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



U.S. Citizenship
and Immigration
Services

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FILE: WAC 08 130 51369 Office: CALIFORNIA SERVICE CENTER Date: **SEP 15 2009**

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

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

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

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

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner states that it engages in software consulting, training and development, that it was established in 1998, employs 210 persons, and has an estimated gross annual income of \$35,000,000 and an estimated net annual income of \$1,200,000. It seeks to extend the employment of the beneficiary as a programmer analyst from April 2, 2008 to April 1, 2011. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

On November 18, 2008, the director denied the petition, determining that the petitioner failed to establish that: (1) it had a *bona fide* specialty occupation position to offer the beneficiary; and (2) it is in compliance with the terms and conditions of employment.

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

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

When filing the Form I-129 petition, the petitioner averred in its April 3, 2008 letter appended to the petition that it is in the business of "designing and developing software solutions for a wide range of commercial and scientific applications." It further stated that its mission was "to help our clients succeed in the global market place by exceeding their expectations and delivering value in everything we do." Regarding the beneficiary, the petitioner stated that he would be employed as a programmer analyst with an annual salary of \$60,000. The petitioner submitted an April 3, 2008 offer of employment offering the beneficiary the position of programmer analyst with an annual salary of \$60,000, health insurance, and legal fees to obtain H-1B classification. The initial record also included the petitioner's approval notice for the beneficiary's H-1B classification valid from May 14, 2005 to April 5, 2008. The initial record further included a Form ETA 9035E, Labor Condition Application, certified by the Department of Labor on April 2, 2008 for a programmer analyst position in Toledo, Ohio with a prevailing wage of \$24,170 and the annual rate of pay for the intended beneficiary at \$48,000.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 13, 2008. In the request, among other things, the director: asked the petitioner to clarify the petitioner's employer-employee relationship with the beneficiary; requested evidence that a specialty occupation exists for the beneficiary; requested copies of signed contracts between the petitioner and the beneficiary; requested a complete itinerary of services or

engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested; requested copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed that specifically lists the beneficiary by name on the contracts and provides a detailed description of the duties the beneficiary will perform; requested a detailed description of in-house projects on which the beneficiary will work; requested the status of the currently employed H-1B and L-1 employees; requested information regarding the petitioner's premises and its office floor plan; requested a clarification of where the beneficiary would actually work; and requested copies of its federal tax returns and its state and federal quarterly wage reports.

In a response dated July 21, 2008, the petitioner addressed the director's queries. The petitioner noted that its services could be "broadly classified into two segments: One, development of software for clients' applications at petitioner's main office at [REDACTED] IL 60005; and second, if requested by the client, providing services to client's worksites." The petitioner emphasized: "that the petitioner is an agent performing the function of the employer and it is the actual employer and controls the beneficiary's work/services." The petitioner stated that the beneficiary was initially engaged in in-house software development at the petitioner's main office in Arlington Heights, Illinois, but that due to a change in the business scenario¹ and needs of the client it was determined that the beneficiary would work from the client-site, Rexam through the petitioner's subcontractor agreement with Corporate Biz Solutions, Inc. (Corporate Biz).

The petitioner also provided a document titled "Itinerary of Services" that is dated July 21, 2008. The petitioner indicates: that the duration of the itinerary is from February 4, 2008 to April 1, 2011; that the beneficiary will be working at the petitioner's offices in Arlington Heights, Illinois 25 percent of the time and will be providing the services of a programmer analyst; that the beneficiary will be working at the Rexam offices in Hamlet, North Carolina 75 percent of the time and will be providing the services of a programmer analyst. The petitioner submitted a new LCA certified by the Department of Labor on July 21, 2008 for Arlington Heights, Illinois area showing the prevailing wage as \$46,301 and for Hamlet, North Carolina showing the prevailing wage as \$42,744, and the beneficiary's intended rate of pay as \$48,000.

To clarify the employer-employee relationship with the beneficiary, the petitioner provided a copy of an agreement dated April 3, 2008 confirming the beneficiary's employment that was signed by both the petitioner and the beneficiary. The petitioner also provided its July 21, 2008 letter in which the

¹ The petitioner uses the same premise - that a change in business scenario requires the petitioner to relocate other beneficiaries - in other petitions for H-1B employment. For example, receipt numbers WAC 08 072 50323, WAC 08 096 51260, WAC 08 079 50553, WAC 08 096 51220, and WAC 08 090 50923. Rather than a change in business scenario, it appears the petitioner's standard practice is to seek to hire H-1B individuals whether specific work exists or not and then when a contract is executed requiring the beneficiaries' services, move the beneficiary to the location of the contracted duties to perform duties for a third party company.

petitioner stated: “as the Employer [we] are responsible for all incidents of employment including, hiring, terminations, payment of wages and promotions, in relation to [the beneficiary]” and “as the Employer, we maintain full control over the employment of [the beneficiary].” The petitioner also noted that the client has a contractual relation with it and not the beneficiary.

The petitioner also provided its February 15, 2005 contract with Corporate Biz wherein the petitioner agreed to provide temporary staffing for computer-related services to Corporate Biz’s third party client’s project according to the training, skills, abilities and experience required by the client. The record includes a statement of work under the Corporate Biz contract that is dated May 22, 2008, identifies the beneficiary as the consultant, describes the project as “SAP WM Functional,” indicates the project/location is Rexam in Hamlet, North Carolina/Toledo, Ohio, and that the start date is February 4, 2008 and the end date is open. The record also includes a July 14, 2008 letter signed by the Hamlet SAP Project Leader on the letterhead of Rexam confirming that the beneficiary is assigned to the Rexam Hamlet organization located in Hamlet, North Carolina and that the duration of the project is “open (long-term).” The record contained a second letter from Rexam’s Hamlet SAP Project Leader, also dated July 14, 2008, indicating that the beneficiary had been providing services to the Rexam organization since February 4, 2008, that the beneficiary is not its employee, that it does not control the beneficiary’s work schedule, promotion/demotion, salary or supervise the technical details of his work, and that it only provides the assignments that need to be completed. The letters also included an overview of the beneficiary’s duties as a programmer analyst. The petitioner also referenced the Department of Labor’s *O*Net Online (O*NET)* reports regarding computer programmers.

The petitioner further provided a copy of its lease for [REDACTED] Heights, Illinois. The petitioner noted that it operated out of Suite 55 while its “sister” company operated out of Suite 54, and that each company had separate employees and separate clientele, but shared the same work labs and training facilities. The lease agreement shows the leased premises includes 5,682 square feet. The petitioner also noted that “due to clients’ requirement and confidential nature of work involved, it becomes an absolute necessity that the petitioner’s employees work from the client’s site” however, “the overall control, supervision and direction of all the petitioner’s employees is centered at petitioner’s business premises.”

The record also includes: a table listing the employment status of the petitioner’s H-1B and L-1 employees; the petitioner’s payroll summary and Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements for 2006 and 2007; state quarterly wage reports and IRS Forms 1120, U.S. Corporate Income Tax Return.

On November 18, 2008, the director denied the petition. The director observed that a petitioner must establish that a specialty occupation position actually exists, that it is not permissible to state that it will employ an individual to perform duties that are characteristic of those found in a particular specialty occupation. The director noted that the petitioner had provided conflicting evidence. The director found that the petitioner had submitted a statement of work showing the job locations as in Hamlet, North Carolina and Toledo, Ohio and a new LCA showing the job locations in Arlington Heights, Illinois and Hamlet, North Carolina. The director determined that the information initially

submitted and the information submitted in response to the RFE in the letters of support and the two disparate LCAs demonstrated two different work locations and different job responsibilities. The director questioned the petitioner's ability to document the requirements for the H-1B classification under the statute and regulations. Upon review of the evidence submitted in response to the RFE, the director determined that the petitioner filed an extraordinarily high number of petitions in relation to the number of employees it claimed on the petition and that few of the employees who were granted H-1B nonimmigrant status are actually still working for the petitioner pursuant to the originally stated terms of employment. The director identified 11 employees whose Forms W-2 for 2007 showed that the employees were not paid the wage proffered in the petition relating to them. The director noted the petitioner's unusual pattern of H-1B petition filings and conflicting statements regarding wages paid to beneficiaries and determined that the evidence reviewed raised legitimate concerns regarding the petitioner's compliance with the terms and conditions of employment as shown on the Form I-129.

The director further determined that the volume of H-1B petitions filed and the low number of employees who were granted H-1B status that are still working for the petitioner established that the petitioner did not have the intent to employ the beneficiary in the job described. The director determined that the record lacked a reliable evidentiary basis to determine that the petitioner's proffer of employment is authentic and thus the petitioner had failed to demonstrate a credible offer of employment for an H-1B classification.

On appeal, the petitioner asserts that the copy of the signed employment agreement submitted in response to the RFE, the letters from Rexam, and the beneficiary's itinerary substantiates that the beneficiary was offered a reasonable and credible offer of employment by the petitioner and there is a *bona fide* position for the services of the beneficiary. The petitioner contends that it is an agent performing the function of an employer, will be the actual employer of the beneficiary, that the beneficiary's job is not contingent upon the existence of a client contract, and that the beneficiary will be paid as a salaried employee. The petitioner reiterates that it was not initially determined that the beneficiary would be providing the services at the client site and that the beneficiary when the petition was filed was working at the petitioner's main office work site in Arlington Heights, Illinois.

The petitioner also explains that it files a high number of H-1B petitions because of the high competition among companies in the IT sector looking for qualified personnel and that for this reason many of its employees transfer to other companies. The petitioner asserts that it fully compensates all its employees for their services as obligated under the regulations. The petitioner states that any discrepancy between the proffered wage and wages actually paid often is the result of employees utilizing unpaid personal leaves. The petitioner provides the reasons for the discrepancies in the proffered and actual wages for 10 of the 11 beneficiaries referenced by the director. The petitioner states that three of the beneficiaries were employed under the OPT program prior to their H-1B classification; that three employees were on medical leave for extended periods of time; that one employee took an extended vacation; and that three employees were on extended leave for personal reasons. The petitioner does not provide a reason for the failure to pay one of the individuals referenced by the director, the proffered wage.

The petitioner also contended that although it shared office space with its sister company, it did not operate a “virtual” office but occupied actual premises. The petitioner submitted a copy of a lease dated July 30, 2008, signed September 3, 2008, for a start date of September 1, 2008 and an end date of March 31, 2009. The leased premises included Suites 55 and 58 containing approximately 4,583 square feet. The petitioner’s submitted floor plan included only Suite 55.

Upon review of the evidence of record, the AAO concurs with the director’s determination that the petitioner’s offer of employment was not *bona fide* and thus was not an offer of a specialty occupation position. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). In this matter, the petitioner has failed to so establish.

Although the petitioner provides a copy of the signed employment agreement between the petitioner and beneficiary in response to the director’s RFE, the AAO does not find this document evidences that the petitioner is offering the beneficiary a specific specialty occupation position. The AAO observes that although the employment agreement document was signed and dated by the beneficiary prior to the date the petition was filed, the petitioner did not initially submit this document, only submitting it in response to the director’s RFE. The AAO questions the legitimacy of a material document dated at the time the petition was filed but submitted only in response to the director’s RFE. The AAO observes that a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Moreover, the employment agreement merely notes the beneficiary’s salary and benefits and indicates that the beneficiary’s duties will generally include: “Programming, Designing, Planning, Consulting, Testing, Coding, Analysis, Development and new documents preparation, etc.” and “other tasks suitable for Programmer Analyst and to which [the petitioner] may assign [the beneficiary].” The document does not include a comprehensive description of the proffered position. This document does not establish that the petitioner had a *bona fide* specialty occupation position available for the beneficiary when the petition was filed.

Upon review of the letters from Rexam, the AAO finds that the petitioner has not supplied the requested contracts underlying the purported position available for the beneficiary. Thus, it is not possible to ascertain if the Rexam position was available when the petition was filed. In addition, the AAO notes that the statement of work ostensibly assigning the beneficiary to work for Rexam is dated May 22, 2008, more than a month after the petition was filed. Further, neither the letters signed by the Rexam representative nor the statement of work dated May 22, 2008 provide a comprehensive description of the specialty occupation duties the beneficiary will be required to perform. These documents do not assist in establishing that the petitioner had a specialty occupation available for the beneficiary when the petition was filed.

Similarly, the itinerary submitted by the petitioner in response to the director’s RFE provides a general overview of the beneficiary’s proposed duties both at the petitioner’s main office and Rexam’s office in Hamlet, North Carolina. Not only does the itinerary fail to set out the specific dates the beneficiary would be located in one place or another and fail to provide the underlying

contractual basis for Rexam's request for the beneficiary's services as well as a detailed description of the proposed duties, but it is also apparent that the position in the Hamlet, North Carolina location was not available when the petition was filed. The AAO finds that if the Hamlet, North Carolina position was available, the petitioner would have submitted a certified LCA including the location. The petitioner's late submission of an LCA certified by the Department of Labor on July 21, 2008, three months after the petition was filed which changes the beneficiary's work location, is evidence that the petitioner did not have a viable position in place when the petition is filed.

The AAO also finds that the petitioner's claim that the beneficiary will work or initially worked in-house is not supported by any work product prepared by the beneficiary or any substantive evidence that the petitioner has ongoing in-house work or could accommodate the number of individuals for which it files petitions to work at its office location. The petitioner has not provided documentary evidence that supports its contention that it has regular, systematic and continuous operations and the ability to support the number of workers it currently employs. 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)). Moreover, the AAO finds an inherent inconsistency in the petitioner's response to the RFE wherein it indicated that the beneficiary was working in its office in-house when the petition was filed and the beneficiary's pay stubs showing his location in Durham, North Carolina as early as February 1, 2008. Likewise, the AAO finds the petitioner's claims contradict the LCA submitted with the petition showing the beneficiary's work location to be in Toledo, Ohio at a substantially reduced rate of pay. It is these inconsistencies regarding the beneficiaries initial work location that casts doubt on the legitimacy of the petitioner's offer of employment. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The record does not establish that the beneficiary has a legitimate job offer with a comprehensive description of the actual duties comprising the specialty occupation position.

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

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

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

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor’s degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation “which [1] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [2] requires the attainment of a bachelor’s degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.”

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred);

see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp., 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category. To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, to determine whether the position qualifies as a specialty occupation. *Defensor v. Meissner*, 201 F. 3d 384.

The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that “[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation.” Moreover, the regulation at 8 C.F.R. § 214.2(h)(4)(iv)(A)(I) specifically lists contracts as one of the types of evidence that may be required to establish that the services to be performed by the beneficiary will be in a specialty occupation.

On the Form I-129, the petitioner stated that the proffered position is that of a “Programmer Analyst.” In the petitioner’s undated letter appended to the petition, the petitioner indicated the beneficiary’s responsibilities would include:

- Developing customer software for enterprise resource planning needs;
- Customizing functional modules on GUI mode like financial accountancy, material management, Human Resources management, sales and distribution and production planning;
- Coding in programming languages that suit the particular front end package;
- Writing algorithms required to develop programs using system analysis and design;

- Preparing flowcharts and entity-relationship models and diagrams to illustrate sequence of steps that program must follow and to describe logical operations;
- Using graphic files and text data from a database and presenting it on web;
- Collecting user requirements and analyzing coding to be done;
- Evaluating an existing system's software, hardware, business bottlenecks, configuration and networking issues, understanding the client's requests for enhancements and new business functions;
- Interface programming, debugging and executing of programs;
- Monitoring the database using backup, archive and restoring procedures.

Daily task activity would be as follows:

- | | |
|--|-----|
| • System Analysis | 25% |
| • System Design | 20% |
| • Writing the source code and develop programs | 30% |
| • Unit and System Testing | 15% |
| • Implementation and Documentation | 10% |

The petitioner's itinerary indicated that the beneficiary would provide these same duties 25 percent of the time at the petitioner's location in Arlington Heights, Illinois. The petitioner's itinerary for the beneficiary provided the following described duties for the beneficiary's location in Hamlet, North Carolina:

- Planning, Developing, testing, documenting and supporting business and technical applications
- Prioritize enhancements tasks with business and deliver the same
- Consulting with users to identify business process and clarify customized program objectives to perform enhancements
- Analyzing, reviewing and performing system configuration to incorporate business requirement and scenarios
- Developing application specifications and identifying operation procedures
- Identifying gaps between user requirements and SAP delivered Functionality
- Performing Unit, Integration and regression testing
- Setup release procedures for operations

Daily task activity will be approximately as follows:

- | | |
|--|-----|
| • System Analysis | 25% |
| • System Design | 20% |
| • Writing the source code and develop programs | 30% |
| • Unit and System Testing | 15% |
| • Implementation and Documentation | 10% |

In Rexam's July 14, 2008 letter, the Rexam representative indicated that the beneficiary's duties would include:

1. Developing Application specifications and corresponded with users to identify operation procedures.
2. Identified gaps between user requirements and SAP Delivered Functionality[.]
3. Performing Unit, Integration and regression testing.
4. Setup Release procedures for Operations based on their values.

Also as noted above, in the April 3, 2008 employment letter, the petitioner also indicated that the beneficiary's duties would generally include: "Programming, Designing, Planning, Consulting, Testing, Coding, Analysis, Development and new documents preparation, etc." and "other tasks suitable for Programmer Analyst and to which [the petitioner] may assign [the beneficiary]."

The above descriptions are generic and do not provide a comprehensive understanding of what comprises the beneficiary's actual work duties. The descriptions provided by the petitioner provide an overview of the duties of a programmer analyst. Such an "all-purpose" description is insufficient to establish a position as a specialty occupation. There is no information that provides the details specific to the job offered to the beneficiary sufficient to conclude that the position involves specialty occupation duties. The AAO observes that due to the wide range of skills required for many computer positions, there are many paths of entry into such positions including associate degrees, technical certificates, and general fields of study at the baccalaureate level. *See* the Department of Labor's *Occupational Outlook Handbook* on Computer Specialists.

The AAO finds that the above documentation, even when reviewed in totality, does not provide sufficient details regarding the specifics of the job offered or the location(s) where the services will be performed during the requested employment period. The AAO reiterates that it is the wide range of knowledge, skills, and education that may or may not be required for a particular computer-related position that necessitates the comprehensive description of the duties the beneficiary will be expected to perform. The AAO is unable to discern from the information in this record, the nature of the beneficiary's purported duties for either the petitioner or the ultimate end user company. The record does not include information regarding specific projects, tasks, or other details regarding what the beneficiary will be working on. The record is without the underlying evidence of the actual work to be performed or other evidence to support the petitioner's claim that the proffered position is a specialty occupation. Failing to provide evidence of end contracts in effect when the petition was filed that substantiate that the beneficiary would be providing specialty occupation services precludes a finding of eligibility in this matter. Again, 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. The AAO notes that despite the director's specific request for this evidence, the petitioner failed to submit such evidence that relates specifically to the beneficiary.² The record does not substantiate that the petitioner had specific

² The regulations state that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). Failure to submit requested evidence

projects for which the beneficiary's services were required, had control over the beneficiary's work product, that any work assigned would be work performed by the worker as part of the employer's regular business and that any work performed would be commensurate with the duties of a specialty occupation.

The AAO also does not find the petitioner's reference to *O*NET* persuasive. The AAO does not consider the *DOT* or its successor *O*NET* to be a persuasive sources of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. Both *DOT* and *O*NET* provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. An SVP and Job Zone rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. They do 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. It is the specificity of the descriptions in particular positions, as well as the nature of the end user company of the beneficiary's services that establish whether a computer-related position may be a specialty occupation. The record in this matter does not include the scope and specific nature of work the petitioner requires of the beneficiary or the petitioner's client's client requires from the beneficiary.

As the record in this matter does not include a comprehensive description of the beneficiary's actual duties and the project(s) he will work on for the duration of the requested employment period, the petition must be denied. Again, to establish that a specific position in the computer field is a specialty occupation, the petitioner must provide evidence of the nature of the employing organization, the particular projects planned, and evidence that the duties described require the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program in a specific discipline. In this matter, the petitioner has failed to provide such evidence. Without evidence of contracts, work orders, in-house projects, or statements of work describing the specific duties the end use company requires the beneficiary to perform, USCIS is unable to discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program. 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. at 165. Without a meaningful job description, the petitioner may not establish any of the alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In support of this analysis, USCIS routinely cites *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000), in which an examination of the ultimate employment of the beneficiary was deemed necessary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources (Vintage), was a medical contract service agency that brought foreign nurses into the United States and located jobs for them at hospitals as registered nurses. The

that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

court in *Defensor* found that Vintage had “token degree requirements,” to “mask the fact that nursing in general is not a specialty occupation.” *Id.* at 387.

The court in *Defensor* held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a “token employer,” while the entity for which the services are to be performed is the “more relevant employer.” *Id.* at 388. The *Defensor* court recognized that evidence of the client companies’ job requirements is critical where the work is to be performed for entities other than the petitioner. The *Defensor* court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary’s services. *Id.*

In this matter, the record demonstrates that the petitioner acts as an employment contractor. The job description provided by the petitioner, as well as various statements from the petitioner both prior to adjudication and on appeal, indicate that the beneficiary will be working on client projects and will be assigned to various clients worksites when contracts are executed. The petitioner has not provided substantive evidence of in-house projects to which the beneficiary would be assigned or the work the beneficiary will perform. The petitioner’s personnel record shows it locates individuals in a number of different states to perform services. 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 throughout the requested employment period renders it impossible to conclude for whom the beneficiary will ultimately provide services, and exactly what those services would entail. The AAO, therefore, is unable to 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)(A)(iii) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(1).

The AAO will now briefly discuss the director’s decision regarding the petitioner’s noncompliance with the terms and conditions of employment.

The AAO notes the petitioner’s explanation for filing a high number of H-1B petitions is due to the intense competition among companies in the IT sector looking for qualified personnel. However, regardless of the high competition among IT companies or IT employment contractors in particular, the petitioner must establish that it has a specific specialty occupation position available for the beneficiary and is not seeking to employ the beneficiary for speculative employment. In this regard, the AAO finds that the director’s questioning of the petitioner’s compliance with its purported offers of employment to other beneficiaries at their specific wage as set out in the LCA and petition pertinent to each beneficiary, is justified.

The AAO has reviewed the voluminous documentation pertaining to the petitioner’s H-1B beneficiaries that was submitted into the record. The AAO acknowledges that absent full details

regarding the circumstances surrounding the employment of each H-1B employee and the petitioner's complete personnel records regarding each of these beneficiaries, the record does not include sufficient evidence to determine whether the petitioner compensated each beneficiary as shown on the pertinent LCA. That being said, the AAO agrees that the number of petitions filed by this petitioner and the record of intermittent compensation raises concerns regarding the legitimacy of the H-1B petitions the petitioner files. The AAO acknowledges the petitioner's general explanations regarding its perceived failure to comply with the terms and conditions of employment expressed to USCIS as well as the petitioner's explanations regarding the 11 specific employees referenced by the director. The AAO finds, however, that the petitioner's specific explanations regarding the 11 employees are not substantiated with independent documentation including information from statements, passports, and medical documentation of each pertinent beneficiary. 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. Although the record in this matter is insufficient to determine that the petitioner failed to comply with the terms and conditions of employment of other beneficiaries in other petitions, the AAO finds that the number of discrepancies in wages and the lack of documentation supporting the petitioner's explanations suggests that the petitioner did not have work available for the beneficiaries for the requested employment period.³

Beyond the decision of the director, the petitioner has not provided a valid LCA for all work locations, as required by 8 C.F.R. § 214.2(h)(2)(i)(B). The director noted that the LCA submitted with the petition listed the beneficiary's work location as Toledo, Ohio. The LCA submitted in response to the director's RFE listed the beneficiary's work location as Arlington Heights, Illinois and Hamlet, North Carolina. However, the Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 248. The petitioner failed to provide a certified LCA for the beneficiary's actual work locations when the petition was filed; thus, the petitioner failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).

Moreover, the AAO finds that the petitioner's letter appended to the petition indicates that the petitioner has offices throughout the United States and the petitioner's response to the director's RFE

³ While the Department of Labor regulations at 20 C.F.R. § 655.731(c)(7)(ii) may permit the non-payment of wages by an H-1B employer "due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience," this has no bearing on a Department of Homeland Security (DHS) determination regarding an alien's maintenance of status in the United States and a petitioner's compliance with DHS H-1B program requirements. In general, except in situations in which the Family and Medical Leave Act (29 U.S.C. § 2601 et seq.) or the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.) may apply, DHS generally requires that the failure to carry on the specific activities for which the H-1B status was obtained constitutes a failure to maintain status and renders the alien immediately deportable and the employer in non-compliance with the H-1B program requirements.

confirms that the petitioner outsources H-1B beneficiaries. Absent end-agreements with clients in effect when the petition was filed and an itinerary of definite employment, the AAO is unable to determine the duration and location of work sites to which the beneficiary will be sent during the course of the petitioner's requested employment period. Absent this evidence, the petitioner has not established that the LCA submitted is valid.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.