

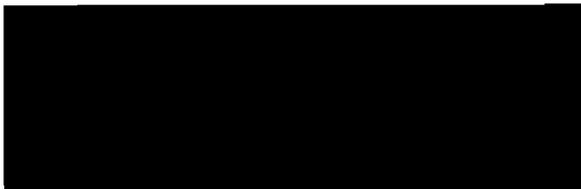
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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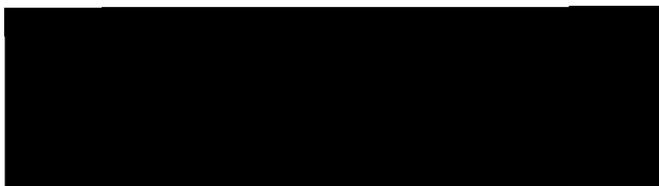
FILE: WAC 08 147 53280 Office: CALIFORNIA SERVICE CENTER Date: **FEB 01 2010**

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a corporation doing business as a computer, software development, and Information Technology IT firm. To employ the beneficiary in what it designates as a Systems Analyst position, the petitioner endeavors to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on two independent grounds, namely, the petitioner's failures to establish (1) that it is qualified to file an H-1B petition, that is, as either (a) a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), or (b) a U.S. agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F); and (2) that the proffered position qualifies as a specialty occupation in accordance with section 101(a)(15)(H)(i)(b) of the Act and its implementing regulations.

The director's denial of the petition for the petitioner's failure to establish the proffered position as a specialty occupation is based upon the director's determination that the petitioner failed to provide contract and contract-related evidence necessary to establish that the beneficiary would actually perform systems analyst duties, and would do so for the employment period specified in the Form I-129. The evidence of record did not persuade the director that, as contended by the petitioner, the beneficiary would be assigned to a project that the petitioner was developing exclusively for its own in-house use. On appeal, counsel argues that the record of proceedings does not support the director's adverse findings or her decision to deny the petition.

As will be discussed below, based upon its consideration of the entire record of proceeding, as supplemented by the Form I-290B and counsel's Memorandum of Points and Authorities in Support of the Appeal, the AAO finds that the director's decision to deny the petition on the specialty occupation issue is correct. Accordingly, the appeal will be dismissed, and the petition will be denied.

While fully affirming the director's determinations on the petitioner's standing to file this petition, the AAO will further address in detail only the specialty occupation basis of the director's decision, as specialty occupation status is ultimately paramount to establishing eligibility for H-1B nonimmigrant classification, regardless of which entity should have filed the petition.

The AAO analyzes the specialty occupation issue according to the statutory and regulatory framework below.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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

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

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

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must 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) (hereinafter referred to as *Defensor*). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

Based upon its review of the entire record including the matters submitted on appeal, the AAO concludes that the petitioner failed to establish that the beneficiary would perform specialty occupation services for the period sought in the petition. As will be discussed below, the AAO bases this conclusion on its evaluation of the evidence of record related to the proposed duties and the knowledge required to perform them. The AAO finds this evidence insufficient to satisfy any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), that is, that the proffered position is either (a) a particular position for which the normal minimum requirement for entry would be at least a bachelor’s degree, or its equivalent, in a specific specialty (criterion 1); (b) parallel to positions for which organizations in the petitioner’s industry that are similar to the petitioner commonly require at least a bachelor’s degree, or its equivalent, in a specific specialty (the first alternative prong of criterion 2); (c) shown to be so complex or unique that it can be performed only by an individual with a degree (the second alternative prong of criterion 2); (d) a position for which the employer normally requires at least a bachelor’s degree, or its equivalent, in a specific specialty (criterion 3); or (e) one with specific duties so specialized and complex that their performance requires knowledge usually associated with the attainment at least a bachelor’s degree in a specific specialty (criterion 4).

The petitioner tacitly asserts that the proffered position meets the first criterion of 8 C.F.R. 214.2(h)(4)(iii)(A), as a position for which a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry. For example, the petitioner’s letter in response to the service center’s request for additional evidence (RFE) includes the following statements:

We unequivocally state that the position of a Systems Analyst is a professional one and that the performance of [its] duties require[s] an individual with education or experience in the field of Computer Science, Engineering or related field. . . .

The [proffered] position parallels the position described in the Dictionary of Occupational Titles under code number 030.167-014 with a standard vocational preparation of 7, thereby justifying our requirement for a Bachelor's Degree. The Occupational Outlook Handbook describes a bachelor's degree as a minimum requirement for this position. Therefore, our requirement for a bachelor's degree in Science, Computer Science, Engineering or related field is well justified.

The AAO finds that the *Dictionary of Occupational Titles (DOT)* does not support the assertion that assignment of an SVP rating of 7 is indicative of a specialty occupation. This is obvious upon reading Section II of the *DOT's* Appendix C, Components of the Definition Trailer, which addresses the Specialized Vocational Preparation (SVP) rating system.¹ The section reads:

II. SPECIFIC VOCATIONAL PREPARATION (SVP)

Specific Vocational Preparation is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.

This training may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.

Specific vocational training includes training given in any of the following circumstances:

- a. Vocational education (high school; commercial or shop training; technical school; art school; and that part of college training which is organized around a specific vocational objective);
- b. Apprenticeship training (for apprenticeable jobs only);
- c. In-plant training (organized classroom study provided by an employer);
- d. On-the-job training (serving as learner or trainee on the job under the instruction of a qualified worker);
- e. Essential experience in other jobs (serving in less responsible jobs which lead to the higher grade job or serving in other jobs which qualify).

¹ The Appendix's Internet site is <http://www.oalj.dol.gov/PUBLIC/DOT/REFERENCES/DOTAPPC.HTM>.

The following is an explanation of the various levels of specific vocational preparation:

Level	Time
1	Short demonstration only
2	Anything beyond short demonstration up to and including 1 month
3	Over 1 month up to and including 3 months
4	Over 3 months up to and including 6 months
5	Over 6 months up to and including 1 year
6	Over 1 year up to and including 2 years
7	Over 2 years up to and including 4 years
8	Over 4 years up to and including 10 years
9	Over 10 years

Note: The levels of this scale are mutually exclusive and do not overlap.

In addition, contrary to the petitioner's assertion, the Department of Labor's *Occupational Outlook Handbook* (*Handbook*) does not "describe a bachelor's degree as a minimum requirement for this position."²

The 2008-2009 edition of the *Handbook* devotes a chapter exclusively to Computer Systems Analysts.

The information on educational requirements in the *Handbook's* "Computer Systems Analysts" chapter indicates a bachelor's or higher degree in computer science, information systems, or management information systems is a general preference, but not an occupational requirement, among employers of computer systems analysts. That this occupational category accommodates a wide spectrum of educational credentials is reflected in the following paragraph that opens the "Training, Other Qualifications, and Advancement" section of the *Handbook's* "Computer Systems Analysts" chapter:

Training requirements for computer systems analysts vary depending on the job, but many employers prefer applicants who have a bachelor's degree. Relevant work experience also is very important. Advancement opportunities are good for those with the necessary skills and experience.

The AAO notes that the paragraph's statement that "many employers prefer applicants who have a bachelor's degree" is not indicative of a pervasive requirement for a specific major or academic

² The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. All references are to the 2008-2009 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

concentration. The *Handbook's* observation of a preference of "many employers" is not evidence that systems analysts positions normally require a bachelor's degree level of knowledge in a specific specialty. The "Education and Training" subsection of the *Handbook's* "Computer Systems Analyst" chapter confirms this fact, as it states:

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

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

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

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

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

Technological advances come so rapidly in the computer field that continuous study is necessary to remain competitive. Employers, hardware and software vendors, colleges and universities, and private training institutions offer continuing education to help workers attain the latest skills. Additional training may come from professional development seminars offered by professional computing societies.

The *Handbook's* "Computer Systems Analysts" chapter's comments with regard to educational requirements - that employers prefer applicants with a bachelor's degree and often seek applicants who have at least a bachelor's degree in a technical field - is authoritative evidence that a bachelor's

degree or higher in a specific specialty is not the norm for hiring systems analysts. In light of this occupational context, it is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers here would necessitate systems analyst services at a level requiring the theoretical and practical application of at least a bachelor's degree level of knowledge in a computer-related specialty. This the petitioner has failed to do. In this regard, the AAO acknowledges that the petitioner's submissions contain a multitude of technical terms and acronyms. However, they indicate no more than that the position so described would involve the application of specialized IT and computer-related knowledge. However, the type and level of education required to attain such knowledge is not self-evident, and it is not conveyed by the submissions' technical language or any other aspect of the record.

The record's descriptions of the proposed duties and responsibilities and the documents submitted regarding the Sense Expert project asserted as the beneficiary's work assignment are replete with IT technical terms and terms-of-art indicating that systems analyst work on the project would generally require the application of some degree of specialized knowledge of the IT and computer industry. However, neither those portions of the record nor any other evidence of record establishes a nexus between the proffered position and the necessity for any particular level of education in any particular specialty, or its equivalent, at an accredited United States college or university. While the petitioner and counsel assert that the proffered position requires at least a bachelor's degree in Computer Science, Engineering, or a related field, they provide no documentary evidence to support that claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The evidence of record does not distinguish the proffered position from systems analyst positions that do not require at least a bachelor's degree, or the equivalent, in a specific specialty. Therefore, as the petitioner has not established that the particular position proffered here is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's

professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Also, there are no submissions from professional associations, individuals, or firms in the petitioner's industry.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." First, the evidence of record does not refute the indication in the *Handbook's* "Computer Systems Analysts" chapter that there is a wide spectrum of educational credentials acceptable for systems analyst positions, including degrees not in a specific specialty closely related to computer systems analysis. Second, the record of proceeding does not contain evidence distinguishing the proffered position as unique from or more complex than systems analysts positions that can be performed by persons without a specialty degree or its equivalent.

As the record has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).³

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree

³ To satisfy this criterion, the record must establish that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of 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 constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. See *id.* at 388.

in a specific specialty. The evidence of record does not convey that the duties of the proffered position are more specialized and complex than those of systems analyst positions not usually associated with the attainment of a baccalaureate or higher degree.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed, and the petition must be denied.

Additionally, the AAO finds a separate ground for dismissing the appeal, namely, the AAO's finding that inconsistencies and contradictory aspects of the petitioner's documentary evidence undermine the credibility of the Sense Expert Software project as providing the beneficiary systems analyst work for the period asserted in the petition. 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). 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. *Id.*, 19 I&N Dec. 582, 591.

The petitioner's March 28, 2008 letter of support, filed with the Form I-129, states that the beneficiary will work at the petitioner's Software Development Center on an "In House project" whose "duration is for 24 months with possible extension." However, neither this letter, the Form I-129, nor any document filed with the Form I-129 identifies the in-house project or its purpose. Moreover, the AAO notes that two elements of the duties that the letter of support ascribes to the beneficiary conflict with the petitioner's later attestation that the in-house project will develop software not for clients, but for the petitioner's exclusive use.⁴ As phrased in the March 28, 2008 letter, those elements are "Involve[ment] in conference calls with the clients in getting the requirements and updating the status of QA Activities"; and "Implementation and customization as requested by the client."⁵

⁴ One of the documents submitted by the petitioner's CEO in response to the RFE includes a "Proprietary Statement" indicating that the project to which the beneficiary will be assigned is for the development of "onsite Sense Expert Software for internal use only" and that the petitioner "will have Proprietary Rights on this software with restrictions on using, copying, and modifying."

⁵ The AAO is not persuaded by counsel's argument, at pages 4-7 of the Memorandum of Points and Authorities in Support of the Appeal, that the words "client" and "clients" as used by the petitioner in the context of the record's documentary evidence refer only to persons who "all work exclusively within the Petitioner company." Counsel's argument does not accord with common usage of "client" and "clients," and counsel provides no documentary support for the special meaning that he attributes to the words. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Additionally, the AAO notes the following three of seven “Role” elements attributed to the proffered position by the petitioner’s CEO in the July 28, 2008 document submitted in response to the RFE:

- Will be involved in requirement gathering from the users and scientific board members for enhancements and future version release.
- Analyze, Design, Develop, and Implement different Enterprise Applications using C#, C, C++, and Java.
- Develop, configure, and support License Manager Applications for Software products.

The AAO finds that role of requirements gathering “from scientific board members” has no apparent correlation to any aspect of the Sense Expert Software project presented in any document in the record of proceeding. Next, the “Analyze, Design, Develop, and Implement different Enterprise Applications using C#, C, C++, and Java” directly contradicts the petitioner’s assertions that the beneficiary will only be engaged in the development of a single type of Software. Additionally, the “Develop, configure, and support License Manager Applications for Software products” conflicts with the scope of the Sense Expert Software project as described in the record, which is limited to “developing onsite Sense Expert Software for Internal use.”

Further, the petitioner’s March 17, 2008 letter offering employment to the beneficiary⁶ does not reflect the existence of any particular assignment for the beneficiary. The letter not only fails to mention a particular project or work location, but it indicates that the beneficiary will be subject to assignment at the petitioner’s discretion and to locations other than in-house. In pertinent part, the letter states:

Your responsibilities may vary depending upon the project, and may include, but not [be] limited to, testing, debugging, documentation[,] etc.” Also, you must be willing to travel on short notice as and when required.

The AAO further notes that the petitioner’s assertion of 24-36 months of work for the beneficiary on its in-house project conflicts with the “Term of Agreement” section of the March 17, 2008 letter, which states that the agreement with the beneficiary “shall be for 365 days from the date last executed.”

Finally, as the adverse determination of the specialty occupation issue is dispositive of the appeal, the AAO will not further address in detail its affirmance of the director’s denial of the petition for the petitioner’s failure to establish its standing to file this petition as either a United States employer

⁶ According to its terms, the letter became the agreement between the petitioner and the beneficiary upon the beneficiary’s signing, which took place on March 31, 2008.

as defined at 8 C.F.R. § 214.2(h)(4)(ii), or (b) a U.S. agent, in accordance with the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F), except to note that the numerous inconsistencies detailed above make it impossible to find any error with the director's conclusion on this issue. Simply put, as it cannot be determined with any certainty who will actually control the work of the beneficiary under the common-law touchstone of control analysis, it cannot be found that the petitioner, or any of its clients, will qualify as having the requisite employer-employee relationship with respect to the beneficiary such that it meets or will meet the definition of United States employer as that term is defined at 8 C.F.R § 214.2(h)(4)(ii). Therefore, the petition must be denied and the appeal dismissed for this additional reason.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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