launch this total application by September 2007 to the customers." The AAO further notes that, likewise, the Summary of the Plan section of the PSA Project Plan projects that by September 2007 - a month before the start of the period of employment specified in the Form I-129 - development of the ProServe Application for the petitioner's in-house use would be completed and that the PSA Project would shift to marketing the application to customers, mainly "service provider companies." It follows that by the time that the period of the beneficiary's employment specified in this petition begins, in October 2007, the nature and very existence of PSA Project work for the beneficiary would depend upon whatever work customers may order in response to the petitioner's marketing efforts, which are not projected to begin prior to September 2007. The record indicates that such orders were non-existent at the time that the petition was filed. Further, the AAO notes that the Basic Business Needs section of the PSA Project Plan indicates that the amount of any PSA Project work that may be generated in the marketing phase of the project is speculative, as it states, in pertinent part:

[The petitioner] has also approached various small to mid[-]size service companies with this framework and explained how it will save the[m] money by avoiding manual work. Few of the companies have shown great interest on this application. Once the application is developed and demonstrated there could be a great potential possibility that [the petitioner] can market this product too. That way this application so becomes [a] revenue generator also, not only [a] revenue saving [application].

Moreover, the record contains no documentary evidence establishing that, at the time the Form I-129 was filed, any service provider company or any other entity obligated itself to purchase the ProServe Application. The record contains no offers, letters of commitment, or any other contractual document related to the petitioner's producing ProServe Application products for any customer. Likewise, the record contains no documentary basis for the petitioner's speculation that "there could be a great potential possibility" for marketing the ProServe Application, and thus providing marketing-phase ProServe Application work for the beneficiary.

In light of the lack of documentary evidence establishing that that ProServe Application work would exist for the beneficiary for the period of intended employment, the duties asserted for the beneficiary for that period have little weight. 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. at 165. 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. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. 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 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.

The AAO further notes that, read in conjunction, the PSA Project phases (in the “Project Development and Financial Plan for Next 3 Years” section of the PSA Plan) and the petitioner’s statements, indicating that the petition’s period of intended employment would begin after the initial development work and during the marketing of the Application to potential customers, indicate that PSA Project work for the beneficiary would most likely be generated during Project Phase 3, described in the PSA Project Plan as:

- Customizing the open interface to meet each client’s business requirement
- Post-production support for the client
- Bug tracking and patch management

The AAO finds that the petitioner fails to establish how the PSA Project Plan outline of eight groups of duties in the “Itinerary of Services and Role of [the Beneficiary] in the Project” relates to work that might be generated for the beneficiary during the marketing stage of the Project, the period of requested employment. The AAO further finds that the record lacks documentary evidence establishing the substantive nature of work that may come to be involved in Phase 3’s components, that is, “Customizing the open interface to meet each client’s business requirement”; “Post-production support for the client”; and “Bug tracking and patch management.” Additionally, even in the aggregate these three phrases are not indicative of work requiring the application of at least a bachelor’s degree level of knowledge in a specific specialty, as required in a specialty occupation.

For the reasons set forth above, the petitioner has failed to provide sufficient evidence to establish that, at the time the petition was filed, there existed specialty occupation work for the beneficiary to perform in the employment period specified in the petition. Thus, the director’s determination that the record does not establish a credible, or *bona fide*, offer of H-1B caliber employment is correct.

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.