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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

U.S. Citizenship and Immigration Services

D2

[redacted]

Date MAY 02 2011 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

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,

Michael T. Kelly

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the 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.

The petitioner is a technology solutions business specializing in the implementation and integration of SAP and the development of add-on tools to enhance quality and productivity in the SAP system. It seeks to employ the beneficiary as an SAP Payroll Consultant 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 concluding that: 1) the petitioner failed to submit an appropriate and valid Department of Labor Form ETA-9035, Labor Condition Application (LCA); 2) the petitioner failed to establish that it qualifies as a U.S. employer or agent; and 3) the petitioner failed to demonstrate that the proffered position is a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE) and the petitioner's response to the RFE; (3) the director's denial letter; and (4) Form I-290B, with counsel's brief and supporting materials. The AAO reviewed the record in its entirety before reaching its decision.

In the petition submitted on March 23, 2009, the petitioner stated it has 94 employees and a gross annual income of $28 million. The petitioner indicated that it wished to employ the beneficiary as an SAP Payroll Consultant from March 25, 2009 to March 24, 2012 at an annual salary of $135,000, however the petitioner is not eligible to extend the beneficiary's H-1B status beyond January 25, 2010 through the present petition because the Form I-129 Supplement H states that the beneficiary has been in the U.S. in H-1B status since January 26, 2004.

The support letter states that the beneficiary will perform the following duties:

- Create and execute test scripts and analyze results relating to test payroll runs, payroll data conversion, interfaces, and reports;
- Pull data out of SAP Payroll/HR for personnel administration, personnel development, and organizational management;
- Create complex solutions with multiple integration points;
- Payroll schema development, benefits configuration, SAP Tax Year-end experience, SAP Third Party remittance functionality, SAP version upgrades, SAP Support pack analysis and application, configuration of posting payroll results to SAP Financials, and wage type configuration.

The petitioner states the proffered position requires a Bachelor's degree in a job-related field plus experience.

The Form I-129 indicates that the beneficiary will work in Sacramento, CA for the duration of the petition.

The petitioner submitted the beneficiary's education documents, indicating that he has a U.S.

Master of Science degree in Mechanical Engineering.

On April 16, 2009, the director issued an RFE stating, in part, that the evidence of record is not sufficient to demonstrate that a specialty occupation exists. The petitioner was advised to submit documentation clarifying the petitioner's relationship with the beneficiary, which could include an itinerary of definite employment, listing the names of the employers and locations where the beneficiary would provide services, as well as copies of its contractual agreements with its clients. The RFE specifically noted that "[t]he evidence should show specialty occupation work with the actual client-company where the work will ultimately be performed. . . ." The director also requested evidence regarding the petitioner's business.

The petitioner responded that the beneficiary would perform internal projects for the petitioner as well as external projects as the need arises. The petitioner explained:

> Part of our business is to design and develop SAP solutions for clients. We do not outsource workers to perform client work. Rather, our employees go to client sites in order to obtain information on customer requirements to design appropriate enterprise solutions using [the petitioner's] specialized techniques and processes to develop optimum SAP integration solutions for customers. Our employees also go to client sites to oversee the implementation of these solutions at these sites. In addition, we offer on-site and off-site support for specialized [petitioner's] solutions. This is a unique service offered to our clients who operate their SAP Systems in a production environment through a Service Level Contract Agreement. The contract between [the petitioner] and our clients allows them to leverage the advanced technical solutions available from our company. The beneficiary is not currently on a client contract but instead is working on internal [petitioner's] projects. We may in the future request that the beneficiary work on client contracts.

The petitioner provided a copy of one of its service level contract agreements as an example.

The petitioner included a copy of its offer letter to the beneficiary for the position of "Senior HCM Consultant." The offer letter states: "The position involves frequent traveling. The company or its clients typically cover the cost of travel/living expenses while on assignments. You will however be responsible for payment of such expenses yourself and submit a claim for these that will be refunded to you with each payroll period. . . ."

Additionally, the petitioner submitted copies of four advertisements it ran on its website. Three advertisements state that the petitioner requires [redacted] to have at least a Bachelor's degree in Computer Science or a similar field plus experience. The fourth advertisement, which is for a Senior SAP Payroll Consultant, similar to the job title proffered in this petition, states that at least a Bachelor's degree "or a foreign equivalent (3 year foreign degree accepted)" in Computer Science, Information Technology, or a related field plus experience is required. The AAO notes that under 8 C.F.R. § 214.2(h)(4)(iii)(C), a three-year foreign degree is not equivalent to a four-year U.S. bachelor's degree.

The director denied the petition on June 12, 2009.

On appeal, counsel explains that the petitioner is not placing IT workers to work directly for other companies, but instead employs its professionals to develop systems based on the petitioner's proprietary instructions and requirements. Counsel further espouses that the petitioner's workers travel to client sites only to gain additional information on client systems and to implement the systems developed by the petitioner. Although counsel stated that a brief and supporting documentation would be submitted within 30 days of filing the Form I-290B, counsel has submitted neither. Therefore, the decision will be based on the record as constituted as of the date this decision is rendered.

First, the AAO will consider whether the petitioner qualifies as an employer or agent.

Upon review, the record establishes that the petitioner will be the employer of the beneficiary for the duration of the petition, and the director's decision to the contrary shall be withdrawn. The petitioner is a technology solutions business that, with regard to the beneficiary in this matter, is using the beneficiary to perform work on behalf of the petitioner regarding products and services that the petitioner provides directly to its clients. Based on the evidence submitted, at all times the petitioner is responsible for, and controls all aspects of employment for its personnel. The petitioner will hire the beneficiary, will pay the beneficiary, has the right to fire the beneficiary and will otherwise control the beneficiary's work, as evidenced by the fact that: (1) it will have and maintain direct control over the work by having the beneficiary report directly to someone employed by the petitioner; (2) the beneficiary's work will be performed for the benefit of the petitioner; (3) the beneficiary will use the petitioner's techniques and processes in performing his duties; and (4) there exists written intent of both the petitioner and the beneficiary to enter into an employer-employee relationship. The petitioner therefore qualifies as a United States employer with regard to the beneficiary in this instance and the director's finding to the contrary is withdrawn.

Next, the AAO will consider whether the position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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 one 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.

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 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), 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 this matter, the petitioner seeks the beneficiary's services as an SAP Payroll Consultant.

To make its determination whether the employment described qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(1)* and *(2)*: a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

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, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

Based on the position description and the occupational code provided by the petitioner in the LCA, the AAO finds that the proffered position is closest to that of a Programmer Analyst, an occupational category that is encompassed in two sections of the *Handbook* (2010-11 online edition) – "Computer Software Engineers and Computer Programmers" and "Computer Systems Analysts."

The *Handbook* describes computer programmers as follows:

> [C]omputer programmers write programs. After computer software engineers and systems analysts design software programs, the programmer converts that design into a logical series of instructions that the computer can follow (A section on computer systems analysts appears elsewhere in the Handbook.).

> The programmer codes these instructions in any of a number of programming languages, depending on the need. The most common languages are C++ and Python.
>
> Computer programmers also update, repair, modify, and expand existing programs. Some, especially those working on large projects that involve many programmers, use computer-assisted software engineering (CASE) tools to automate much of the coding process. These tools enable a programmer to concentrate on writing the unique parts of a program. Programmers working on smaller projects often use "programmer environments," applications that increase productivity by combining compiling, code walk-through, code generation, test data generation, and debugging functions. Programmers also use libraries of basic code that can be modified or customized for a specific application. This approach yields more reliable and consistent programs and increases programmers' productivity by eliminating some routine steps.
>
> As software design has continued to advance, and some programming functions have become automated, programmers have begun to assume some of the responsibilities that were once performed only by software engineers. As a result, some computer programmers now assist software engineers in identifying user needs and designing certain parts of computer programs, as well as other functions. . . .
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> * * *
>
> [M]any programmers require a bachelor's degree, but a 2-year degree or certificate may be adequate for some positions. Some computer programmers hold a college degree in computer science, mathematics, or information systems, whereas others have taken special courses in computer programming to supplement their degree in a field such as accounting, finance, or another area of business. . . .

The *Handbook*'s section on computer systems analysts reads, in pertinent part:

> In some organizations, programmer-analysts design and update the software that runs a computer. They also create custom applications tailored to their organization's tasks. Because they are responsible for both programming and systems analysis, these workers must be proficient in both areas. (A separate section on computer software engineers and computer programmers appears elsewhere in the Handbook.) As this dual proficiency becomes more common, analysts are increasingly working with databases, object-oriented programming languages, client–server applications, and multimedia and Internet technology.
>
> * * *

> [W]hen 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. 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 areas 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. . . .
>
> Recruitment specialists maintain contacts within the community and may travel considerably, often to job fairs and college campuses, to search for promising job applicants. Recruiters screen, interview, and occasionally test applicants. They also may check references and extend job offers. These workers must be thoroughly familiar with their organization, the work that is done, and the human resources policies of their company in order to discuss wages, working conditions and advancement opportunities with prospective employees. They also must stay informed about equal employment opportunity (EEO) and affirmative action guidelines and laws, such as the Americans with Disabilities Act.

Therefore, the *Handbook's* information on educational requirements in the programmer analyst occupation indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement for this occupational category. Rather, the occupation accommodates a wide spectrum of educational credentials.

As the *Handbook* indicates no specific degree requirement for employment as a programmer analyst, and as it is not self-evident that, as described in the record of proceeding, the proposed duties comprise a position for which the normal entry requirement would be at least a bachelor's degree, or its equivalent, in a specific specialty, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a specific specialty. Accordingly, the AAO finds that the petitioner has not established its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, 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.

Again, 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 at 1165 (quoting *Hird/Blaker Corp. v. Sava,* 712 F. Supp. at 1102).

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 or the equivalent in a specific specialty and the petitioner has not submitted evidence that parallel firms require at least a bachelor's degree or the equivalent in a specific specialty for the proffered position.

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." The evidence of record does not refute the *Handbook's* information to the effect that a bachelor's degree is not required in a specific specialty. Additionally, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than programmer analyst positions that can be performed by persons without a specialty degree or its equivalent.

Although the evidence indicates that the petitioner employs other consultants in addition to the beneficiary, no evidence was provided that the petitioner has a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty. In fact, as discussed previously, the advertisement previously placed by the petitioner with the job title that is closest to the one proffered here states that a three-year foreign degree is acceptable for the proffered position, which is not necessarily equivalent to a U.S. bachelor's degree. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. The AAO does not find that the evidence supports that the proposed duties reflect a higher degree of knowledge and skill than would normally be required of programmer analysts not equipped with at least a bachelor's degree, or its equivalent, in a specific specialty. The AAO, therefore, concludes that the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Third, the AAO will consider whether the petitioner submitted a valid LCA.

The regulation at 20 C.F.R. § 655.715 defines place of employment as "the worksite or physical location where the work actually is performed" and the regulation at 20 C.F.R. § 655.730(c) stipulates the following:

> What should be submitted? Form ETA 9035.
>
> (1) General. One completed and dated original Form ETA 9035 containing the labor condition statements referenced in Secs. 655.731 through 655.734 of this part, bearing the employer's original signature (or that of the employer's authorized agent or representative) and one copy of the completed and dated original Form ETA 9035 shall be submitted to ETA (see paragraph (b) of this section and Sec. 655.760(a)(1) of this part with respect to applications filed by facsimile transmission). Copies of Form ETA 9035 are available at the addresses listed in Sec. 655.720 of this part; photocopies of the form (obtained from any source) also are permitted. Each application shall identify the occupational classification for which the labor condition application is being submitted and shall state:
>
> > (i) The occupation, by Dictionary of Occupational Titles (DOT) Three-Digit Occupational Groups code and by the employer's own title for the job;
> >
> > (ii) The number of H-1B nonimmigrants sought;
> >
> > (iii) The gross wage rate to be paid to each H-1B nonimmigrant, expressed on an hourly, weekly, biweekly, monthly or annual basis;
> >
> > (iv) The starting and ending dates of the H-1B nonimmigrants' employment;
> >
> > (v) The place(s) of intended employment; and
> >
> > (vi) The prevailing wage for the occupation in the area of intended employment and the specific source (e.g., name of published survey) relied upon by the employer to determine the wage. If the wage is obtained from a SESA, the appropriate box must be checked and the wage provided; wages obtained from a source other than a SESA must be identified along with the wage;
>
> (2) Multiple positions or places of employment. The employer shall file a separate LCA for each occupation in which the employer intends to employ one or more H-1B nonimmigrants. All places of employment covered by the application must be located within the jurisdiction of a single ETA regional office, or, if the nonimmigrant(s) is(are) to be employed sequentially in various places of employment, the application is to be submitted to the regional office having jurisdiction over the initial place of employment;

The petitioner may place the petitioner at other worksites pursuant to the regulation at 20 C.F.R.

§ 655.735 which states:

(a) Subject to the conditions specified in this section, an employer may make short-term placements or assignments of H-1B nonimmigrant(s) at worksite(s) (place(s) of employment) in areas not listed on the employer's approved LCA(s) without filing new labor condition application(s) for such area(s).

(b) The following conditions must be fully satisfied by an employer during all short-term placement(s) or assignment(s) of H-1B nonimmigrant(s) at worksite(s) (place(s) of employment) in areas not listed on the employer's approved LCA(s):

(1) The employer has fully satisfied the requirements of Sec. Sec. 655.730 through 655. 734 with regard to worksite(s) located within the area(s) of intended employment listed on the employer's LCA(s).

(2) The employer shall not place, assign, lease, or otherwise contract out any H-1B nonimmigrant(s) to any worksite where there is a strike or lockout in the course of a labor dispute in the same occupational classification(s) as that of the H-1B nonimmigrant(s).

(3) For every day the H-1B nonimmigrant(s) is placed or assigned outside the area(s) of employment listed on the approved LCA(s) for such worker(s), the employer shall:

(i) Continue to pay such worker(s) the required wage (based on the prevailing wage at such worker's(s') permanent worksite, or the employer's actual wage, whichever is higher);

(ii) Pay such worker(s) the actual cost of lodging (for both workdays and non-workdays); and

(iii) Pay such worker(s) the actual cost of travel, meals and incidental or miscellaneous expenses (for both workdays and non-workdays).

(c) An employer's short-term placement(s) or assignment(s) of H-1B nonimmigrant(s) at any worksite(s) in an area of employment not listed on the employer's approved LCA(s) shall not exceed a total of 30 workdays in a one-year period for any H-1B nonimmigrant at any worksite or combination of worksites in the area, except that such placement or assignment of an H-1B nonimmigrant may be for longer than 30 workdays but for no more than a total of 60 workdays in a one-year period where the employer is able to show the following:

(1) The H-1B nonimmigrant continues to maintain an office or work station at his/her permanent worksite (e.g., the worker has a dedicated workstation and telephone line(s) at the permanent worksite);

(2) The H-1B nonimmigrant spends a substantial amount of time at the permanent worksite in a one-year period; and

(3) The H-1B nonimmigrant's U.S. residence or place of abode is located in the area of the permanent worksite and not in the area of the short-term worksite(s) (e.g., the worker's personal mailing address; the worker's lease for an apartment or other home; the worker's bank accounts; the worker's automobile driver's license; the residence of the worker's dependents).

As stated earlier in this decision, counsel argues on appeal that the beneficiary will be based at the petitioner's office in Sacramento, CA. Although the beneficiary will travel frequently to client sites, the petitioner has provided evidence that the beneficiary will travel to client sites to obtain information on client systems and to implement systems the petitioner develops, but would not be outsourced to perform client work. Given the nature of the petitioner's business and the evidence presented, the AAO finds that, more likely than not, the LCA corresponds to the employment location where the petitioner intends to employ the beneficiary and if the beneficiary does perform any work outside of the metropolitan region of Sacramento, CA, this employment is likely to meet the short-term criteria under 20 C.F.R. § 655.735(c). Therefore, this basis of the director's decision to deny the petition will be withdrawn.

The petition will be denied and the appeal dismissed. 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.