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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

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Date: NOV 01 2011 Office: VERMONT SERVICE CENTER File:

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:

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,

for *Michael T. Kelly*
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and affirmed this decision, upon consideration of the petitioner's subsequent combined motion to reopen and motion to reconsider. 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 an information technology consulting company. The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on January 28, 2009. At that time, the petitioner indicated that the company consisted of 18 employees and had a gross annual income of approximately \$1.7 million.

Seeking to employ the beneficiary in what it designates as a systems analyst position, the petitioner filed this H-1B petition in an endeavor 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, having determined that the petitioner had failed to establish that the proffered position qualifies as a specialty occupation in accordance with the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A). Upon consideration of a combined motion to reopen and motion to reconsider filed by the petitioner, the director affirmed the denial. In doing so, the director also determined that a Labor Condition Application (LCA) newly submitted on motion to support the beneficiary's assignment to a location not earlier specified in the petition was not valid for (i.e., did not support) the present petition, as this new LCA was certified by the U.S. Department of Labor after the filing of the petition.

As will be discussed below, the AAO finds that the director was correct in determining that the petition should be denied on each of these grounds.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; (5) the petitioner's Motion to Reopen and Reconsider; (6) the director's Dismissal of the Motion to Reopen and Reconsider; and (7) the Form I-290B and documentation in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO concurs with the director that the petitioner has not established that the proffered position qualifies as a specialty occupation and that the petitioner failed to establish eligibility at the time the Form I-129 was filed in accordance with the controlling statutory and regulatory provisions. Accordingly, the appeal will be dismissed, and the petition will be denied.

In this matter, the petitioner indicated on the Form I-129 and supporting documentation that it sought the beneficiary's services as a systems analyst at an annual salary of \$49,500. The AAO notes that the LCA provided in support of the instant petition listed a Level I (entry) prevailing wage for the position. The petitioner indicated that the period of employment would be from January 27, 2009 to January 26, 2012.

In a letter of support dated January 27, 2009, the petitioner listed the following job duties for the proffered systems analyst position:

- Provide staff and users with assistance in solving computer related problems, such as malfunctions and program problems;
- Test, maintain, and monitor computer programs and systems, including coordinating the installation of computer programs and systems;
- Use object-oriented programming languages, as well as client and server applications development processes and multimedia and Internet technology;
- Confer with clients regarding the nature of the information processing or computation needs a computer program is to address;
- Coordinate and link the computer systems within an organization to increase compatibility and so information can be shared;
- Consult with management to ensure agreement on system principles;
- Expand or modify system to serve new purposes to improve workflow;
- Interview or survey workers, observe job performance or perform the job to determine what information is processed and how it is processed;
- Determine computer software or hardware needed to set up or alter system.

The AAO notes that the wording of the above duties as provided by the petitioner for the proffered position is the same as the description of duties for computer systems analysts provided at the Internet version of the *O*NET* (which is commonly, and hereinafter, referred to as *O*NET OnLine*).¹

The AAO also finds that, as they conform exactly to the *O*NET*'s generalized summary of the generic tasks of the proffered position, the above-quoted descriptions do not relate any dimensions of complexity, uniqueness, and/or specialization that may or may not be inherent in the particular position proffered in this petition.

The letter of support states, in part:

The *Occupational Outlook [sic] Handbook* under 'Systems Analyst' clearly states that College graduates are always sought for the position of Systems Analyst. Many employers seek graduates with a bachelor's degree in commerce,

¹ *O*NET OnLine* is accessible at <http://www.onetonline.org/>. As stated on the Home Page of this Internet site, *O*NET OnLine* is created for the U.S. Department of Labor's Employment & Training Administration by the National Center for *O*NET* Development. The *O*NET OnLine* Summary Report for the occupational classification Computer Systems Analysts is accessible on the Internet at <http://www.onetonline.org/link/summary/15-1121.00>.

management etc. . . . [t]he beneficiary is already working for us The beneficiary is presently working on a project with Sam's Club.²

On March 12, 2009, the director issued an RFE requesting additional information from the petitioner. The petitioner was asked to provide a detailed itinerary (including specific dates, locations and clients) and LCAs (certified prior to the filing of the Form I-129) listing all areas of the beneficiary's intended employment. Furthermore, the director requested the petitioner provide documentation regarding the nature and scope of the petitioner's business and projects, to establish that the beneficiary will be employed to perform the duties set forth and to establish that the petitioner will be able to sustain an employee performing duties at this level. The RFE outlined the specific evidence to be submitted by the petitioner if the beneficiary would be assigned to client consulting projects, working at multiple client sites and/or working on in-house projects. The director also requested evidence pertaining to the beneficiary's nonimmigrant status, including her most recent W-2 and/or 1099 and copies of her pay statements from November 2008 until the filing of the petition in January 2009.

In response to the RFE, the petitioner provided a letter stating that the beneficiary was working at the petitioner's premises on an in-house project for Global ERP, Inc. The petitioner also submitted what is identified as its project plan for a web-portal for Global ERP, Inc.: two leases (one for property in Hollis, New York and the other for property in Seaford, New York); and photos that counsel indicated were of both of the premises leased by the petitioner.

The director reviewed the evidence submitted by the petitioner. He noted that the petitioner had not submitted all of the requested evidence and denied the petition, finding that the petitioner had not satisfied its burden of proof to establish that the job offered qualifies as a "specialty occupation" pursuant to section 101(a)(15)(H)(i)(b) of the Act.

On August 18, 2009, counsel for the petitioner submitted a motion to reopen/reconsider. Counsel indicated that the beneficiary had previously been working on an in-house project for the petitioner but that the project had ended and the petitioner now wanted to employ the beneficiary to serve on a project for Wal-Mart in Arkansas, which, the AAO notes, was not identified in the Form I-129 as filed and the associated LCA filed with it, and is outside the geographical area covered by the LCA filed with the petition.

On motion, counsel also provided photos, which he described as "new pictures of the Premises." The petitioner also submitted copies of a Subcontractor Services Agreement between the petitioner and GDH Consulting, and Work Schedule. (The AAO notes that neither copy bears a signature from GDH Consulting, Inc.)

² Under certain circumstances, an employee in valid H-1B status who changes (ports) to a new employer can begin to work with the new employer upon the filing of a non-frivolous H-1B petition with USCIS. However, a beneficiary is not permitted to begin working for a new employer *prior* to the filing of the H-1B petition.

The Work Schedule states that the beneficiary will be employed as a business analyst for Wal-Mart Stores, Inc. (the client) in Bentonville, Arkansas from June 1, 2009 to June 1, 2010. In addition, the last page of an unidentified document ("Page 4 of 4") was provided. The document is incomplete but states "Consultant's resource [the beneficiary] shall work forty (45) [sic] hours per week starting on or about 6/1/09 and ending on or about 12/31/10." Someone has crossed out the date "12/31/10" and handwritten the date "1/31/10." This document appears to be signed by a representative of GDH Consulting and by a representative of Wal-Mart Stores, Inc.

The petitioner also provided several new LCAs, all of which were denied by Department of Labor (DOL). A review of the (denied) LCAs indicates that the petitioner indicated that the job title is systems analyst, the SOC (*O*NET/OES*) occupation title for the position is computer systems analysts, the salary is \$52,000 per year and the place of employment is Bentonville, Arkansas. No other locations are listed.

In support of the motion, counsel provided a brief, stating, in part, that "[t]he position of Programmer Analyst is well described in *O*NET* and [the] Occupational Outlook Handbook." Counsel also provided a list of job duties, which match verbatim the description of duties for computer programmers as described in the *O*NET*. No explanation was provided for referring to the position as a "Programmer Analyst" (rather than as a systems analyst or business analyst). Furthermore, counsel did not provide any reason for providing the job duties from the *O*NET* for computer programmers, although the position was classified on the LCAs as falling under the occupation of computer systems analysts. It is also noted that, in the initial filing, the petitioner provided a description of the duties taken verbatim from the *O*NET* for the occupation of computer systems analysts. Aside from counsel's brief, none of the aforementioned documents provided the nature of the beneficiary's duties on the project.

The director reviewed the motion and the supporting evidence and determined that the petitioner did not overcome the grounds of the denial. The director affirmed the denial of the Form I-129 petition because the petitioner failed to establish that the proposed position qualifies as specialty occupation.

On November 6, 2009, the petitioner filed an appeal. In his brief, counsel states that the "job duties of the beneficiary are not limited to" the following:

- Assist Project Manager in creating Project Plan using MS Project and evaluate the WBS (Work Breakdown structure);
- Perform business analysis for the assigned projects and create the respective DOU (Document of Understanding);
- Conduct meetings with the 3rd party integration team (for ex: TAXWARE, HARLAND CLARKE, ENDECA, AFFINION, Retail Decision, OMNITURE site catalyst) to understand the business requirements;
- Outline all the risks associated with the projects by performing RISK analysis which involve evaluating all the future risks;
- Perform SWOT analysis/work flow analysis by evaluating strengths, weaknesses, opportunities and threats involved in project;

- Conduct feasibility analysis in correlation with the Developer to ensure the project is in scope with the time line defined by the Project Plan;
- Prepare Business Process Models that includes modeling of all the activities of the business from the conceptual to procedural level;
- Conduct GAP Analysis by analyzing the as-is (current system) and to be processes. And therefore determine the functions needed for the new system;
- Gather requirements from the SME (Subject Matter Expert) by using techniques such as story boarding, brain storming sessions and document those requirements in Requisite PRO;
- Elicited and documented business, user and system requirements and maintained these requirements in MS Excel;
- Create the business Requirement document (BRD) and include the Uses cases, Business rules and Business Processes in it;
- Create UML diagrams like Use Case Diagrams, Sequence Diagram, data flow diagrams and Context diagram using MS Visio;
- Create Functional Requirement Document (FRD), Test plan and Test cases and review them for their accuracy. Track all the test cases in HP Quality Center;
- Create Test Strategy document and outlined the environments required for the projects;
- Prepared Logical process Models which covers "What" business processes are required by the business to accomplish their goals;
- Conduct Joint development sessions with the offshore team (technical team) in order to discuss the project status and resolve technical issues. Also provided KT to the offshore team whenever necessary;
- Discuss Wire frames with the business users and the 3rd parties and provide with system level solutions;
- Serve as liaisons between the internal/external business community and the IT organization in order to provide technical solutions to meet user needs;
- Analyze the data from the web analytics and used it to the re-design the business process. Document and manage all the change requests by updating the respective document(s);
- Participate in the peer review for the Business Requirement document and fix the defects based on the review;
- Discuss with the TA (Technical Architects) the respective properties of the system and discuss the impact of the changing requirements accordingly;
- Follow waterfall and agile methodologies and underline the core milestone for each phase. Participate in all phases, keep track of time line and milestones to be achieved at each phase;
- Provide Presentations for the respective documents to the client.

Counsel also stated "[p]lease find attached the copy of the Contract. The beneficiary has already started working on [a] New Project at Wal Mart in Arkansas. Please also find attached the duly certified and duly signed Labor Condition Application for the new place."

The petitioner provided a signed copy of the previously submitted Subcontractor Services Agreement between the petitioner and GDH Consulting, along with a signed copy of the previously submitted Work Schedule. The petitioner also enclosed another copy of the previously submitted unidentified document ("Page 4 of 4"). It is noted that none of the supporting evidence provided any information regarding the nature of the beneficiary's duties on the project (aside from counsel's brief which listed the job duties above).

The AAO finds that the duties provided by counsel on appeal are not probative evidence that the proffered position qualifies as a specialty occupation. In fact, those counsel-described duties have little evidentiary weight, as they are assertions by counsel without supporting documentary evidence to corroborate their accuracy. 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 Obaighena*, 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).

In any event, the AAO further finds that, aside from the lack of evidence corroborating their accuracy, counsel's duty descriptions would have no probative value, for they only state a litany of generalized functions without relating how such a broad spectrum of duties would actually apply to any specific projects to which the beneficiary would be assigned, and how their performance in the course of such projects would correlate to a need for at least a bachelor's degree in a specific specialty.

On appeal, the petitioner provided a new LCA, certified by DOL on October 28, 2009 (a date after the petition's filing), which lists the job title for the proffered position as business analyst/systems analyst and the place of employment as Bentonville, Arkansas. The petitioner listed the SOC (*O*NET/OES*) occupation title as computer systems analysts. The LCA indicates a wage level of Level II (qualified). It is noted that a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.³ The petitioner chose a Level II for the position, which suggests that the LCA was certified for a more senior position than the position listed on the LCA that was submitted with the Form I-129 petition, which indicated a Level I (entry) wage level.

The AAO will first address its conclusion that the director was correct in his determination to reject the newly submitted LCA as untimely filed.

³ DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* (Revised Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

The record reflects that both the Form I-129 as filed and the timely certified LCA filed with the Form I-129 specify only one location for the work to be performed by the beneficiary, namely, the petitioner's office location in Seaford, New York.

It was upon submission of the motion that the petitioner first asserted that the beneficiary would be assigned to work on a "New Project," at a Wal-Mart site in Arkansas, which the AAO notes is well outside the Seaford, New York area encompassed by the LCA that was filed with the Form I-129. The petitioner attempts to overcome this deficiency by submitting a new LCA, which does encompass the newly specified Arkansas worksite. However, as will now be discussed, the petitioner's attempt is ineffective, as it runs counter to the controlling regulations regarding when an LCA must be certified and filed.

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 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 an LCA with DOL when submitting the Form I-129.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.*

[Italics added]. The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit a valid LCA, certified prior to the filing of the Form I-129 that corresponds to all of the proposed work locations.

In addition, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) states, as part of the general requirements for petitions involving a specialty occupation, that:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

Further, the regulation at 8 C.F.R. § 214.2(h)(2)(E), states the following:

Amended or new petition. The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. In this matter, the petitioner submitted a new LCA on appeal that was certified approximately nine months after the petitioner filed the Form I-129. Further, the AAO finds that the changes in the beneficiary's job title, duties, salary and work location were material changes in the terms and conditions of employment.

Additionally, in light of the fact that the record of proceeding indicates that the beneficiary is working in a different position and at a location not identified in the Form I-129 and the LCA filed with it, USCIS cannot conclude that the newly submitted LCA supports and corresponds to the H-1B petition. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). 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. at 248. The petitioner failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).

For the reasons discussed above, the director was correct in rejecting the second, new LCA, as it was certified after the petition was filed. Consequently, as the Wal-Mart project is outside the scope of this petition – because it is not supported by a timely certified and timely filed LCA – the petition must be denied for the period that the petitioner claims for the Wal-Mart project, as the record of proceeding lacks a timely filed LCA that corresponds to the location, and the associated LCA-wage requirements for that location.

This leaves only one additional issue for the AAO to address, namely, whether the director's decision to deny the petition for failure to establish a specialty occupation for the period of employment prior to the asserted assignment of the beneficiary to Wal-Mart in Arkansas was correct. As shall now be discussed, the AAO finds that the evidence in the record of proceeding fails to establish that the position as described for the period prior to the Wal-Mart assignment constituted a specialty occupation. Accordingly, the AAO shall not disturb the director's decision. The appeal will be dismissed and the petition will be denied on this ground also.

To meet its burden of proof with regard to the specialty occupation issue, the petitioner must establish that the proffered position satisfies the following statutory and regulatory requirements.

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

- (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 the following:

An occupation which requires [(1)] 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 [(2)] 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.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position.

The AAO recognizes the U.S. Department of Labor’s *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁴

In the initial filing, the petitioner indicated that the beneficiary would be employed as a systems analyst. Also, as earlier noted in this decision, the petitioner provided a list of job duties for the position that correspond with the tasks that the *O*NET* lists for computer systems analysts. Likewise, the petitioner stated “[t]he *Occupational Outlook [sic] Handbook* under ‘Systems Analyst’ clearly states that College graduates are always sought for the position of Systems Analyst. Many employers seek graduates with a bachelor’s degree in commerce, management etc.”

In support of the motion, counsel stated “[t]he position of Programmer Analyst is well described in *O*NET* and [the] *Occupational Outlook Handbook*.” A list of job duties was provided, which corresponds exactly to the description of duties for computer programmers as described in *O*NET*. The petitioner provided documents in support of the motion, which list the job title for

⁴ All of the AAO's references are to the 2010-2011 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

the proffered position as systems analyst and as business analyst. In support of the appeal, counsel provided another list of job duties. The supporting documentation provided with the appeal lists the job title of the position as business analyst and as business analyst/systems analyst.

The petitioner and counsel have provided several job titles (including systems analyst, business analyst, programmer analyst, business analyst/systems analyst) and multiple descriptions of the proffered position (including three separate lists of job duties -- one of which was entirely based upon the *O*NET* description for a computer systems analyst and another which was based entirely upon the *O*NET* description for a computer programmer).

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 (5th Cir. 2000). 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 upon a review of the record of proceeding, the two chapters of the *Handbook* most relevant to this proceeding are the chapter "Computer Systems Analysts" and the section on computer programmers in the chapter "Computer Systems Engineers and Computer Programmers."⁵

A review of the *Handbook* indicates that neither computer systems analysts nor computer programmers comprise an occupational group that categorically requires at least a bachelor's degree, or the equivalent, in a specific specialty.

The introduction to the "Training, Other Qualifications, and Advancement" section of the chapter on computer systems analysts in the *Handbook* states the following:

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.

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. For jobs in

⁵ For these chapters, see Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2010-11 Edition*, Computer Systems Analyst, on the Internet at <http://bls.gov/oco/ocos287.htm> (visited October 26, 2011) and Computer Software Engineers and Computer Programmers at <http://www.bls.gov/oco/ocos303.htm> (also visited October 26, 2011).

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.

The introduction to the "Education and Training" subsection of the chapter on computer software engineers and computer programmers in the *Handbook* states the following about computer programmers:

Many 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* information on the educational requirements in the computer systems analyst and computer programmer occupations indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement for these occupational categories. Rather, the occupations accommodate a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty. While the *Handbook* states that employers often seek individuals with at least a bachelor's degree level of education in a specific specialty for particular positions, this merely indicates a preference for a certain degree, not a normal minimum requirement.

The evidence of record on the particular position here does not demonstrate requirements for the theoretical and practical application of such a level of highly specialized computer-related knowledge. The duties for the proffered position appear routine and do not elevate the proffered position above that for which no particular educational requirements are demonstrated. The fact that a person may be employed in a position designated as that of a computer systems analyst (i.e. systems analyst, business analyst, systems analyst/business analyst) or computer programmer and may be involved in using information technology (IT) skills and knowledge to help an enterprise achieve its goals in the course of his or her job is not in itself sufficient to establish the position as one that qualifies as a specialty occupation. Thus, it is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. To

make this determination, the AAO turns to the record for information regarding the duties and the nature of the petitioner's business operations.

The petitioner is an information technology consulting company that wishes to employ the beneficiary for client consulting projects. The petitioner and counsel have provided multiple job titles and several lists of job duties for the proffered position. On the Form I-129, the petitioner requested that the beneficiary be granted H-1B status until January 26, 2012. Initially, the petitioner indicated that the beneficiary was already working for the petitioner on a project for Sam's. However, in response to the RFE, the petitioner asserted that the beneficiary was working on an in-house project for [REDACTED]. At the time the petitioner filed its motion, counsel notified USCIS that the beneficiary would be working on a project at a client site for Wal-Mart.

The documentation provided indicates that the beneficiary's work on the Wal-Mart project is scheduled to terminate either on January 31, 2010 or June 1, 2010. (The petitioner provided conflicting information regarding the end date but did not explain the inconsistency.) The evidence submitted by the petitioner does not demonstrate that the beneficiary will work for the petitioner for the entire duration of the petition. It is noted that the petitioner did not provide an itinerary with the dates and locations of the services to be performed by the beneficiary. Additionally, the petitioner did not submit sufficient documentation from its client(s) regarding the project(s) on which the beneficiary would work. Thus, the AAO cannot determine the beneficiary's actual duties, let alone whether the duties are more complex than those for which no particular educational requirements are indicated.

Furthermore the documentation presented on motion and appeal, regarding the beneficiary's responsibilities, materially changes the scope and nature of the position for which the petition was filed. On motion or appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, the level of authority within the organizational hierarchy, or the associated job responsibilities. 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). A petitioner 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'r 1998). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner and counsel did not clarify or provide more specificity to the original duties of the position, but rather completely altered the duties that the beneficiary would perform.

Moreover, as reflected in this decision's earlier comments about the descriptions of the proposed duties, a review of the job duties of the proffered position do not convey the substantive nature of either the specific matters upon which the beneficiary would focus or the practical and theoretical level of knowledge that the beneficiary would have to apply to those matters. Furthermore, without evidence of contracts, work orders, or statements of work describing the duties the beneficiary would perform and for whom during the requested validity period, the petitioner fails to establish that the duties that the beneficiary would perform are those of a

specialty occupation. Providing job descriptions that leave to speculation the substantive nature of the particular work that the beneficiary would actually perform at a worksite is insufficient.

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.” It must be noted that simply going on record without providing adequate 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).

It is evident that the beneficiary's duties will potentially vary based on the requirements of a client at any given time. This possibility renders it necessary to examine the ultimate end-clients of the petitioner to determine the exact nature and scope of the beneficiary's duties for each client, since it is logical to conclude that the services provided to one client may differ vastly from the services provided to another, particularly if they varied from one industry sector to another. However, the record of proceeding lacks such substantive evidence from end-user entities that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis. The absence of substantive documentation pertaining to the work assignments of the beneficiary during the requested validity period precludes the AAO from examining the nature of the beneficiary's duties and thus finding that the duties will be those of a specialty occupation. Thus, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary.

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

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

In this matter, it is unclear whether the petitioner will be an employer or will act as an employment contractor. The job descriptions provided by the petitioner and counsel, as well as various statements from the petitioner and counsel, indicate that the beneficiary will be working on different projects throughout the duration of the petition. The petitioner's failure to provide sufficient evidence of valid work orders or employment contracts between the petitioner and clients, which identify the beneficiary as personnel and outline the nature of her 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 her duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. The record of proceeding fails to establish that the duties to be performed by the beneficiary would require the practical and theoretical application of a highly specialized knowledge attained by at least a bachelor's degree, or the equivalent, in a specific field, as required by the Act and its implementing regulations regarding a position's qualification as an H-1B specialty occupation.

As the *Handbook* indicates that the proffered position does not belong to an occupational classification for which there is a categorical requirement for at least a bachelor's degree in a specific specialty, and as the duties of the proffered position as described in the record of proceeding do not indicate that the proffered position in this petition is one for which a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong 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.

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. at 1102 (S.D.N.Y. 1989)).

As reflected in the discussion above, 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. Thus, the *Handbook* does not support a favorable finding under this criterion. The AAO also notes that the record does not include submissions from a professional association or from individuals or other firms in the petitioner's industry attesting to routine employment and recruiting practices.

As the evidence in the record of proceeding fails to establish that a requirement of a minimum of a bachelor's degree, in a specific specialty, is common to the petition's industry in parallel positions among similar organizations, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that the proffered position in this petition is "so complex or unique" that it can be performed only by an individual with at least a bachelor's degree in a specific specialty.

In the instant case, the petitioner has not submitted evidence distinguishing the proffered position as more complex or unique than the range of computer systems analysts and computer programmer positions for which the *Handbook* indicates that there is no requirement for a bachelor's or higher degree or its equivalent in a specific specialty. Therefore, elements of complexity or uniqueness in any work that may be assigned to the beneficiary if this petition were approved could not be ascertained at the time the petition was filed. Thus, the petitioner has not satisfied 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."

Next, the AAO will consider the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is satisfied if the petitioner establishes that it normally requires a degree or its equivalent in a specific specialty for the position.

To merit approval of the petition under this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency in its prior recruiting and hiring for the position. Further, it should be noted that the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position.⁶

⁶ To satisfy this criterion, the evidence of record must show 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 (5th Cir. 2000). 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 the instant case, the petitioner has not provided any information or documentation to establish that it, or the clients for whom the beneficiary may work, normally requires at least a bachelor's degree, or its equivalent, in a specific specialty for the position. Thus, the AAO concludes that the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), as the evidence in the record of proceeding does not document a recruiting and hiring history requiring for the proffered position at least a bachelor's degree, or the equivalent, in a specific specialty.

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 in a specific specialty.

In the instant case, the petitioner has not submitted evidence to indicate that the specific duties of the position are so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The evidence of record does not refute the *Handbook's* information to the effect that a bachelor's degree in a specific specialty is not normally required for performance of computer systems analyst positions. The AAO incorporates by reference and reiterates its earlier discussion that the record of proceeding fails to adequately establish the actual work that the beneficiary would perform during the period specified in the petition, let alone the relative specialization and complexity of any specific duties that would be involved. The petitioner has failed to establish that the duties of the proffered position are sufficiently specialized and complex that performance would require knowledge at a level usually associated with at least a bachelor's degree, or the equivalent, in specific specialty.

The AAO, therefore, concludes that the proffered position failed to satisfy the criterion 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 any one of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO, therefore, affirms the director's finding that the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation.

Beyond the decision of the director, the AAO finds that the petition must also be denied because the petitioner failed to provide the itinerary required by the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B). The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the exercise of this function that the AAO identified this additional ground for denying the petition.

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.

The itinerary language at 8 C.F.R. § 214.2(h)(2)(i)(B), with its use of the mandatory "must" and its inclusion in the subsection "Filing of petitions," establishes that the itinerary as there defined is a material and necessary document for an H-1B petition involving employment at multiple locations, and that such a petition may not be approved for any employment period for which there is not submitted at least the employment dates and locations. USCIS may in its discretion deny an application or petition for lack of initial evidence. 8 C.F.R. § 103.2(b)(8)(ii).

Accordingly, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) precludes approval of the petition for the Wal-Mart assignment and all other locations outside the petitioner's office location –the only location specified on the Form I-129 when filed.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

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. Accordingly, the director's decision will be affirmed, and the petition will be denied.

ORDER: The director's decision is affirmed. The petition is denied.