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FILE: EAC 07 145 51309 Office: VERMONT SERVICE CENTER

Date: **SEP 14 2009**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The 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 software development and consulting company that seeks to employ the beneficiary as a programmer-analyst. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the basis of his determination that: (1) the petitioner had failed to establish that the beneficiary qualifies to perform the duties of the proposed position; (2) that the petitioner previously filed an “identical” H-1B petition for the same beneficiary and position in the same fiscal year; and (3) that the petitioner used the same labor condition application (LCA) for the instant petition as it had for the H-1B petition previously filed on behalf of the beneficiary.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director’s request for additional evidence; (3) the petitioner’s response to the director’s request; (4) the director’s denial letter; and (5) the petitioner’s Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

At the outset of its analysis, the AAO will first withdraw the director’s finding that, at the time it filed the instant petition, the petitioner was limited to filing only one petition, per fiscal year, on behalf of a particular beneficiary. At the time the petitioner filed the instant petition on April 2, 2007, no such limitation existed.¹

The AAO also withdraws the director’s finding that the LCA submitted with the instant petition was not valid because it had been submitted with the previous H-1B petition that had been filed for the beneficiary for the same employment period as covered by that LCA. The Department of Labor’s certification of an LCA is valid for the period of employment indicated on the certified LCA, and the certified period is not affected or otherwise diminished by the employer’s failure to obtain approval of an H-1B petition with which the LCA was previously submitted. The AAO also withdraws the director’s comment that the LCA was certified for only one nonimmigrant.

¹ However, the petitioner should note for future reference that, by an interim rule effective on March 24, 2008, U.S. Citizenship and Immigration Services (USCIS) issued a new regulatory provision, at 8 C.F.R. § 214.2(h)(2)(i)(G), which precludes a petitioner from filing, during the course of any fiscal year, more than one H-1B petition on behalf of the same alien beneficiary if he or she is subject to the 65,000 cap or qualifies for the master’s degree cap-exemption. *See* 73 Fed. Reg. 15389, 15394 (Mar. 24, 2008).

Counsel correctly notes that the LCA in this proceeding was filed to support the H-1B employment of ten nonimmigrants, and not one as was stated by the director.²

The remaining ground of the director's denial is the director's determination that the beneficiary does not qualify to perform the duties of the proposed position.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Upon review, the AAO concurs with the director's finding that the petitioner has failed to establish that the beneficiary is qualified to perform an occupation that requires a baccalaureate degree in a computer-related field.

When it filed the petition on April 2, 2007, the petitioner submitted a March 25, 2007 evaluation from Morningside Evaluations and Consulting, which evaluated the beneficiary's foreign degree in electronics and communication engineering as equivalent to a bachelor's degree in electronics engineering from an accredited institution in the United States.³ After requesting additional information on July 16, 2007, the director denied the petition on October 9, 2007. In finding the evidence of record, including the petitioner's response to the request for additional evidence, insufficient to establish that the beneficiary is qualified to perform the duties of the proposed position, the director noted that the Morningside evaluator failed to indicate precisely how the beneficiary's coursework taken toward obtaining her degree in electronics and communication engineering relates to the duties that she would perform as a programmer-analyst. The director stated that the petitioner "cannot utilize the phrase 'programmer analyst' as an umbrella term stretched far enough to include any or all baccalaureate degrees in engineering."

Counsel's November 29, 2007 appellate brief fails to address the grounds of the director's denial. For this reason alone, the appeal must be dismissed. Although counsel's brief is several pages long, he spends only two sentences discussing the qualifications of the beneficiary, which was the primary basis for the petition's denial. In those two sentences, counsel refers the AAO to the Morningside evaluation, which counsel has now submitted into the record three times, and states that because the evaluator determined the beneficiary's foreign degree equivalent to a bachelor's degree in electronics engineering from an accredited institution in the United States, the petition

² See Item 4 of Part D of the LCA.

³ This is in contrast to the petitioner's incorrect assertion in its April 1, 2007 letter of support that the evaluator had determined the beneficiary's foreign degree to be equivalent to a bachelor's degree in computer science from an accredited institution of higher education in the United States.

should be approved. Counsel makes no effort to satisfy the director's specific concerns regarding the Morningside evaluation; i.e., that the evaluator had failed to indicate precisely how the beneficiary's coursework taken toward obtaining her degree in electronics and communication engineering relates to the duties that she would perform as a programmer-analyst.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have [1] education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and [2] have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The first criterion requires a demonstration that the beneficiary earned a baccalaureate or higher degree from a United States institution of higher education. The beneficiary did not earn a degree in the United States, so she does not qualify under this criterion.

Nor does the beneficiary qualify under the second criterion, which requires a demonstration that the beneficiary's foreign degree has been determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university. Although the director set forth his concerns with the Morningside evaluation in his October 9, 2007 denial, as noted previously, counsel and the petitioner have elected not to address those concerns on appeal. As no attempt to overcome the director's concerns has been made on appeal, the beneficiary does not qualify under this criterion.

The record does not demonstrate, nor has the petitioner contended, that the beneficiary holds an unrestricted state license, registration or certification to practice the specialty occupation, so he does not qualify under the third criterion, either.

The fourth criterion, set forth at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), requires a showing that the beneficiary's education, specialized training, and/or progressively responsible experience is equivalent to the completion of a United States baccalaureate or higher degree in the specialty occupation, and that the beneficiary also has recognition of that expertise in the specialty through progressively responsible positions directly related to the specialty. As the petitioner has failed to establish that the beneficiary qualifies under any of the other criteria, the AAO will analyze the beneficiary's qualifications under this criterion. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating a beneficiary's credentials to a United States baccalaureate or higher degree is determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

The beneficiary does not qualify under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), as there has been no demonstration that the Morningside evaluator possesses the authority to grant college-level credit for training and/or experience in a related field at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience in the field.

No evidence has been submitted to establish, nor has counsel contended, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(2), which requires that the beneficiary submit the results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI).

Nor does the beneficiary satisfy 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). As was the case under 8 C.F.R. § 214.2(h)(4)(iii)(C)(2), the beneficiary is unqualified under this criterion because counsel and the petitioner have elected not to address those concerns on appeal. As no attempt to overcome the director's concerns has been made on appeal, the beneficiary does not qualify under this criterion.

No evidence has been submitted to establish, nor has the petitioner contended, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(4), which requires that the beneficiary submit evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty.

The AAO turns next to the fifth criterion. When USCIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;⁴
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

⁴ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

While the record contains letters of regarding the beneficiary's work history, they do not establish that this work experience included the theoretical and practical application of specialized knowledge required by the specialty; that it was gained while working with peers, supervisors, or subordinates who held a bachelor's degree or its equivalent in the field; and that she achieved recognition of expertise in the field as evidenced by at least one of the five types of documentation delineated in sections (i), (ii), (iii), (iv), or (v) of 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

Accordingly, the beneficiary does not qualify under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(1)(2)(3)(4), or (5), and therefore by extension does not qualify under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4). The petitioner has failed to establish that the beneficiary qualifies to perform the duties of a specialty occupation, and the AAO agrees with the director's decision to deny the petition on this ground.

However, the beneficiary's qualifications to perform the duties of the proposed position are irrelevant because, beyond the decision of the director, the AAO finds that the proposed position does not qualify for classification 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.

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 petitioner stated on the Form I-129 that it was established in 1998, is engaged in the business of software development and consulting services, currently employs 65 persons, and has a gross annual income of \$7,000,000 and a net annual income of \$1,500,000.

In its April 1, 2007 letter of support, the petitioner stated that it “mainly deals with sectors in Banking and Financial Services, Insurance, Securities, Trading, Telecommunications, Healthcare, Manufacturing, Technical Support Services, eCommerce, Systems Engineering, Geographical Information Systems, Life Sciences, IT Consulting, Management Consulting, & Higher Education.” The petitioner stated that it has “4 lines of businesses,” namely, Business Intelligence, Data Warehousing, Web Technologies, and ERP technologies.⁵ According to the petitioner, “the main Domains of the business” are Health Check, Product Evaluation, Consulting Services, Project Based Solutions, Application Development, Product Development, Support and Maintenance, Technology Transfer, Corporate Training, [and] Offshore. The petitioner identifies “the main authorized clients” as Johnson & Johnson, Pfizer, Pepsico, Boar’s Head, Philips Electronics DAP, JPM Chase, BankOne, CitiGroup, Bank of New York, Lord Abbett, Inter Public Group, Merrylinch [sic], GE, Ford Motor Company, Chrysler, Yahoo, T-Mobile, [and] FedEx.”

The petitioner also stated that the beneficiary’s engineering degree might become necessary to meet the software-development needs of a high-tech client:

A high tech engineering firm may have issues regarding development of software for analysis of research data or for automation of design process and simulation. In order to understand the highly technical and specific need, the programmer analyst should have to have a solid and thorough background in engineering, physical sciences and/or advanced applied quantitative methodologies or mathematics and statistics.

Accordingly, it is critical for the company to devise high quality computer systems and programs which will meet the needs of our customers and which are free of technical and operational errors. It is essential that we employ highly qualified computer professionals with the experience and ability to write, develop, and implement software programs.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which assigns specialty-occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position’s duties.

The AAO recognizes the Department of Labor’s *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of

⁵ The AAO notes that the petitioner does not explain the acronym “ERP.”

occupations that it addresses. The AAO finds that the proposed duties described in the record substantially comport with the general duties that the 2008-2009 edition of the *Handbook* identifies with its Programmer Analyst occupational category, which is discussed in the *Handbook* chapters entitled “Computer Programmers” and “Computer Systems Analysts.” The “Computer Programmers” chapter describes programmer-analysts as workers responsible for both systems analysis and programming. The chapter describes the systems-programmer aspect as follows:

Computer programmers often are grouped into two broad types—applications programmers and systems programmers. Applications programmers write programs to handle a specific job, such as a program to track inventory within an organization. They also may revise existing packaged software or customize generic applications purchased from vendors. Systems programmers, in contrast, write programs to maintain and control computer systems software for operating systems, networked systems, and database systems. These workers make changes in the instructions that determine how the network, workstations, and central processing unit of a system handle the various jobs they have been given, and how they communicate with peripheral equipment such as terminals, printers, and disk drives. Because of their knowledge of the entire computer system, systems programmers often help applications programmers determine the source of problems that may occur with their programs.

The “Computer Programmers” chapter indicates that computer-systems-analyst component of the programmer-analyst occupation involves providing a computer-software design which will then be coded, in the programming phase, into a logical series of instructions that computers can follow, using “a conventional programming language such as COBOL; an artificial intelligence language such as Prolog; or one of the more advanced object-oriented languages, such as Java, C++, or ACTOR.” The “Computer Programmers” chapter refers to the *Handbook’s* “Computer Systems Analysts” chapter for “[a] more detailed description of the work of programmer-analysts.”

The “Nature of the Work” segment of the *Handbook’s* “Computer Systems Analysts” chapter includes this relevant information:

Computer systems analysts solve computer problems and use computer technology to meet the needs of an organization. They may design and develop new computer systems by choosing and configuring hardware and software. They may also devise ways to apply existing systems’ resources to additional tasks. Most systems analysts work with specific types of computer systems—for example, business, accounting, or financial systems or scientific and engineering systems—that vary with the kind of organization. Analysts who specialize in helping an organization select the proper system software and infrastructure are often called system architects. Analysts who specialize in developing and fine-tuning systems often are known as systems designers.

To begin an assignment, systems analysts consult managers and users to define the goals of the system. Analysts then design a system to meet those goals. They specify the inputs that the system will access, decide how the inputs will be processed, and format the output to meet users' needs. Analysts use techniques such as structured analysis, data modeling, information engineering, mathematical model building, sampling, and cost accounting to make sure their plans are efficient and complete. They also may prepare cost-benefit and return-on-investment analyses to help management decide whether implementing the proposed technology would be financially feasible.

When a system is approved, systems analysts determine what computer hardware and software will be needed to set it up. They coordinate tests and observe the initial use of the system to ensure that it performs as planned. They prepare specifications, flow charts, and process diagrams for computer programmers to follow; then they work with programmers to "debug," or eliminate errors, from the system. Systems analysts who do more in-depth testing may be called software quality assurance analysts. In addition to running tests, these workers diagnose problems, recommend solutions, and determine whether program requirements have been met.

In some organizations, programmer-analysts design and update the software that runs a computer. They also create custom applications tailored to their organization's tasks. Because they are responsible for both programming and systems analysis, these workers must be proficient in both areas. . . .

The *Handbook's* information on educational requirements in the programmer-analyst occupation indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement for this occupation. Rather, the occupation accommodates a wide spectrum of educational credentials, as indicated in the following excerpt from the "Educational and training" subsection of the *Handbook's* "Computer Systems Analyst" chapter:

When hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor's degree. For more technically complex jobs, people with graduate degrees are preferred.

The level and type of education that employers require reflects changes in technology. Employers often scramble to find workers capable of implementing the newest technologies. Workers with formal education or experience in information security, for example, are currently in demand because of the growing use of computer networks, which must be protected from threats.

For jobs in a technical or scientific environment, employers often seek applicants who have at least a bachelor's degree in a technical field, such as computer

science, information science, applied mathematics, engineering, or the physical sciences. For jobs in a business environment, employers often seek applicants with at least a bachelor's degree in a business-related field such as management information systems (MIS). Increasingly, employers are seeking individuals who have a master's degree in business administration (MBA) with a concentration in information systems.

Despite the preference for technical degrees, however, people who have degrees in other majors may find employment as systems analysts if they also have technical skills. Courses in computer science or related subjects combined with practical experience can qualify people for some jobs in the occupation.

Employers generally look for people with expertise relevant to the job. For example, systems analysts who wish to work for a bank should have some expertise in finance, and systems analysts who wish to work for a hospital should have some knowledge of health management.

As indicated above, the information in the *Handbook* does not indicate that programmer-analyst positions normally require at least a bachelor's degree in a specific specialty.

The AAO acknowledges counsel's references on appeal to the Department of Labor's *Occupational Information Network (O*NET™ Online)* assignment of Job Zone 4 and SVP [Specialized Vocational Preparation] 7-8 codes to the Programmer-Analyst occupation. The AAO first notes that counsel is incorrect in his assertion that a Job Zone 4 code indicates that the rated occupation "requires a four-year bachelor's degree." In fact, the Education segment of this coding reads:⁶

Education Most of these occupations require a four-year bachelor's degree, but some do not[.]

Counsel's assertion that an SVP 7 rating "requires a minimum of a bachelor's degree" is also incorrect. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require.

The AAO also acknowledges counsel's statements that the Department of Labor assigns the programmer analyst occupation to the "Educational and Training Code for Professional Occupations," and that "the job duties of Programmer Analyst is [sic] categorized as Code 5, which requires completion of a bachelor's degree." Counsel does not provide a citation to support this claim, but the AAO notes that the Department of Labor's Foreign Certification Data

⁶ For an explanation of the Job Zone, SVP, and other O*NET™ terms, access O*NET™ Online Help summary section, at <http://online.onetcenter.org/help/online/summary>.

Center provides a five-tier scale of Education and Training Codes for Professional Occupations (ETCPO), the fifth of which reads:⁷

Five: Bachelor's Degree

Completion of the degree program generally requires at least 4 years but not more than 5 years of full-time equivalent academic work.

These codes are provided for an employer's use in calculating the prevailing wage for LCA purposes. They are not statements of objective educational requirements of a particular position, but are intended as a tool for an employer's use in calculating the prevailing wage for a position designated on the LCA that the employer asserts as requiring a bachelor's degree, whether or not in a specific specialty. Further, an ETCPO level does not distinguish between degrees that are in a specific specialty directly related to a proffered position and those that are not.

In short, counsel's assertions about the codes he references are not persuasive. The codes do not specify the particular type of degree that a job would normally require; do not indicate whether a baccalaureate or higher degree in a specific specialty is a minimum for entry into the type of position proffered here; and do not rebut the *Handbook's* information that such positions do not normally require a degree in a specific specialty.

Not only do the *Handbook* and the Department of Labor sources cited by counsel not support the programmer-analyst occupation as one that normally requires at least a bachelor's degree in a specific specialty, but the evidence about the duties that the beneficiary would perform is insufficient to satisfy any specialty-occupation criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

To determine whether a particular job qualifies as a specialty occupation, the AAO does not simply rely on the proposed position's title or the extent to which the petitioner's descriptions of the position and its underlying duties correspond to occupational descriptions in the *Handbook*. Critical factors for consideration are the record's evidence about specific duties of the proffered position and the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the alien will likely perform for the entity or entities ultimately determining the work's content. In the present petition, the petitioner's business is providing software-development and consulting services for clients contracting for those services. In this context, those clients are the entities determining the actual content of the beneficiary's work.

However, the record lacks independent documentation from any such clients to further explain the nature and scope of the beneficiary's duties. 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

⁷ These codes appear at <http://www.flcdatcenter.com/TrainingCodes.aspx>.

may or may not do at each worksite is insufficient. Simply 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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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 proposed 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.*

The petitioner’s failure to provide evidence of a credible offer of employment and/or work orders or employment contracts between the petitioner and its clients renders it impossible to conclude for whom the beneficiary will ultimately provide services and exactly what those services would entail. The AAO, therefore, cannot analyze whether the beneficiary’s duties at each worksite would 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 proposed position qualifies as a specialty occupation under any of the criteria 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). For this additional reason, the petition may not be approved.

The petitioner has failed to establish that the beneficiary qualifies to perform the duties of a specialty occupation. However, the beneficiary’s qualifications to perform the duties of the proposed position are irrelevant as the AAO has also determined, beyond the decision of the director, that the proposed position does not qualify for classification as a specialty occupation.

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

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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.