



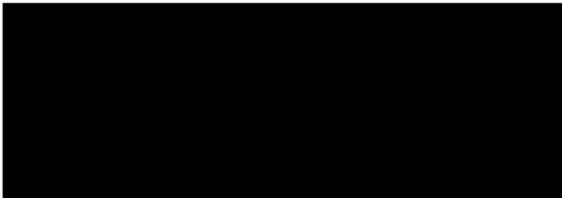
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SEP 24 2009



FILE: WAC 08 150 51495 Office: CALIFORNIA SERVICE CENTER Date:

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:

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 and development, that it was established in 2003, employs 24 persons, and has an estimated gross annual income of \$6,070,000. It seeks to employ the beneficiary as a quality assurance analyst from October 1, 2008 to September 30, 2011. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

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

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

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

When filing the Form I-129 petition, the petitioner averred in its April 1, 2008 letter appended to the petition that it “provides several types of services to its customers” including consulting, application development, application maintenance and system integration services.” The petitioner emphasized that it is not a job shop or a personnel company and that the “Programmer Analyst” work for the petitioner and are its direct employees. The petitioner stated that it normally requires a degree or its equivalent for the preferred position and listed its current employees, their job titles, their qualifications, and the petitioner’s education requirements. The list identified the educational requirements for the various job titles as “baccalaureate degree.” The petitioner provided job descriptions for several positions within the company but failed to provide a job description for a quality assurance analyst in the April 1, 2008 letter. The petitioner also listed several of its clients and identified different projects for each client, as well as providing copies of its agreements with each of the clients listed.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 23, 2008. In the request, the director: asked that the petitioner submit copies of signed contracts between the petitioner and the beneficiary; requested that the petitioner submit a complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment,

venues, or locations where the services will be performed for the period of time requested; requested that the petitioner submit copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed that specifically lists the beneficiary by name on the contracts and provides a detailed description of the duties the beneficiary will perform; and requested copies of the petitioner's state and federal quarterly wage reports. The director noted that the evidence must show specialty occupation work for the beneficiary with the actual end-client company where the work will ultimately be performed.

In a response dated July 30, 2008, the petitioner listed the same or similar information previously submitted.¹ The petitioner again emphasized that it is not a job shop or a personnel company and that the "Quality Assurance Analysts" work for the petitioner and are its direct employees. The petitioner asserted that because the position of a quality assurance analyst is involved "in a software environment [that] is a blend of computer-related technology and sophisticated engineering principles, the duties of this position can only be satisfactorily discharged by an individual having knowledge of the Software industry and the equivalent of a Bachelor's degree in Computer Science, Information Systems, Engineering, Mathematics, or a related analytic or scientific discipline, as well as experience with information systems." The petitioner stated: "[i]n order to properly plan, design and implement software development and programming activities, the Quality Assurance Analyst must possess not only a thorough knowledge of the technical requirements of engineering concepts, but also must have analytical and technical expertise to be able to develop software as per the requirements of the customer."

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

The petitioner also added an overview and the typical functions of a quality assurance analyst in the July 30, 2008 letter, inserted just prior to the already described typical job duties of its other employees. The petitioner indicated:

Overview:

Evaluates and tests new or modified software programs and software development procedures used to verify that programs function according to user requirements and conform to establishment guidelines.

Typical Functions:

¹ The petitioner's July 30, 2008 response to the director's RFE is the same letter submitted in support of the petition except where the petitioner has inserted paragraphs that appear to relate more specifically to the beneficiary and the proposed position of quality assurance analyst, which is information that was not initially provided.

Conducts compatibility test with vendor-provided programs. Runs in depth testing, diagnoses problems, recommends solutions, and determines if program requirements have been met. Recommends program improvements or corrections to programmers. Writes, revises, and verifies quality standards and test procedures for program design and product evaluation to attain quality of software economically and efficiently. Reviews new or modified program, including documentation, diagram and flow chart, to determine if program will perform according to user request and conform to guidelines. Reviews computer operating log to identify program processing errors. Enters instructions into computer to test program for validity of results, accuracy, reliability, and conformance to establishment standards. Observes computer monitor screen during program test to detect error codes or interruption of program and corrects errors. Identifies differences between establishment standards and user applications and suggest modifications to conform to standards. Sets up tests at request of user to locate and correct program operating error following installation of program. Monitors program performance after implementation to prevent recurrence of program operation problems and ensure efficiency of operation. Writes documentation to describe program evaluation, testing and correction. May evaluate proposed software or software enhancement for feasibility. May develop utility program to test, track and verify defects in software program. May write programs to create new procedures or modify existing procedures. May train software program users.

The petitioner also added a section in the July 30, 2008 letter identified as the beneficiary's itinerary of employment inserted just after the description of the Thales Avionics contract, one of the contracts referenced in the letter of support dated April 1, 2008. The petitioner listed two projects under the Thales Avionics contract: (1) IFE Service Data Automation; and (2) Fault Report Analysis Tool 2.0. The IFE Service Data Automation project was not listed in the petitioner's original description of its projects for Thales Avionics. The petitioner provided brief descriptions of the two projects and then indicated the project would commence on November 3, 2008 with final deployment planned in September 2009 and that the beneficiary would "be working on this requirement for the client, Thales Avionics" primarily at the petitioner's offices but would travel to the client site when needed.

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

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

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

The AAO observes that the petitioner again includes an "itinerary" in its September 10, 2008 statement submitted on appeal. In the section identified as the beneficiary's itinerary, the petitioner again identifies two projects it has contracted for with Thales Avionics. The petitioner also inserts a description of the beneficiary's job responsibilities after listing the two projects, a description that varies from the description provided in the petitioner's response to the RFE. The petitioner now states that the beneficiary's job responsibilities include:

- Evaluate software requirements documents for clarity, completeness, and testability. This includes providing feedback on user-interface design, usability, and end-user documentation.
- Create, manage and review automated/manual test suites for functional and regression testing.
- Collaborate with business partners, subject matter experts and project teams to investigate defects and ensure that they are satisfactorily resolved.
- Manage the process of resolving software defects submitted to a bug tracking database.
- Work closely with project managers to complete QA activities within project timelines.
- Test case design and documentation in conjunction with customers and developers.
- Test scripting and environment configuration.
- Comprehensive testing and test record maintenance.

The petitioner notes that “[t]his project will commence on January 2009, with the final deployment planned in January 2010. Thereafter, further enhancements have been planned for these two applications, which is likely to extend until September 2010.” The petitioner also indicates that the beneficiary will work on this requirement in its offices and will travel to Thales Avionics offices in Irvine, California when needed. The petitioner also includes an August 25, 2008 letter from Thales Avionics stating: “[the petitioner] is currently involved in Information Technology projects in the areas of fault reporting and component maintenance. In addition, [the petitioner] has been contracted to provide on-going production support and application software enhancements as needed.” The petitioner also provides a statement of work dated August 15, 2008 effective September 22, 2008 for the Thales Avionic’s “ISEDIS Data Automation I-DAD” project which lists the team composition for the project with job titles of project manager, project lead & business analyst, three senior developers, and a test engineer. The statement of work does not include the position of quality assurance analyst.

Also on appeal, the petitioner reiterated its belief that the position of quality assurance analyst requires a theoretical and practical application of highly specialized knowledge. The petitioner provided copies of four Internet advertisements to establish that a bachelor’s degree is the minimum requirement for this position. The four advertisements are for: (1) a QA analyst/automation analyst/quality assurance position for an email service provider that indicates a bachelor’s degree is required and that a bachelor’s degree in computer science, information systems or a related technical field is preferred; (2) a QA analyst/QA engineer for a clearinghouse and payment processor for healthcare that indicates a bachelor’s degree is required and that a bachelor’s degree in computer science or related field is preferred; (3) a quality assurance analyst for a major audit, tax, consulting, and financial advisory firm that lists a bachelor’s degree in information technology, computer science, engineering, or related field but does not identify if this is required or preferred; and (4) a quality assurance analyst for an unidentified firm that indicates that a bachelor’s degree in computer science or related field is required but may be substituted with an associate’s degree with two or three years of related professional experience. The petitioner also informs that it normally requires a bachelor’s degree in a field related to the field of work and provides a list of its employees indicating that a bachelor’s degree is the education required for all of its listed positions including, operations manager, lead programmer analyst, programmer analyst, systems administrator, network administrator, president, SAP business process analyst, technical consultant, director of projects and recruiter.

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

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.

The petitioner’s initial evidence submitted in support of the petition did not provide any information describing the duties of the proffered position of “quality assurance analyst.” In response to the director’s RFE, the petitioner included an overview of the duties of a quality assurance analyst,

indicating that a quality assurance analyst would perform certain tasks and might also be required to perform other tasks. The petitioner also indicated its belief that the position of a quality assurance analyst required the equivalent of a bachelor's degree in computer science, information systems, engineering, mathematics, or a related analytic or scientific discipline, as well as experience with information systems. The petitioner briefly described two projects for a third party company and indicated that the beneficiary would "be working on this requirement for the client, Thales Avionic."

On appeal, the petitioner again identifies two projects it has contracted for with Thales Avionics and provides an overview of the duties of a generic quality assurance analyst and infers that the beneficiary will work on these two projects for Thales Avionics. As noted above, the petitioner also includes an August 25, 2008 letter from Thales Avionics stating: "[the petitioner] is currently involved in Information Technology projects in the areas of fault reporting and component maintenance. In addition, [the petitioner] has been contracted to provide on-going production support and application software enhancements as needed." The petitioner further provides a statement of work dated August 15, 2008 effective September 22, 2008 for the Thales Avionic's "ISEDIS Data Automation I-DAD" project which lists the team composition for the project with job titles of project manager, project lead & business analyst, three senior developers, and a test engineer. The statement of work does not include the position of quality assurance analyst and there is insufficient information in the file regarding the descriptions of test engineer and quality assurance analyst to determine if these are the same or similar positions. Thus, the record on appeal also fails to include the detailed information necessary to establish that the quality assurance analyst working on Thales Avionics' two projects exists and that the duties that will be performed are duties that comprise the duties of a specialty occupation.

The AAO acknowledges the petitioner's assertion that the position of quality assurance analyst requires a theoretical and practical application of highly specialized knowledge. However, an assertion without the underlying description of actual duties and evidence from the actual user of the beneficiary's services of the proposed duties is insufficient. General statements and vague descriptions of an occupation do not establish that a specific proffered position is a specialty occupation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO also acknowledges the four job advertisements the petitioner submitted that relate to a quality assurance analyst and the petitioner's note that the job advertisements require the successful applicant to have a bachelor's degree. Upon review of the four job announcements, the AAO finds that two of the advertisements indicate that a bachelor's degree is required but only note that a bachelor's degree in a specific discipline is preferred. In addition, one of the job announcements does not indicate whether a bachelor's degree in a specific discipline is required or preferred and one of the job announcements indicates that a bachelor's degree in a specific discipline is required but also notes that an associate's degree and related professional experience may be substituted for the specific bachelor's degree. The AAO finds that these advertisements do not establish an industry standard for quality assurance analysts in parallel positions in organizations similar to the petitioner.

The AAO observes first that the petitioner has not established that the organizations listed in the advertisements are similar to the petitioner, as the job announcements do not provide sufficient information to enable the AAO to conclude that the businesses advertising the positions are similar to the petitioner in size, number of employees, level of revenue, or nature of business. Second the broadly stated descriptions for the petitioner's position and those in the advertisements are insufficient to establish that the actual duties of the positions are indeed parallel. Finally, the AAO finds that the information in the advertisements underscores the fact that a broadly-defined quality assurance analyst is not a specialty occupation, as the advertisements do not indicate that a degree in a specific discipline is required.

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

The record is without the underlying evidence of the actual work to be performed or other evidence to support the petitioner's claim that the proffered position is a specialty occupation. As the record in this matter does not include a comprehensive description of the beneficiary's actual duties and the specific duties that the beneficiary will perform as they relate to the listed project(s) the beneficiary will work on for the duration of the requested employment period, the petition must be denied. To establish that a specific position in the computer field is a specialty occupation, the petitioner must provide evidence of the nature of the employing organization, the particular projects planned, a comprehensive description of the beneficiary's duties from the ultimate end user of the beneficiary's services, and evidence that the duties described require the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program in a specific discipline. In this matter, the petitioner has failed to provide such evidence. Without evidence of work orders or statements of work describing the specific duties the petitioner and/or the end use company requires the beneficiary to perform, USCIS is unable to discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly

specialized knowledge attained through a baccalaureate program. Again, going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Without a meaningful job description, the petitioner may not establish any of the alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

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

In this matter, the petitioner provides generic descriptions of computer-related positions such as programmer analyst, SAP technical consultant, systems administrator, network administrator, and in response to the director’s RFE adds quality assurance analyst. The petitioner does not provide the underlying statements of work that describe the projects the beneficiary will work on and the beneficiary’s actual duties as those duties relate to the specific projects. The general information in the record does not substantiate that a generic quality assurance analyst is a specialty occupation. The petitioner has not established that the petitioner’s type of industry requires a degree in a specific discipline. The petitioner has offered no description of the proffered position beyond a generalized outline of duties. It has not detailed the actual work to be performed on the third party company’s projects or a statement of work from the third party company detailing the beneficiary’s expected services. The AAO, therefore, is unable to analyze whether the beneficiary’s duties require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the position meets any of the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(1).

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

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

The petition will be denied and the appeal dismissed for the above stated reason. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.