

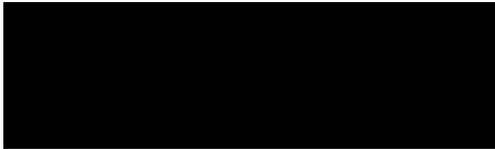
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529



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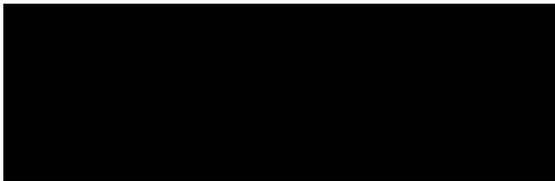
FILE: WAC 07 068 50093 Office: CALIFORNIA SERVICE CENTER Date: SEP 30 2009

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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


Perry Rhew
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 1998, that it employs 150 persons, and that it has an estimated gross annual income of \$8,600,000. It seeks to extend the employment of the beneficiary as a programmer analyst from February 6, 2007 to January 7, 2010. 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 June 11, 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); and (3) the proffered position is a specialty occupation. The director also found that the petitioner’s unusual pattern of H-1B petition filings raised legitimate concerns regarding the evidence submitted and the petitioner’s compliance with the terms and conditions of employment in its petition.

On appeal, counsel for the petitioner submits a brief and documentation in support of the Form I-290B, Notice of Appeal, 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 January 3, 2007; (2) the director’s request for evidence (RFE); (3) counsel’s response to the director’s RFE on behalf of the petitioner; (4) the director’s denial decision; and, (5) the Form I-290B and counsel’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 December 28, 2006 letter appended to the petition that it is in the business of “software development, manufacturing, training and computer consulting services.” The petitioner noted that its range of activities included research and designing systems, marketing and distribution of computer software manufactured/developed by other computer firms, and developing in-house computer programs. The petitioner further stated that it performed various computer-related services for its vast range of clients. Regarding the proffered position of programmer analyst, the petitioner provided an overview of the duties and responsibilities of a “typical” programmer position. The petitioner listed various responsibilities and the amount of time a programmer analyst would spend on the various responsibilities.¹ The petitioner stated: “while most people working in the field of computer sciences, are called by generic

¹ As the director listed these duties and responsibilities in her decision and as counsel and the petitioner appear to acknowledge that the listing is an overview of the position and not a description of the actual duties the beneficiary would be expected to perform for the end client company, the list will not be repeated here.

titles such as 'Programmer analyst,' 'Systems Analyst,' or 'Software Engineer,' within the industry it is recognized that such broad based classification only outlines the nature of duties performed by professionals in the field and do not reveal the diversity of specific tasks performed by professionals in this field." The petitioner also referenced the Department of Labor's *Occupational Outlook Handbook (Handbook)* and its recognition that employers' preferences in terms of specific educational background depend on the work being done. The petitioner also provided a Form ETA 9035E, Labor Condition Application (LCA), certified by the Department of Labor on December 28, 2006 for the position of a programmer analyst in Jersey City, New Jersey.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on March 11, 2008. In the request, among other things, the director: noted that USCIS must examine the ultimate employment of the alien, to determine whether the position qualifies as a specialty occupation; asked the petitioner to clarify the petitioner's employer-employee relationship with the beneficiary; requested copies of complete contractual agreements including all addendums, work orders, statements of work, service agreements, invoices, and letters from the authorized officials of the ultimate client companies that provide a comprehensive description of the beneficiary's proposed duties; asked for examples to establish that the petitioner had its own proprietary software; requested a description of conditions of employment, such as contracts or letters from authorized officials of the ultimate client companies; requested an itinerary 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 that the temporary employment is requested; asked for documentary examples of the petitioner's products or services; and asked for any other documents that the petitioner believed would substantiate sufficient qualifying employment. The director also requested copies of the petitioner's federal tax returns and its state and federal quarterly wage reports.

In a response dated May 29, 2008, counsel for the petitioner addressed the director's queries. The petitioner provided a copy of its August 3, 2006 contract with Vector Consulting, Inc. (Vector) and noted that the beneficiary would perform work for Lance, Inc. in Jersey City, New Jersey and Charlotte, North Carolina. An Exhibit "A" attached to the contract indicated that the client project would start on January 28, 2008 and terminate on December 31, 2009 and that the project involved "Oracle Applications, Forms, Reports & PL/SQL Development" in Jersey City, New Jersey and Charlotte, North Carolina. The petitioner also provided copies of its Internal Revenue Service (IRS) Forms 1120S, U.S. Income for an S Corporation for 2006 and 2007, IRS Forms 941, Federal Quarterly Wage reports for 2006 and 2007, and IRS Forms W-2, Wage and Tax Statement, for its employees for the 2006 and 2007 years.

The director denied the petition on June 11, 2008. The director found that the petitioner is a contractor that subcontracts workers with a variety of computer skills to other companies who need computer programming services. The director determined that the petitioner had not submitted the contract between Vector and the firms that ultimately define the work orders of the beneficiary. The director concluded that, without evidence of these contracts, it is not possible to verify the condition and scope of the beneficiary's services; thus USCIS could not determine that the petitioner is the beneficiary's employer and that it met the definition of United States employer or agent. The

director also determined that without valid contracts between Vector and the actual end-client firm(s) ultimately involved with the beneficiary's computer related duties, the evidence does not establish the work to be completed and that the duties to be performed are the duties of a specialty occupation. The director referenced the Department of Labor's *Handbook* and noted that although bachelor's degrees for programmer analysts are commonly required, certain jobs require only a two-year degree or certificates. The director found that the record did not detail the specific duties the beneficiary would perform under contract for its clients and thus the petitioner had not established that the duties of the proffered position comprise the duties of a specialty occupation.

Finally, as referenced above, the director determined that the petitioner's unusual pattern of H-1B petition filings raised legitimate concerns regarding the evidence submitted and the petitioner's compliance with the terms and conditions of employment in its petitions. The director identified ten of the petitioner's employees and noted that based on the information in the record, it appeared that the employees had not been employed on a continual basis pursuant to the hours originally specified and/or the rates of pay on each of the Form I-129 petitions.

On appeal, counsel for the petitioner asserts that the petitioner is a genuine employer who has entered into an employer-employee relationship with the beneficiary. Counsel provides a copy of the petitioner's employment agreement entered into with the beneficiary, notes that the petitioner has employed the beneficiary since November 2003, and asserts that the petitioner exercises complete control and supervision over the beneficiary. Counsel also references the previously submitted August 3, 2006 contract between the petitioner and Vector and notes that the beneficiary will provide services to Lance, Inc., Vector's client. Counsel attaches an undated letter signed by Vector's HR Administrator indicating that the beneficiary has been providing services to Lance, Inc. as an Oracle developer and that it anticipates it will need the beneficiary's services for approximately one year. The petitioner also submits a July 7, 2008 letter on Lance, Inc. letterhead signed by the program director, ERP/BI Implementation. The program director states: "[the beneficiary], a Resource of Vector Consulting, Inc. has been providing services to our organization since Jan[.] 28, 2008 for the implementation of Oracle Application 11i." The Lance, Inc. letterhead identifies the location of the business as in Charlotte, North Carolina. The record also includes a July 11, 2008 letter signed by Vector's HR administrator wherein the HR administrator stated:

[A]s an Oracle Application Developer, [the beneficiary's] job duties include but [are] not limited to implementation and maintenance/support of Oracle Manufacturing 11i. Work on Technical/functional areas in Inventory (Inv), Bill of materials (BOM) and Purchase Order (PO), Order Management (OM), Develop various customized forms and reports in above-mentioned modules, Document using AIM Methodology. He has expertise in SQL, PL/SQL, Oracle Forms 6i and Oracle Reports 6i[.]

Counsel contends that the proffered position is a specialty occupation and submits a professional position evaluation dated August 7, 2008, prepared by [REDACTED], Associate Professor, Department of Computer Systems Technology, The New York City College of Technology/CUNY. [REDACTED] compares the broadly described position description set out in the

petitioner's initial letter in support of the petition with the description provided by the petitioner's client, Vector. ██████████ asserts:

[A]n IT firm will typically contract employees according to a more generalist description, and then assign them to specific end-client projects in which specific tools and platforms will be utilized and a specific type of application will be developed and implemented (thus resulting in a more specific job description, grounded in the use of applicable platforms, systems, and tools, for the end-client work).

██████████ opines: “[t]he end-client assignment in this case clearly falls under the purview and more general description of the programmer analyst role that is described in [the petitioner’s] support letter.” ██████████ notes that upon review of the petitioner’s initial outline of the job duties required for the programmer analyst position, “[t]he duties describe a professional, specialty-level programming occupation, with significant duties in both the analysis of client business processes and use of this analysis in order to prepare and deploy custom business software solutions.” ██████████ referring to the petitioner’s description, opines: “[t]he comprehensive job description shows engagement not just in one component of the software development or programming process (for which a lower-level degree, such as an Associate’s Degree might provide sufficient preparation), but rather a fully engaged role across the entire development lifecycle.” ██████████ notes that he has also reviewed the end-client assignment² and that the beneficiary “will research, analyze, and design various components of information technology applications (emphasizing Oracle technologies and Java-based applications)” and “will ensure proper installation of the Oracle 11i applications and accordant coding of Java components” and provide a range of post implementation services. ██████████ opines that the Oracle 11i technology “cannot be customized and then deployed without execution of the detailed analytical and developmental process that is laid out in the petitioner’s programmer analyst description” and can only be properly executed via application of a bachelor’s level background, comprising concepts and techniques of advanced mathematics and algorithms, engineering, computer applications, computer science, computer information systems, IT , the technical sciences, and/or related areas, as gained via prior academic study and/or employment.”³

² The record before the AAO does not include a description of the beneficiary’s job duties for Lance, Inc., the ultimate end user of the beneficiary’s services, other than the July 7, 2008 letter on Lance, Inc. letterhead in which the program director states: “[the beneficiary], a Resource of Vector Consulting, Inc. has been providing services to our organization since Jan[.] 28, 2008 for the implementation of Oracle Application 11i.”

³ The AAO observes that the beneficiary’s foreign degree has been evaluated to be the equivalent of a bachelor of business administration degree from an accredited institution in the United States. Although the evaluator also noted that the beneficiary had five years of employment-related experience in computer science, a petitioner may not rely on a credentials evaluation service to evaluate a beneficiary’s work experience. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). To establish an academic equivalency for a beneficiary’s work experience, a petitioner must submit an evaluation of such experience from an official who has the authority to grant college-level credit for training and/or

Also on appeal, counsel provides a lengthy list of duties, indicates that the beneficiary will be working as a programmer analyst at the client site⁴ on a number of different operation systems, application servers, development tools and languages, and software methodologies. Counsel provides several job advertisements found on the Internet for various companies and asserts that the job advertisements show that similar positions in the industry require at least a bachelor's degree in the related field of employment. Counsel references data obtained from the Department of Labor's *Dictionary of Occupational Titles (DOT)* for the job title programmer analyst and data from the Department of Labor's *O*NET Online (O*NET)* for the position of computer programmer. Counsel also lists several unpublished decisions issued by the AAO relating to the occupation of programmer analyst and contends that the AAO found that the positions in those matters qualified as specialty occupation positions. Counsel concludes that the proffered position is a specialty occupation.

Counsel also addresses the director's determination that it had not complied with the terms and conditions of employment. Counsel acknowledges that in 2007, 14 out of approximately 400 employees received yearly compensation less than the compensation stated in the Form I-129/LCA. Counsel provides letters from each of the employees showing that the employees requested vacation or medical leave from work. Counsel also notes that the petitioner filed requests to revoke H-1B petitions filed on behalf of past employees when their employment was terminated. Counsel contends that the petitioner is in compliance with the regulatory requirements for its H-1B employees.

Preliminarily, the AAO finds that the record lacks sufficient evidence to determine whether the petitioner compensated each beneficiary as shown on the pertinent LCA in each of the petitioner's petitions for other beneficiaries. The AAO acknowledges the letters the petitioner sent to USCIS regarding the circumstances of its failure to pay the beneficiaries listed by the director in her decision according to the terms and conditions of the petition and LCA related to each beneficiary. Although the director's concerns may be justified, the AAO finds 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 is insufficient to determine that the petitioner failed to comply with the terms and conditions of employment of other beneficiaries in other petitions. Thus, the director's comments concerning the petitioner's failure to comply with the terms and conditions shown on the Form I-129 will be withdrawn.

The director also denied the petition finding that the petitioner had not established its status as either a U.S. employer or an agent. The AAO affirms, but will not address this issue, because the petitioner has failed to establish that the job is a specialty occupation, which is the most crucial issue in the adjudication of an H-1B petition.

experience in the specialty at an accredited college or university that has a program for granting such credit. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(I). Thus, the record fails to demonstrate that the beneficiary holds the equivalent of a baccalaureate degree in computer science, a degree [REDACTED] opines is necessary to perform the proffered position.

⁴ The client site, according to Lance, Inc., letterhead is in Charlotte, North Carolina. The record does not include an LCA for work to be performed in Charlotte, North Carolina.

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)(1) 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.

Turning to the specialty occupation issue, the AAO has reviewed the record to determine if the petitioner has provided sufficient evidence to establish that the proffered position is a specialty occupation. Upon that review the AAO finds that the petitioner has not supplied the requested contracts underlying the position proffered to the 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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO has reviewed the generic description of a “typical” programmer analyst initially submitted by the petitioner. The petitioner did not submit any independent documentation to further explain the nature and scope of these duties for the beneficiary’s actual position. Noting that the petitioner is engaged in the software development/computer consulting business, the director indicated that USCIS must examine the ultimate employment of the beneficiary to determine whether the proffered position qualifies as a specialty occupation. The director requested pertinent information to assist in establishing the actual duties of the beneficiary. Although the director requested specific forms of evidence that would establish the beneficiary’s ultimate employment and the duties relating to that employment, the petitioner failed to provide such evidence. The Exhibit “A” attached to the August 3, 2006 Vector letter did not provide a comprehensive description of the beneficiary’s proposed duties for yet a third party, Lance, Inc. Identifying a project is insufficient to establish the specific duties a worker or workers will be expected to perform on the project. Moreover, the Exhibit “A” to the Vector contract is not from the ultimate user of the beneficiary’s services. 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 that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Despite the director’s request for specific evidence relating to the ultimate user of the beneficiary’s services, the petitioner failed to comply.

On appeal, counsel for the petitioner provides a letter signed by Vector’s HR administrator that identifies the proposed position as an Oracle Application Developer and provides an overview of the proposed project for a third party company. The only information from the actual user of the beneficiary’s services is limited to a letter noting that the beneficiary has been providing services that relate to the implementation of Oracle 11i. The actual user of the beneficiary’s services does not describe the tasks associated with this project and does not provide other information demonstrating the beneficiary’s work product as it relates to this project. Thus, the record does not include the necessary information to enable USCIS 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, 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).

The AAO has also reviewed the position evaluation provided on appeal. The AAO agrees with Dr. [REDACTED] analysis of the petitioner's outline of the job duties for a programmer analyst and notes that an individual performing these broadly stated duties may very well be performing the duties of a specialty occupation. However, the AAO disagrees that the more selective description provided by Vector also comprise the duties of a specialty occupation. Although the description of duties provided by Vector may fall under the purview of the petitioner's general outline of duties, the description does not provide the detail necessary to establish that the beneficiary will indeed be providing services at a specialty occupation level. In fact, the description only generally notes the beneficiary's involvement with implementation, maintenance, and support of a particular segment of Oracle. The Vector description is broadly stated and vague regarding details of the level of support and actual actions that the beneficiary will be expected to perform. The Vector description shows, at most, one component of the software development or programming process, for which a lower-level degree might provide sufficient preparation. The AAO acknowledges [REDACTED] review of the Vector description; however, [REDACTED] expands upon the description to include greater detail than that supplied in the description before the AAO. Moreover, the AAO finds that the Vector description of duties is not a description of duties from the ultimate end-user of the beneficiary's services; rather Vector's description is the description of the middleman company, a company that is not directly using the beneficiary's services. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

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. Such a description must come from the actual user of the beneficiary's services. 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.*

The record establishes that the petitioner has provided a generalized description of the duties of a "typical" programmer analyst. The AAO does not have a description of the nature of the specific duties of the proposed position before it; thus is precluded from determining that the actual proffered position is a specialty occupation under any of the criteria set out in the statute or regulation. The opinion of [REDACTED] is not based on a description of duties provided to the AAO and is without the necessary factual foundation to support his opinion. His opinion does not demonstrate that the proffered position satisfies the referenced criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Counsel further refers to unpublished decisions in which the AAO determined that the proffered position of "programmer analyst" met the requirements of a specialty occupation. Counsel has not furnished evidence that establishes the facts of the instant petition are analogous to those in the unpublished decisions. Moreover, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The AAO also acknowledges counsel's reference to *DOT* and *O*NET* regarding the occupation of a programmer analyst. However, the AAO does not consider either the *DOT* or *O*NET* to be a persuasive source 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 or JobZone rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. 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 has also considered the job announcements submitted. However, 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, or level of business. Again, going on the 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. As the petitioner has not provided a detailed description of the duties from the ultimate user of the beneficiary's services, the duties of the proffered position have not been established to be sufficiently similar to the descriptions in any of the advertised positions.

In this matter, the record demonstrates that the petitioner acts as an employment contractor. The petitioner's failure to provide work orders or employment contracts between the petitioner and its clients that comprehensively describe the beneficiary's proposed duties renders it impossible to conclude exactly what those services would entail. The AAO, therefore, is unable to analyze whether the beneficiary's duties 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).

Beyond the decision of the director, the AAO notes that the petitioner has indicated that the beneficiary would perform work in Charlotte, North Carolina. The record does not include a certified LCA that specifies that location. As the submitted LCA is not valid for all the beneficiary's work locations, for this additional reason, the petition must be denied.

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. 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.