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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090

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U.S. Citizenship  
and Immigration  
Services

S2

[REDACTED]

Date: **JUL 07 2011** Office: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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)

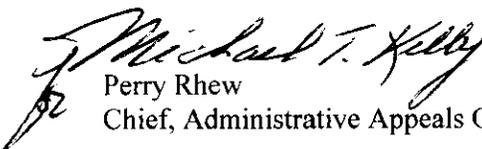
ON BEHALF OF PETITIONER:

[REDACTED]

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

  
Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner is an information technology consulting company. It seeks to employ the beneficiary as a business analyst and to classify him 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, finding that the petitioner failed to establish that: (1) it submitted a Labor Condition Application (LCA) that corresponded to the petition; and (2) the proposed position qualifies for classification as a specialty occupation. On appeal, counsel for the petitioner submits a brief and additional evidence.

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

In the letter of support dated June 7, 2009, the petitioner claimed that it is an information technology services company "that specializes in offering creative and cost effective IT solutions that meet the specific business needs of our clients." Regarding the beneficiary, the petitioner indicated that it wished to employ the beneficiary as a business analyst. The petitioner submitted a certified Labor Condition Application (LCA) for the work location of Manchester, Missouri in support of the petition.

The director found the initial evidence insufficient to establish eligibility, and thus issued an RFE on June 8, 2009. The director requested additional details regarding the ultimate employment of the beneficiary, such as specific information with regard to any in-house projects upon which the beneficiary would be working and whether they were for clients or solely for the petitioner. Additionally, the director noted that, since the petitioner appeared to be engaged in consulting, it requested additional information pertaining to the location(s) at which the beneficiary would work and the supervisor of the beneficiary at each worksite, along with clarification regarding whether his supervisor would be the petitioner, vendor, or end client. Additional details regarding his duties at each potential work location were also requested.

In response, the petitioner, through counsel, addressed the director's queries. In a statement dated June 30, 2009, the petitioner stated that through an equity joint venture [REDACTED] it created two software products, namely, [REDACTED] (a contact management system and [REDACTED] application) and [REDACTED], which is a type of integrated workflow management software. The petitioner claimed that, as lead business analyst, the beneficiary would help to customize these two products to individual customers. Regarding the duties of the beneficiary, the petitioner provided the following chart:

	<b>Duties as a Business Analyst [Beneficiary]</b>	<b>Estimated % of time spent</b>
1	Study existing business processes at customer	20
2	Gap/Impact analysis and Customization requirement document preparation	45
2	Working with developers and technical teams including functionality reviews	15
3	Others – including client reviews and meetings and change management	20

The petitioner concluded by stating that the beneficiary would be working out of the petitioner's head [REDACTED] for the requested validity period. The petitioner also indicated that travel to client locations might be required occasionally.

The director denied the petition, finding that the evidence submitted by the petitioner did not establish eligibility in this matter. Specifically, the director found that based on the petitioner's claim that 20% of the beneficiary's time would be spent studying existing business processes at customer locations, the LCA submitted with the petition, which identified only the petitioner's head office location in Manchester, Missouri, could not be deemed to cover all potential work locations of the beneficiary. Moreover, based on the lack of evidence pertaining to the exact nature of the beneficiary's duties, the director concluded that the proffered position had not been established as a specialty occupation.

On appeal, counsel for the petitioner contends that the employment of the beneficiary would be in-house for the petitioner, and that if the beneficiary should be required to work for more than 30/60 days at a client site, an amended petition would be filed. Counsel further contended that the petitioner submitted sufficient evidence to establish that the proffered position was a specialty occupation.

The first issue before the AAO is whether the LCA submitted in support of the petition corresponds to the petition by encompassing all of the locations where the beneficiary would work.

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) as follows:

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission . . . .

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1):

Demonstrating eligibility at time of filing. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. Any evidence submitted in connection with the application or petition is incorporated into and considered part of the relating application or petition.

The first issue before the AAO is whether the petitioner submitted an LCA that corresponded to the petition at the time of filing, and thus established filing eligibility at the time the Form I-129 was received by U.S. Citizenship and Immigration Services (USCIS).

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from the Department of Labor (DOL) in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. § 214.2(h)(4)(i)(B). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of a labor certification application with the DOL when submitting the Form I-129.

Additionally, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) provides as follows:

*Service or training in more than one location.* A petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with the Service office which has jurisdiction over I-129H petitions in the area where the petitioner is located. The address which the petitioner specifies as its location on the I-129H petition shall be where the petitioner is located for purposes of this paragraph.

In the instant case, the petitioner filed the Form I-129 petition with USCIS on April 21, 2009, indicating that the beneficiary would work in Manchester, Missouri. The petitioner also submitted a certified LCA for this location with the petition. In response to the director's RFE, however, the petitioner claimed that the beneficiary would spend 20% of his time studying the existing business processes at customer sites.

The director denied the petition, noting that based on the claim set forth above, the beneficiary would not work solely in-house for the petitioner in Manchester, Missouri as claimed on the Form I-129, LCA, and supporting documents.

On appeal, counsel contends, without any supporting explanatory statement from the petitioner or other documentary evidence, that the beneficiary would spend no more than 30 days per year at any client site. The AAO accords no weight to the out-of-office limits

asserted by counsel because they are not supported by documentary evidence. 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 Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. Title 20 C.F.R. § 655.705(b) further indicates that an LCA must correspond to the petition with which it is submitted. The LCA submitted with the petition is certified for Manchester, Missouri. In response to the RFE, however, the petitioner claimed, without explanation of the basis for this projection, that 20% of the beneficiary's time would be spent at customer sites studying existing business processes.

Although an employment contract was not submitted with the petition, the petitioner claimed in its letter of support that the beneficiary would be expected to work five days per week on a full-time basis. Not including weekends, and assuming a standard two-week vacation in a given year, it stands to reason that the beneficiary would work full-time for approximately 50 weeks, or 250 days, each year. According to the petitioner, if the beneficiary spent 20% of his time studying business processes at customer sites, this would equate to approximately 50 workdays in a given year.<sup>1</sup>

Despite the director's request in the RFE, the petitioner provided no information with regard to its customers or clients, and the record is devoid of evidence demonstrating where and for whom the beneficiary will provide services. Since the petitioner contends that 20% of the beneficiary's time will be spent at customer sites, the AAO affirms the director's denial of the petition on the LCA grounds, as the petitioner has not established that the LCA submitted corresponds to the petition.

Although counsel on appeal attempts to refute the director's findings, his assertions are not persuasive. On appeal, a petitioner cannot materially change the associated job responsibilities

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<sup>1</sup> On appeal, counsel cites regulations at 20 C.F.R. §§ 655.715 and 655.735 to support of the position that the LCA submitted with the petition is sufficient. While the provisions in these sections support the contention that a new LCA is not always required when an employee is temporarily assigned to perform services at a non-LCA location, counsel overlooks the fact that the record contains no specific evidence demonstrating where, and for what duration, the beneficiary will provide services. Based on the evidence of record, there is no way to determine that the beneficiary's assignments to client sites outside the area covered in the LCA will be temporary, nor is there any evidence to definitely show that the duration of the beneficiary's assignments at these sites will comply with the time restrictions imposed under the cited regulations.

of a beneficiary. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits the classification sought. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). In this matter, counsel seeks to change the amount of time the beneficiary will spend at client worksites in order to overcome the basis for the director's denial in this matter. A petitioner, however, may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

In addition, counsel relies on an unpublished decision in which the AAO invalidated a requirement that an employer submit detailed contracts and itineraries to show that the services of the beneficiary were needed. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. 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. Further, Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Also, 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 regulations at 8 C.F.R. §§ 103.2(b)(8) and 214.2(h)(9)(i) provide the director broad discretionary authority to require such evidence as contracts and itineraries to establish that the services to be performed by the beneficiary will be in a specialty occupation during the entire period requested in the petition. A service center director may issue an RFE for evidence that he or she may independently require to assist in adjudicating an H-1B petition, and his or her decision to approve a petition must be based upon consideration of all of the evidence as submitted by the petitioner, both initially and in response to any RFE that the director may issue. *See* 8 C.F.R. § 214.2(h)(9). The purpose of an RFE 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)(1), (b)(8), and (b)(12).

The AAO finds that the evidence in the record of proceeding – and particularly the differing duty descriptions provided initially with the petition and later in response to the RFE - does not demonstrate that the beneficiary will work solely within the geographical area encompassed by the LCA filed in support of the petition and that the beneficiary's work outside that geographical area would comply the DOL regulations' limited exceptions for short-term work away from the geographical area specified in the LCA. Consequently, the petitioner failed to establish that the certified LCA covers all the worksites where the beneficiary would be employed. Thus, as the petitioner failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B), the petition may not be approved.

The next issue is whether the beneficiary will be employed in a specialty occupation.

Section 214(i)(1) of the Immigration and Nationality Act (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 regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

*Specialty occupation* means 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed 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 (5<sup>th</sup> Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

In addressing whether the proffered position is a specialty occupation, the record is devoid of any documentary evidence as to where and for whom the beneficiary would be performing his services during the requested employment period, and whether his services would be that of a business analyst.

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) indicates that contracts are 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 March 30, 2009 support letter submitted by the petitioner described the proffered position and indicated that the beneficiary would be responsible for the following:

- Gather and organize information on problems or procedures;
- Analyze data gathered and develop solutions or alternative methods of proceeding;
- Confer with personnel concerned to ensure successful functioning of newly implemented systems or procedures;
- Develop and implement records management program for filing, protection, and retrieval of records, and assure compliance with program; review forms

and reports, and confer with management and users about format, distribution, and purpose, and to identify problems and improvements;

- Develop and implement records management program for filing, protection, and retrieval of records, and assure compliance with program;
- Document findings of study and prepare recommendations for implementation of new systems, procedures, or organizational changes;
- Prepare manuals and train workers in use of new forms, reports, procedures or equipment, according to organizational policy; Prepare manuals and train workers in use of new forms, reports, procedures or equipment, according to organizational policy.
- Design, evaluate, recommend, and approve changes of forms and reports.

As discussed above, in response to the RFE, the petitioner stated that through an equity joint venture [REDACTED] it created the two software products; namely, [REDACTED] (a contact management system and [REDACTED] application) and [REDACTED], a type of integrated workflow management software. The petitioner claimed that, as lead business analyst, the beneficiary would help to customize these two products to individual customers. Regarding the duties of the beneficiary, the petitioner provided the following chart:

	<b>Duties as a Business Analyst [Beneficiary]</b>	<b>Estimated % of time spent</b>
1	Study existing business processes at customer	20
2	Gap/Impact analysis and Customization requirement document preparation	45
2	Working with developers and technical teams including functionality reviews	15
3	Others – including client reviews and meetings and change management	20

At the outset, the AAO notes that the proposed duties described in the petitioner's letter of support filed with the Form I-129 are materially different from those that the petitioner attributed to the proffered position in the letter it submitted in response to the RFE.

The nature and focus of the proposed duties described in the petitioner's March 30, 2009 letter are internal and focused on improving the efficiency and effectiveness of the petitioner's operations. This is obvious not only in the letter's phrasing of the duties (for example, "Develop and implement records management program for filing, protection, and retrieval of records," "Prepare manuals and train workers in use of new forms, reports, procedures or equipment, according to organizational policy," and "Design, evaluate, recommend, and approve changes of forms and reports") but also in the letter's general characterization of the proffered position in

the following paragraph:

Our continued success will depend[,] to a large extent, on our ability to remain in the forefront of the developments in the field of information technology. At present we have identified the need for the temporary professional services of a Business Analyst to conduct organizational studies and evaluations, design systems and procedures, conduct work specifications and measurement studies, and prepare operations and procedures manuals to assist management in operating more efficiently and effectively.

In sharp contrast, the duties as described in the RFE response is outward-looking, product-development and client oriented, and focused on two applications that were not previously mentioned.

Further, in light of the sharp contrast between the proposed duties as described initially and as later described in response to the RFE, and the lack of evidence documenting [REDACTED] and/or [REDACTED] work designated for the beneficiary by the time that the petition was filed, the AAO finds that the petitioner had not established that that, at the time of petition-filing, definite, non-speculative work had been secured for the beneficiary. A petitioner, however, may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Further, USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). Also, as previously noted, the petitioner must establish that the facts when the petition was filed merit the classification sought, and 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. In this regard, the AAO notes that the petition was filed on April 1, 2009, without any mention of Swap-Card and/or Time Office.

For all of the additional reasons just discussed above with regard to the discrepancies between duty descriptions and with regard to the lack of evidence of actual work secured for the beneficiary at the time of the petition's filing, the AAO will not disturb the director's decision, for the petitioner failed to establish the nature of the actual work upon which the petition was filed.

Next, as a separate and independent ground for dismissing the appeal, the AAO finds that, even if the petitioner had not failed to substantiate its newly asserted claim that the petition was filed for [REDACTED] work for the beneficiary, the appeal must still be dismissed and the petition denied, because the evidence in the record of proceeding does not establish that work generated under either of those projects would require the theoretical and practical application of any particular educational level of a body highly specialized in a specific specialty, as the Act demands for any specialty occupation position.

The petitioner contended in response to the RFE that the beneficiary would work to tailor the two aforementioned applications to individual client needs, and would have to spend a significant amount of his time at client sites studying their business processes and coordinating with clients. Thus, it is evident that the nature of the beneficiary's work would require adherence to and assessment of client needs and demands, and that the end client on a particular project would determine the exact nature of the beneficiary's duties. However, in the absence of statements of work or contractual agreements to clarify the exact nature of the duties the beneficiary would perform for each client, the AAO cannot determine whether the proffered position requires the beneficiary to perform the duties of a specialty occupation. The uncertainty surrounding the current projects and work assignments of the beneficiary renders it impossible to find that the proffered position is a specialty occupation, since no specific description of the duties the beneficiary will actually perform on a particular project for a client is included in the record.

As discussed briefly above, the record is devoid of evidence of any agreements between the petitioner and end clients for whom the beneficiary will work. As noted previously, although the petitioner claimed in response to the RFE that the beneficiary would work solely on in-house projects for the two systems discussed above, no evidence has been submitted into the record to corroborate this claim.<sup>2</sup>

The brief description of duties in the petitioner's support letter is generic and fails to specifically describe the nature of the services required by the beneficiary. Moreover, the petitioner's statements in response to the RFE suggest that the beneficiary's assignments will fluctuate between clients throughout the validity period and thus his duties and responsibilities are subject to change in accordance with each client's requirements. Therefore, absent evidence of contracts or statements of work describing the duties the beneficiary would perform and for whom throughout the entire validity period, the petitioner fails to establish that the duties that the beneficiary would perform are those of a specialty occupation.

USCIS routinely looks to *Defensor v. Meissner*, 201 F.3d 384, which requires an examination of the ultimate employment of the beneficiary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources (Vintage) is 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

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<sup>2</sup> Although counsel for the petitioner submits letters from customers on appeal, in which they express interest in the petitioner's software systems, these letters are insufficient to demonstrate eligibility in this matter. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). Moreover, these letters demonstrate a mere interest in the petitioner's products and do not represent contractual agreements for the services of the petitioner and the beneficiary.

“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. *Id.* The *Defensor* court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary’s services. *Id.* In *Defensor*, the court found that that evidence of the client companies’ job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

On appeal, counsel relies on an unpublished decision in which the AAO determined that the proffered position of graphic designer met the requirements of a specialty occupation and that contracts and work orders from clients were not necessary to demonstrate that the position qualified as a specialty occupation. Again, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. The AAO reiterates that 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. Further, pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, 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 regulations at 8 C.F.R. §§ 103.2(b)(8) and 214.2(h)(9)(i) provide the director broad discretionary authority to require such evidence as contracts and itineraries to establish that the services to be performed by the beneficiary will be in a specialty occupation during the entire period requested in the petition. A service center director may issue an RFE for evidence that he or she may independently require to assist in adjudicating an H-1B petition, and his or her decision to approve a petition must be based upon consideration of all of the evidence as submitted by the petitioner, both initially and in response to any RFE that the director may issue. *See* 8 C.F.R. § 214.2(h)(9). The purpose of an RFE 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)(1), (b)(8), and (b)(12). Accordingly, there is no merit to counsel’s contention that the RFE’s request for contracts exceeds the authorized scope of an RFE.

The differing job descriptions provided by the petitioner with the petition and in response to the RFE indicate that the beneficiary will be working on different projects throughout the duration of the petition. Moreover, counsel’s assertions on appeal where he claims that the beneficiary will

work no more than 30 days at client sites is not convincing to the AAO, particularly since counsel's claims (1) directly contradict the claims made by the petitioner in response to the RFE; and (2) are not supported by any documentary evidence. 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). Moreover, if USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The petitioner's failure to provide evidence of valid work orders or employment contracts, which identify the beneficiary as personnel and outline the nature of his duties, renders it impossible to conclude for whom the beneficiary will ultimately provide services, and exactly what those services would entail. The AAO, therefore, cannot analyze whether his duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner's normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). For this additional reason, the petition must be denied.

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