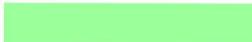


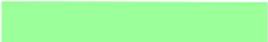


U.S. Citizenship
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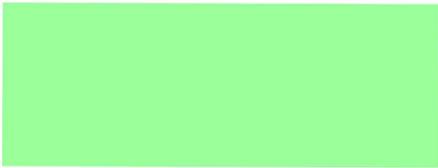


DATE: **JUN 21 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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)

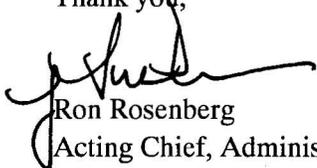
ON BEHALF OF PETITIONER:



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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The director initially approved the nonimmigrant visa petition. Upon subsequent review of the record, the director issued a notice of intent to revoke (NOIR), and ultimately did revoke the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The approval of the petition will remain revoked.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on December 8, 2009. On the Form I-129 visa petition, the petitioner describes itself as a technology services company established in 2004. In order to employ the beneficiary in what it designates as an [REDACTED] design verification engineer position, the petitioner seeks 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 approved the petition on January 5, 2010. However, on April 26, 2011, the director issued a Notice of Intent to Revoke (NOIR) finding that the statement of facts contained in the petition was not true and correct, and the petitioner violated the terms and conditions of the approved petition. On June 29, 2011, the director ultimately did revoke the approval of the petition. Thereafter, counsel for the petitioner submitted an appeal.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's notice of intent to revoke (NOIR); (5) the petitioner's response to the NOIR; (6) the director's notice of revocation; and (7) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

As will be discussed below, the petitioner has not overcome the specified ground for revocation. Accordingly, the appeal will be dismissed, and the approval of the petition will remain revoked.

U.S. Citizenship and Immigration Services (USCIS) may revoke the approval of an H-1B petition, on notice and provide an opportunity to rebut, pursuant to 8 C.F.R. § 214.2(h)(11)(iii), which states the following:

- (A) Grounds for revocation. The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:
- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
 - (2) The statement of facts contained in the petition was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
 - (3) The petitioner violated terms and conditions of the approved petition; or
 - (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or

(5) The approval of the petition violated paragraph (h) of this section or involved gross error.

(B) Notice and decision. The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

As a preliminary matter, the AAO finds that the basis specified for the revocation action in the instant matter is a proper ground for such action. The director's statements in the NOIR regarding the evidence indicating that the beneficiary would not be employed in the capacity specified in the Form I-129 were adequate to notify the petitioner of the intent to revoke the approval of the petition in accordance with the provision at 8 C.F.R. § 214.2(h)(11)(iii).

As will be evident in the discussion below, the AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner has failed to establish that the beneficiary will be employed by the petitioner in the capacity specified in the petition. The documents submitted in response to the NOIR and on appeal fail to effectively rebut and overcome the basis for revocation specified at 8 C.F.R. § 214.2(h)(11)(iii)(A).

The petitioner stated in the Form I-129 and supporting documentation that it seeks the beneficiary's services as an [redacted] verification design engineer on a full-time basis. With the initial petition, the petitioner submitted a letter dated October 2, 2009. The petitioner described itself as "an established technology services company with a mission to become the leader in providing high quality [redacted] design services." The petitioner indicated that they provide "design services ranging from [redacted] to [redacted] to several fables, [redacted] and system companies." The petitioner provided the following job duties for the proffered position:

The Beneficiary's duties in the proffered specialty occupation position include research, design, development and testing electronic circuits, components and chips in telecommunication, networking, storage and graphics industry. Day to day responsibilities for the position include assisting in creation of verification plans, creating the test bench using latest verification platforms and tools based on [redacted] and [redacted] or [redacted] assisting in developing efficient system/chip level test and regression environment and running simulation to achieve code and functional coverage goals.

In the letter of support, the petitioner stated that the beneficiary's "duties are in a 'specialty occupation' because the duties are complex and require, at the minimum, a Bachelor's degree." The petitioner indicated that the beneficiary will work "in-house at the petitioner's office premises, located on [redacted] San Jose, CA [redacted]."

The petitioner also submitted an LCA in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Electronics Engineers, Except Computer" - SOC (ONET/OES Code) 17-2072, at a Level I wage.

Upon review of the documentation, the director found the evidence insufficient to establish eligibility for the benefit sought and issued an RFE on December 17, 2009. In the RFE, the director noted that the petitioner appears to be in the business of consulting, employment staffing or job placement, and requested to clarify the petitioner's employer-employee relationship with the beneficiary. The director outlined the evidence to be submitted.

Counsel responded to the director's RFE by submitting a letter and additional evidence. Counsel provided the same description of the petitioner's business previously provided in the support letter and did not offer further details about the nature of its business. Further, counsel indicated that the beneficiary will be working "in-house as an [redacted] Design Verification Engineer at the Petitioner's Office premises located at [redacted], San Jose, CA [redacted]." Counsel stated that the petitioner is developing a product line called [redacted] and that the beneficiary will work on "design, development, deployment and enhancements of the Petitioner's product, [redacted] over the next 3 (three) years up to October 14, 2012." Counsel provided a revised and highly technical description of the beneficiary's duties including the percentage of time to be spent on each duty as follows:

-Architectural Definitions and Documentation

Percentage of time-10% in refining the architectural definitions and documentation of the intended targets of [redacted]

- Refine the [redacted] class diagram representation of the object oriented testbench. A preliminary [redacted] diagram has already been created that incorporates the [petitioner's] proprietary [redacted] testbench classes in graphical representation.
- Identify the key elements of the testbench and define the components that constitute the key elements of the testbench.
- Design the key blocks of the following targets: Scoreboard, monitor, generator class.
- Define the coverage classes and establish a methodology for measuring the coverage obtained by the generated tests.
- Define the classes and code blocks that would be needed to implement a CDV (Coverage Driven Verification) approach

-Coding of the [the petitioner's] proprietary [redacted] specific [redacted] classes using [redacted] in accordance with [redacted] methodology.

Percentage of time-20%

- The Beneficiary will be involved in actual coding of specific [redacted] transactor classes in accordance with the [redacted] class diagram defined in an

earlier step. Coding to be done in [REDACTED] in accordance with [REDACTED] guidelines.

-Participating in the creation of a [REDACTED] to enable more comprehensive testing
Percentage of time-30%

- Coding of the [REDACTED] in accordance with the specification of the [REDACTED] [REDACTED] device. This would enable very comprehensive testing. [REDACTED] coding to be done to create a product that could be standalone as well as be a part of a larger more comprehensive verification offering. [REDACTED] coding will follow proprietary [REDACTED] guidelines to ensure easy integration into any end user verification methodology.

-Development of an actual IP core
Percentage of time-30%

- IP Core design including the following:
 1. Writing the [REDACTED] code to implement the various blocks in an [REDACTED] [REDACTED] including Transaction layer and Data layer.
 2. Generating files that would enable programming an [REDACTED] device that would implement the core and be capable of interfacing to and be interoperable with devices from other manufacturers.
 3. Coding guidelines defined by [REDACTED] to be followed.
 4. Code will include assertion blocks and hooks for error injection as defined in proprietary [REDACTED] methodologies.

-Generating the tests required to demonstrate compliance with the [REDACTED] standard
Percentage of time-10%

- Generate the tests on a test system that interfaces the IP core with other devices on a [REDACTED] platform.
- Generate reports documenting the compliance procedure.

Further, counsel stated that "the minimum level of education required by the Petitioner and by general current industry standards" is "a Bachelor of Science Degree in Electronics or Electrical Engineering or Computer Science Engineering or equivalent."

However, the AAO notes that counsel's brief was not endorsed by the petitioner and the record of proceeding does not indicate the source of the duties and responsibilities that counsel attributes to the proffered position. Thus, counsel's expanded description of the duties of the proffered position submitted in response to the RFE is not probative evidence as the description was provided by counsel, not the petitioner. 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).

Counsel also submitted a document entitled "[redacted]" (write-up) dated May 14, 2008. The write-up included a description of the project, timeline, current status, manpower resources, work location, market potential, target market, revenue and more. Specifically, the timeline reported the following, in part:

Project Start Date: October 01, 2009

Estimated Project Duration: 36 months

Major Project Milestones:

Phase 1- [redacted] Development

- Project Setup Oct[.] 01[,] 2009
- [redacted] Architecture Review Jan [.] 25, 2010
- [redacted] Test Bench Completed May 14, 2010
- Testcases for [redacted] Nov [.] 1, 2010

The document stated that "projects may be executed either at our design center or at our customers premises based on whichever location is better for the success of the project execution." It also indicated that "for this project, the majority of the assigned engineers will be working at our offices in San Jose, California." The AAO notes that the document lists the beneficiary as one of the 13 employees assigned to the project. Further, the AAO also observes that the write-up stated that the petitioner has "completed the first phase of the project including setting up the team in [the petitioner's company] USA."

Moreover, the record also contains an offer letter dated December 19, 2009 and signed by the beneficiary on December 21, 2009. The petitioner states the position description as follows:

In the regular position of [redacted] Design Verification Engineer, you will report directly to VP of Engineering and your primary responsibilities includes [sic] working under close supervision of project lead to assist Research, design, develop and test electronic circuits, components and chips in telecommunication, networking, storage and graphic industry. Day to day responsibilities for the position includes [sic] **physical design implementation, floor planning, place & route, clock distribution, timing closure, power and single integrity analysis.** [Emphasis added].

The AAO notes that the offer letter is dated December 19, 2009, a date after the instant petition had been filed. Further, the AAO observes that the description of duties such as "floor planning, place & route, clock distribution, timing closure, power and single integrity analysis" differs from the previously provided duties. No explanation for the differences in the job descriptions was provided.

In addition, the record contains a document entitled "[beneficiary]'s Itinerary." The AAO notes that the document is not on the petitioner's letterhead, is not dated, and is not signed by the petitioner. The document provides a description of the beneficiary's work as well as the timeline for the projection on which the beneficiary would be working:

MILESTONE	START DATE	ENDDATE
Phase 1- [redacted] Development	Oct 15, 2009	Dec 24, 2010
Phase 2- [redacted] Development	Dec 27, 2010	May 26, 2011
Phase 3-IP Core Design	May 27, 2011	Jun 14, 2012
Phase 4- [redacted] Compliance Testing	Jun 15, 2012	Oct 14, 2012

On January 5, 2010, the director approved the petition. Subsequently on January 28, 2010, the beneficiary had a visa interview at the United States Consulate General in Chennai, India.

On April 26, 2011, the director issued a Notice of Intent to Revoke (NOIR). In the NOIR, the director stated that the beneficiary indicated during the visa interview that he would work as a contract employee for one of the petitioner's clients instead of working at the petitioner's premises. The director concluded that absent contracts with end-clients, the petitioner failed to demonstrate the exact duties that the beneficiary would execute, or the existence of a specialty occupation position for the beneficiary upon his admission to the United States. The director also noted that the petitioner failed to provide an appropriate and valid Labor Condition Application (LCA), as the LCA showed only one work location.

In response, counsel for the petitioner submitted an affidavit from the beneficiary regarding the consular interview and a summary of debriefing of the interview from the petitioner. Counsel claimed that while the beneficiary "answered affirmatively that he would be working *for a client*," the beneficiary meant that "he would be working to address [the petitioner's] client's technical needs, at the Petitioner's offices in San Jose, California." Counsel further added that the petitioner's core business involves designing chips for various clients; "therefore, the Petitioner's employees are working in-house, at the Petitioner's office premises, on the chip design for various clients." Counsel also asserted that the beneficiary "should have explained to the Visa Officer that he would be working on the chip design for a client, who would later be identified, *in-house*, at the Petitioner's office premises, located in San Jose, California." Counsel emphasized that the

beneficiary would be a part of the [REDACTED] project and re-submitted the previously submitted write-up of the project and the itinerary.¹

The director reviewed the petitioner's response but found it insufficient to refute the findings in the NOIR. The director stated that the petitioner failed to establish that the proffered position is a specialty occupation. The director noted that the documents submitted by the petitioner in response to the NOIR were the same documents previously submitted, and found that the petitioner failed to provide sufficient information about its project and the beneficiary's duties for the proffered position. The director revoked the approval of the petition on June 29, 2011.

Thereafter, counsel submitted an appeal. On appeal, counsel asserts that the director erred in the decision to revoke the approval of the petition.

The AAO reviewed the record of proceeding in its entirety, including the documents submitted with the petition, in response to the NOIR and in support of the appeal. The AAO notes that the record of proceeding contains material discrepancies regarding the beneficiary's duties and in what capacity he will be employed, and the petitioner has not sufficiently resolved the inconsistencies. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* As will be discussed, the petitioner has not met its burden of proof in this regard.

On appeal, counsel claimed that "USCIS' constantly changing requirements have denied the petitioner with an opportunity to explain the facts of the case and therefore constitutes an abuse of discretion." Specifically, counsel pointed to the director's revocation notice stating that "no evidence of specialty occupation work was established because the Petitioner failed to submit current information about the development of the in-house project," and noted the absence of documents such as "critical reviews of the petitioners software in trade journals that describe the purpose of the software, its cost, it's ranking among similarly produced software manufacturers" or "marketing analysis for the petitioner's final software product." Counsel claimed that director's failure to raise certain issues in the NOIR denied the petitioner of an opportunity "to explain the facts of the situation."

To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. U.S. Citizenship and Immigration Services (USCIS) interprets the degree

¹ Counsel indicated that the petitioner changed its name from [REDACTED] to [REDACTED] on May 28, 2010. The record of proceeding contains a Certificate of Amendment of the Amended and Restated Articles of Incorporation, dated June 15, 2010, stating that the name of the corporation is [REDACTED]

requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).²

There are numerous inconsistencies and discrepancies in the petition and supporting documents that undermine the petitioner's assertions with regard to the services the beneficiary will perform, as well as the actual nature and requirements of the proffered position. When a petition includes numerous discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions.

When determining whether a position is a specialty occupation, the AAO must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered the location of employment, the proffered wage, et cetera. 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."

For H-1B approval, the petitioner must demonstrate a legitimate need for an employee exists and to substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. It is incumbent upon the petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or the equivalent, to perform duties at a level that requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.

² Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. See, e.g., *Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; cf. *Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.

In the Form I-129, the petitioner indicated that it is a technology services company. The petitioner indicated that it has 19 employees. The petitioner further designated its business operations under the North American Industry Classification System (NAICS) code 541712. The AAO notes that this NAICS Code is designated for "Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology)." The U.S. Department of Commerce, Census Bureau website describes this NAICS code by stating the following:

This U.S. industry comprises establishments primarily engaged in conducting research and experimental development (except biotechnology research and experimental development) in the physical, engineering, and life sciences, such as agricultural, electronics, environmental, biology, botany, computers, chemistry, food, fisheries, forests, geology, health, mathematics, medicine, oceanography, pharmacy, physics, veterinary and other allied subjects.

See U.S. Dep't of Commerce, U.S Census Bureau, 2007 NAICS Definition, 541712-Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology), on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last viewed March 14, 2013).

However, in the U.S. Corporate Income Tax Returns 2008 and 2009, the petitioner indicates its business activity code as 541990 and business activity as "consulting" and product as "chip design." The AAO notes that this code corresponds to NAICS Code 541990, designated as "All Other Professional, Scientific & Technology services." The U.S. Department of Commerce, Census Bureau website describes the NAICS code 541990 as "establishments primarily engaged in the provision of professional, scientific, or technical services (except legal services; accounting, tax preparation, bookkeeping, and related services; architectural, engineering, and related services; specialized design services; computer systems design and related services; management, scientific, and technical consulting services; scientific research and development services; advertising, public relations and related services; market research and public opinion polling; photographic services; translation and interpretation services; and veterinary services)." See U.S. Dep't of Commerce, U.S Census Bureau, 2007 NAICS Definition, 541990-All Other Professional, Scientific, and Technical Services, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last viewed March 14, 2013).

As previously indicated, the petitioner describes itself as "an established technology services company providing complete [redacted] design services." The AAO finds that the evidence provided does not sufficiently demonstrate the nature of the petitioner's business. While the petitioner claims to be a technology services company providing [redacted] design services, the record does not have documentary evidence of their past projects or work to substantiate its claims regarding its business operations.

Further, while counsel repeatedly claims that the beneficiary will be employed at the petitioner's location, the AAO finds that the petitioner has provided inconsistent information regarding the actual work that the beneficiary will perform to establish eligibility for this benefit. That is, the petitioner failed to substantiate a viable on-going project that has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

In the instant case, the record lacks sufficient information about the work to be performed and the beneficiary's specific role in the project(s). This is exemplified by the petitioner's job description of the duties of the proffered position. For example, in the support letter, the petitioner indicated that the beneficiary's duties include "research, design, development and testing electronic circuits, components and chips in telecommunication, networking, storage and graphics industry." The petitioner stated that on a day-to-day basis, the beneficiary's responsibilities include "assisting in creation of verification plans, creating the test bench using latest verification platforms and tools based on [REDACTED] and [REDACTED] or [REDACTED], assisting in developing efficient system/chip level test and regression environment and running simulation to achieve code and functional coverage goals." The petitioner's description is generalized and generic in that the petitioner fails to convey either the substantive nature of the work that the beneficiary would actually perform, any particular body of highly specialized knowledge that would have to be theoretically and practically applied to perform it, or the educational level of any such knowledge that may be necessary. The responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance. Furthermore, the petitioner did not provide probative evidence substantiating the job duties and responsibilities of the proffered position. The abstract, speculative level of information regarding the proffered position and the duties comprising it is exemplified by the phrases "research, design, development and testing electronic circuits, components, and chips;" "assisting in creation of verification plan;" "assisting in developing efficient system/chip level test;" and "running simulation."

Notably, the statements fail to establish the beneficiary's actual responsibilities, and they do not include any details regarding the specific tasks that the beneficiary will perform. The petitioner repeatedly states that the beneficiary will "assist" in various tasks, but fails to sufficiently define how this translates to specific duties and responsibilities as the phrase "assist" does not delineate the actual work the beneficiary will perform. The petitioner does not explain the beneficiary's specific role ("assist[ing]").

Further, as noted previously, in the offer letter, the petitioner provides a different version of the beneficiary's day-to-day responsibilities, which includes "physical design implementation, floor planning, place & route, clock distribution, timing closure, power and signal integrity analysis."

To the extent that they are described by the petitioner and due to inconsistencies present in the record, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire three-year period requested. The petitioner has failed to provide sufficient details regarding the nature and scope of the beneficiary's employment or substantive evidence regarding the actual work that the beneficiary would perform.

For example, counsel claimed that the beneficiary would be working in-house on "design, development, deployment and enhancements of the Petitioner's product, [REDACTED] over the next 3 (three) years up to October 14, 2012." However, during the consular interview, the beneficiary stated "affirmatively that he would be working for a client." Counsel claimed that "the

Beneficiary meant that he would be working to address [the petitioner's] client's technical needs, at the Petitioner's offices in San Jose, California." Counsel further stated that "the Petitioner's employees are working in-house, at the Petitioner's office premises, on the chip design for *various clients*." Counsel also asserted that the "Beneficiary should have explained that to the Visa Officer that he would be working on the chip design for a client, who would later be identified, in-house, at the Petitioner's office premises, located in San Jose, California."

Counsel submitted a letter from the beneficiary dated May 23, 2011 which stated the following:

I am writing to clarify the conversation that occurred between the Visa Officer, and myself, at the U.S. Consulate in Chennai, India, during my consular H-1B visa interview on Thursday, January 28, 2010.

Prior to, during, and after the interview, it was my understanding that upon approval of my H-1B visa, I would begin work for [the petitioner] at its offices located in San Jose, California. I was to begin work on a project known as [redacted] [Petitioner] [redacted] or [redacted].

[Petitioner]'s employees work *in-house*, at the Petitioner's office premises, on the chip design for *various clients*. Therefore, when the Visa Officer asked me whether I would be working for a client, I responded in the affirmative. While this statement was true, it was also incomplete, and left the consular officer with the mistaken impression that I would be working at a client site. However, I simply meant that I would be working at the [petitioner's] San Jose, California offices on a project that is geared towards addressing [the petitioner]'s clients' technical needs.

I apologize for any misunderstanding that occurred during the interview. I attribute my lack of eloquence at the time to the natural feelings of nervousness that any visa candidate would have during a visa interview. Please let me know if there is any more information that you would require.

Counsel also submitted a copy of an e-mail sent by the petitioner to "associate attorney" which summarizes the interview as follows:

VISA Interview was on: Thurs 1/28/2010 at Chennai Consulate

Officer: So you are working here?

Beneficiary: Yes

He started browsing the passport.

Officer: Where is your H1 visa?

Beneficiary: I am applying for the visa.

Officer: Then why do you say you are working here?

Beneficiary: I am working for [the petitioner] Bangalore and would be transferring to [the petitioner] US

Officer: Then you shouldn't say you are working here

Beneficiary: Ok

Officer: Would you be working for a client or in house?

Beneficiary: For a client

Officer: Which client

Beneficiary: To be decided

Officer: What are your degrees

Beneficiary: Masters in Engineering, Bachelors in Engineering

Officer: Show me the certificates

Browsed the certificates and degrees.

Gets 221G and fills it.

Officer: You don't need to come back. Just provide this information through a drop box and we will decide the approval accordingly.

Takes fingerprints for [REDACTED] & wife.

The AAO notes that the e-mail is dated May 16, 2011, which is more than a year after the interview. Further, the e-mail does not indicate the source of information other than counsel noting that this is the petitioner's summary of debriefing of the beneficiary regarding the events of the consular interview. The AAO notes that there is no independent source to validate the petitioner's summary of the interview.

Based on the evidence presented including uncontroverted statements made by the beneficiary during the consular interview, the AAO is unable to conclude that the beneficiary will be engaged in an in-house three-year project.

In addition, the AAO finds that the petitioner failed to substantiate an on-going project that would be active for the duration of the beneficiary's H-1B status. In the record of proceeding, counsel repeatedly refers to the write-up of the petitioner's [REDACTED] project, claiming that this write-up already addressed the concerns raised by the director. For example, in response to the director's statement in the revocation notice that "no current information about the development of the project was submitted," counsel refers to pg. 16 of the document and claims that it "identifies the then 'Current Status' of the project." Counsel also states that the petitioner's [REDACTED] project "is currently in the **development phase**" [emphasis in the original] and, therefore, there are no critical reviews of [REDACTED] in trade journals. Further, counsel claims that marketing and cost analyses were already provided in the write-up.

However, as previously noted, the write-up is dated May 14, 2008, almost three years prior to the NOIR. The petitioner failed to update this document or provide any evidence of the project's status at the time the NOIR had been issued. In addition, at the time of filing the appeal, more than three years had passed since the May 14, 2008 document had been written about the [REDACTED] project, but the petitioner failed to provide any evidence of the ongoing status to the [REDACTED] project, despite that the project would have been in the third phase of four phases, as outlined in the timeline. The petitioner has not provided any evidence to substantiate an ongoing project at the petitioner's business location that would require the beneficiary to perform duties of a specialty occupation.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. 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). The petitioner failed to establish that the petition was filed on the basis of employment for the beneficiary as an [redacted] design verification engineer that, at the time of the petition's filing, was definite and nonspeculative for the entire period of employment specified in the Form I-129. Further, the record of proceeding contains discrepancies between what the petitioner claims about the level of responsibility inherent in the proffered position set against the contrary level of responsibility conveyed by the wage level indicated by the LCA submitted in support of petition.

In the instant case, the petitioner provided an LCA in support of the instant petition that indicates the occupational classification for the position is "Electronics Engineers, Except Computer" at a Level I (entry level) wage. Wage levels should be determined only after selecting the most relevant Occupational Information Network (O*NET) occupational code classification. Then, 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 Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.⁴ The U.S. Department of Labor (DOL) emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and

³ For additional information on wage levels, see DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

⁴ A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009), available on the Internet at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf.

The AAO must question the level of complexity, independent judgment and understanding required for the proffered position as the LCA is certified for a Level I entry-level position. The characterization of the position and the claimed duties and responsibilities as described in the record of proceeding conflict with the wage-rate element of the LCA selected by the petitioner, which, as reflected in the discussion above, is indicative of a comparatively low, entry-level position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and her work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

This aspect of the LCA undermines the petitioner's assertions regarding the demands, level of responsibilities and requirements of the proffered position. As previously mentioned, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 591-92.

As noted below, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) specifies that certification of an LCA does not constitute a determination that an occupation is a specialty occupation:

Certification by the Department of Labor of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

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 (emphasis added):

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.

The regulation at 20 C.F.R. § 655.705(b) therefore requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. In the instant case, the record establishes that, at the time of filing, the petitioner had not obtained a certified LCA for the proper occupational category and prevailing wage that applied at the time the petition was filed. Therefore, the petitioner has failed to comply with the filing requirements at 8 C.F.R. §§214.2(h)(4)(i)(B) and 214.2(h)(i)(2)(B) by providing a certified LCA that corresponds to the instant petition. For this reason also, the petition may not be approved.

The AAO finds that, fully considered in the context of the entire record of proceedings, the petitioner failed to establish the nature of the proffered position and in what capacity the beneficiary will actually be employed. A review of the enclosed LCA indicates that the information provided does not correspond to the claimed level of work and requirements that the petitioner ascribed to the proffered position. As a result, even if it were determined that the petitioner overcame the director's basis for revoking approval of the petition (which it has not), the petition could not be approved for this independent reason.⁵

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. § 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The approval of the petition remains revoked.

⁵ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1043, *aff'd*, 345 F.3d 683; *see also Soltane v. DOJ*, 381 F.3d 145 (noting that the AAO conducts appellate review on a *de novo* basis).