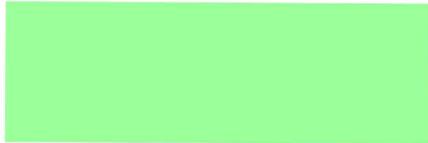
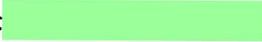


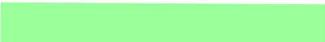


U.S. Citizenship  
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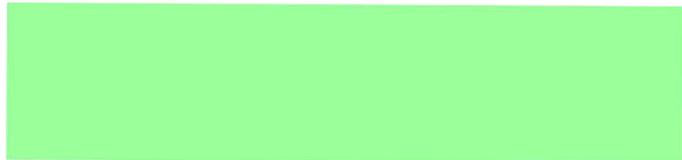


DATE: **AUG 05 2014** OFFICE: VERMONT SERVICE CENTER FILE: 

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The director's decision will be withdrawn in part and affirmed in part. The appeal will be dismissed. The petition will remain denied.

The petitioner is a software consulting and application development company. The petitioner seeks to employ the beneficiary as a programmer analyst and to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the grounds that the evidence of record failed to establish that the petitioner would have a valid employer-employee relationship with the beneficiary for the entire period of requested employment authorization, and failed to establish that the job offered qualifies as a specialty occupation.

The record of proceeding contains: (1) the Form I-129 petition and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision; and (5) Form I-290B, an appeal brief, and supporting materials. We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant as an alien:

subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . , who meets the requirements for the occupation specified in section 214(i)(2) . . . , and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1) . . . .

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

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

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

*Specialty occupation* means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the

attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act 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 result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such, and consonant with section 214(i)(1) of the Act and 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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular 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 directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

We note, as recognized by the court in *Defensor, supra*, that where the work is to be performed for an entity other than the petitioner, evidence of the client company's job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. In that decision the court held that the former 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.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

In this case the H-1B petition (Form I-129), filed on April 9, 2013, stated that the petitioner is seeking to employ the beneficiary as a computer programmer for a three-year period from October 1, 2013 to September 2, 2016. The petition identified two addresses where the beneficiary would work: (1) the petitioner's corporate address at [REDACTED] in [REDACTED] Florida, and (2) [REDACTED] Texas. The petition was accompanied by a letter from the petitioner's HR director [REDACTED] dated March 26, 2013, outlining the beneficiary's job duties, as well as an "Itinerary of Services and Contractual Relationship" on the petitioner's letterhead which stated that the beneficiary, pursuant to a contractual agreement with the staffing company, [REDACTED], would be providing her services to [REDACTED] Texas, for the entire three-year time period from October 2013 to September 2016. The petitioner submitted an Employment Agreement signed by its HR director and the beneficiary, dated March 15, 2013, which did not contain any details as to the duration of the contract and the beneficiary's work location. The petitioner also submitted a copy of its "Independent Contractor Agreement" with [REDACTED] and a letter from the senior IT recruiter of [REDACTED] dated March 1, 2013, verifying that the beneficiary is an employee of the petitioner and that she had been assigned to provide IT services to [REDACTED] client, [REDACTED] Texas, for a period of three years. In addition to the foregoing employment documentation, the petitioner submitted academic records showing that the beneficiary earned a Bachelor of Technology in Computer Science &

Engineering at [REDACTED] India in May 2008 upon completion of a four-year degree program.<sup>1</sup>

On April 18, 2013, the director sent a Request for Evidence (RFE) to the petitioner. The director indicated that the evidence submitted with the petition was insufficient to establish that a valid employer-employee relationship would exist for the duration of the requested validity period for H-1B classification because it did not establish the petitioner's right to control when, where, and how the beneficiary performs the job with the "third party employer," [REDACTED]. To establish the requisite employer-employee relationship for the duration of the requested validity period, the director suggested that the petitioner submit the following types of evidence:

- Copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the beneficiary will perform the work, which provide information such as a detailed description of the duties the beneficiary will perform, the qualifications that are required to perform the job duties, salary or wages paid, hours worked, benefits, a brief description of who will supervise the beneficiary and their duties, and any other related evidence.
- Copy of the formal position description or other documentation that describes the skills required to perform the job offered, the source of the instrumentalities and tools needed to perform the job, the product to be developed or the service to be provided, the location where the beneficiary will work, the duration of the beneficiary's services and the petitioner's discretion in that regard, whether the petitioner has the right to assign additional duties to the beneficiary and hire assistants for utilization by the beneficiary, the method of payment to the beneficiary, the tax treatment of the beneficiary's wages, and company benefits offered to the beneficiary.

The petitioner responded to the RFE on June 13, 2013, with a letter from its president [REDACTED] dated May 24, 2013, and additional documentation. Mr. [REDACTED] reiterated that the beneficiary would be employed by the petitioner and perform her duties at the job site of the end-client, [REDACTED] Texas. Supplementing its previously submitted contractual agreement with [REDACTED] the petitioner submitted a copy of a "Staffing Services Supplier Agreement (Non-Payroll)" between [REDACTED] and [REDACTED] signed by the parties on May 10 and 13, 2013, with an effective date of April 1, 2013, in which [REDACTED] agreed to provide staffing services to [REDACTED]. The petitioner also submitted five "employee weekly status reports" covering the time period from late March to late April 2013, each of which records the beneficiary as working 40-hour weeks at [REDACTED] in [REDACTED] Texas, identifies the project title as "Case Automation Phase 1.5," lists the tasks assigned and completed, as well as the issues and resolution. The weekly status reports are presented on the petitioner's letterhead and co-signed by the beneficiary and the petitioner's IT

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<sup>1</sup> The beneficiary also earned a Master of Science in Computer Science from [REDACTED] in California on May 31, 2011. [REDACTED] is not an accredited institution, and the petitioner is not relying on this degree to establish the beneficiary's qualification for entry into a specialty occupation.

supervisor. The petitioner also submitted copies of the beneficiary's business card from [REDACTED] identifying her as a contractor, and two photographs of the beneficiary which appear to be taken in front of the [REDACTED] Texas.

On June 24, 2013, the director denied the petition. In her decision the director stated that the evidence of record "does not document the work arrangement with [REDACTED] nor establish the petitioner's "right to control when, where, and how the beneficiary will perform the job with [REDACTED]". Thus, the petitioner failed to establish that a valid employer-employee relationship would exist for the duration of the requested three-year validity period. While acknowledging that the job duties described by the petitioner may meet the criteria of a specialty occupation, the director found that the petitioner "failed to validate the work duties to be performed for . . . the end party client," [REDACTED] "Without evidence that a work assignment exists," the director stated, "a determination cannot be made that the duties of the position are in fact duties associated with a specialty occupation . . ." The director noted that "[i]n *Defensor*, the 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." With this court decision in mind, the director concluded that "[s]ince the record lacks validation from the end client, [REDACTED] [the petitioner has] not established that there is a position for consideration as a specialty occupation. . . . USCIS cannot determine that the duties listed in the supporting documentation will be performed and that [they] require at least a baccalaureate degree or the equivalent in a specific specialty as required for H-1B classification."

The petitioner appealed the Director's decision on July 25, 2013, supported by a brief from counsel and some additional evidence. One new evidentiary item is the copy of a work order, submitted on June 19, 2013, confirming that the beneficiary was assigned to an IT project at [REDACTED] for the six-month time period from July 1 to December 31, 2013 (and that the starting date of the project was July 16, 2012, a year earlier). Another new evidentiary item is a letter from a division director of [REDACTED], dated July 10, 2013, stating that [REDACTED] refuses to provide an "end-client letter" in accordance with company policy. The [REDACTED] letter states that the beneficiary "has been assigned to work at [REDACTED] site by her employer, [the petitioner], that this was arranged through her employer, our firm, and [REDACTED] along with its implementation arm, [REDACTED] We . . . have very reasonable anticipation that this project would last for three (3) years, as we believe an extension of the present agreement . . . will be executed in December of 2013." The letter went on to say that [REDACTED] had been working with [REDACTED] for 10 years and had obtained numerous extensions of employment for its consultants, including two for the instant beneficiary. Also submitted with the appeal are photocopies of three earnings statements issued by the petitioner to the beneficiary in December 2012, February 2013, and March 2013, which identify the beneficiary as a resident of Dallas, Texas, and an employee of the petitioner. In his appeal brief counsel asserts that the petitioner furnished the name and contact information of an individual at [REDACTED] who could verify the beneficiary's placement at the bank. In counsel's view, the totality of the evidence provided by the petitioner is sufficient, applying the preponderance of the evidence standard of proof, to establish that the petitioner will have an employer-employee relationship with the beneficiary for the entire three-year period of requested H-1B classification.

Based on the entire record, we are persuaded that the petitioner has an employer-employee relationship with the beneficiary. Accordingly, the director's finding to the contrary will be withdrawn.

However, the evidence of record still fails to establish that the beneficiary is performing, and will continue to perform, specialty occupation work for the client company, [REDACTED] for the three-year period of requested H-1B classification from October 2013 to September 2016. The work order submitted on appeal only confirms that the beneficiary would be working at [REDACTED] for the first few months of the requested validity period, and contains no information about the job duties she would be performing. Thus, the work order does not show that the beneficiary would be performing job duties that involve the application of a body of highly specialized knowledge and require the attainment of a bachelor's degree or higher in a specific specialty, as required for H-1B classification. While counsel suggests that USCIS contact a [REDACTED] official to confirm the beneficiary's work at the bank, it is the petitioner's responsibility to furnish evidence in support of its petition. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The only descriptions in the record of the job duties to be performed by the beneficiary for the client, [REDACTED] have been provided by the petitioner (in its letter accompanying the petition and in its employment agreement with the beneficiary) and by the staffing company, [REDACTED] (in its letters of March 1, 2013, and July 10, 2013). No description of the job duties has been provided by [REDACTED] to corroborate the information from the petitioner and [REDACTED]. As recognized in *Defensor v. Meissner*, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location(s) in order to properly ascertain the minimum educational requirements necessary to perform those duties. *See Defensor v. Meissner*, 201 F.3d at 387-388. Because they come exclusively from the petitioner and its contractor, the letters and the employment agreement cited above do not establish the job duties to be performed by the beneficiary. *See id.* In this case, the description of the job duties to be performed in [REDACTED] Texas, must come from the end-client, [REDACTED]. No such evidence from [REDACTED] has been submitted. Accordingly, we cannot determine from the evidence of record whether or not the beneficiary will be employed in a specialty occupation.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary for its end-client, [REDACTED] precludes a finding that the proffered position satisfies any criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of the work that determines:

(1) the normal minimum educational requirement for the particular position, which is the focus of criterion one;

(2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement under the first alternate prong of criterion two, and the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion two;

(3) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion three; and

(4) the degree of specialization and complexity of the specific duties, which is the focus of criterion four.

Accordingly, the petitioner has not established that the proffered position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Furthermore, the petitioner has not been entirely clear about the location where the beneficiary will perform her job duties. While most of the documentation identifies the work location as [REDACTED] Texas – [REDACTED] corporate address – the petitioner indicated on the Form I-129 petition that the beneficiary would work both at the [REDACTED] Texas, address and at the petitioner's home address in [REDACTED] Florida. This information reinforces the question raised by the lack of any communication from [REDACTED] as to whether the beneficiary will actually be employed at the [REDACTED] work site in [REDACTED] Texas, for the full three-year period of requested H-1B classification.

It is incumbent upon an applicant to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant's evidence also reflects on the reliability of the applicant's remaining evidence. *See id.*

In summation, while the evidence of record documents an employer-employee relationship between the petitioner and the beneficiary, it does not establish that the beneficiary will be employed by the petitioner at a client work site in [REDACTED], Texas, to perform specialty occupation work for [REDACTED] during the entire three-year period of requested H-1B classification. There is no documentation from [REDACTED] confirming that there is specialty occupation work to be performed at its [REDACTED] Texas location for the entire period of intended employment from October 2013 to September 2016, that the beneficiary will be deployed by the petitioner to work on that project for the entire period of requested H-1B classification, and the specific duties the beneficiary will perform. USCIS regulations 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). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corporation*, 17 I&N Dec. 248.

In accordance with the foregoing analysis, we conclude that the petitioner has failed to establish that it will be employing the beneficiary to perform the duties of a specialty occupation for the entire period of intended employment and requested H-1B classification.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not sustained that burden. Accordingly, we will not disturb the director's decision denying the petition.

**ORDER:** The director's finding that the evidence of record fails to establish an employer-employee relationship between the petitioner and the beneficiary is withdrawn.

The director's other finding, that the petitioner failed to establish that the job offered qualifies as a specialty occupation, is affirmed.

Based on the second finding, the appeal is dismissed. The petition remains denied.