



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: AUG 22 2014

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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 (hereinafter "director") denied the nonimmigrant visa petition and dismissed a subsequent motion. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

I. PROCEDURAL AND FACTUAL BACKGROUND

On the Form I-129 visa petition, the petitioner describes itself as an "Advanced Software Development & Consulting" firm. In order to employ the beneficiary in what it designates as a "Technical Consultant" 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 denied the petition, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director's basis for denial was erroneous and contended that the petitioner satisfied all evidentiary requirements.

As will be discussed below, we have determined that the director did not err in her decision to deny the petition on the specialty occupation issue. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

We base our decision upon our review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; (5) counsel's submissions with the motion, (6) the director's dismissal of the motion; and (7) the Form I-290B and counsel's submissions on appeal.

II. THE LAW

The issue before us is whether the petitioner has demonstrated that the proffered position qualifies as a specialty occupation. 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 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. *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 that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. 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.

III. EVIDENCE

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a Technical Consultant position, and that it corresponds to Standard Occupational Classification (SOC) code and title 15-1121, Computer Systems Analysts from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I, entry-level, position.

The place of employment specified on the LCA is [REDACTED] Illinois, which was then the petitioner's address. The record indicates that the petitioner subsequently moved to [REDACTED] Illinois.

With the visa petition, counsel submitted evidence that the beneficiary received a bachelor's degree in electronics and communication engineering and a master's degree in business administration from

[REDACTED] in India. The record contains no evaluation of the beneficiary's foreign education and degrees in terms of their equivalence to degrees earned at a U.S. institution.

Counsel also submitted a letter, dated March 25, 2013, from the petitioner's president, which lists the following as duties of the proffered position:

- Designing, coding and unit/integration testing using
- Proficient methodologies, technology and tools
- Debugging and troubleshooting code related issues/defects
- Producing client deliverables such as detailed design documentation, unit test plans and well documented code
- Gaining an understanding of the unique business and technical requirements on each engagement to facilitate the most appropriate solution design
- Practicing strong configuration management and version control

As to the education requirement of the proffered position, the petitioner's president stated:

[W]e absolutely require, at a minimum, the functional equivalent of a Bachelor's Degree or Equivalent in Computer Science, Computer Applications, Engineering, and Information Technology, Management Information Systems or related area of study with good exposure in software development, programming and designing.

On August 8, 2013, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation. The service center provided a non-exhaustive list of items that might be used to satisfy the specialty occupation requirements.

In response, counsel submitted, *inter alia*, (1) an employment contract, dated March 28, 2013 and signed by the petitioner's HR Manager and the beneficiary; and (2) a letter, dated September 26, 2013, from the petitioner's president.

The employment contract between the petitioner and the beneficiary states, *inter alia*:

[The beneficiary] will use [his] best energies and abilities on a full-time basis to perform the employment duties assigned to [him] at locations designated by the [petitioner], including customer offices.

In his September 26, 2013 letter, as to the location where the beneficiary would work, the petitioner's president stated: "[The beneficiary] will solely perform services for our location." The petitioner's president also reiterated the duty description previously provided. He further stated, "[W]e absolutely require, at minimum, a Bachelor's degree or its working equivalent."

The director denied the petition on November 1, 2013, finding the evidence in the record was "insufficient to establish that the [proffered position] qualifies as a specialty occupation and that [the petitioner has] sufficient work for the requested period of intended employment." In that decision, the director analyzed the evidence based on her finding that the petitioner would assign the beneficiary to work on projects of other companies at those other companies' locations.

With a motion submitted November 21, 2013, counsel provided additional evidence and asserted that the record demonstrated that the visa petition should be approved. Counsel provided contracts and other documents showing agreements between the petitioner and other companies, pursuant to which the petitioner's workers would provide services at those other companies' sites, as evidence that the petitioner has sufficient specialty occupation work throughout the period of requested employment for the beneficiary. Counsel asserted that the evidence is sufficient to show that the petitioner would employ the beneficiary in a specialty occupation position.

In a decision dated December 21, 2013, the director denied the visa petition, finding, again, that the evidence is insufficient to show that the petitioner would employ the beneficiary in a specialty occupation position.

On appeal, counsel provided a description of the petitioner's in-house software, [REDACTED] and a brief. In the brief, counsel asserted that the record, as supplemented on appeal, demonstrates that the petitioner would employ the beneficiary in a specialty occupation position.

IV. ANALYSIS

As a preliminary matter, we observe that the petitioner has never alleged that the proffered position requires a minimum of a bachelor's degree in a specific specialty or its equivalent. That is, in his September 26, 2013 letter, the petitioner's president stated that the petitioner requires a bachelor's degree for the proffered position, but not that the degree must be in any specific specialty. Further, in his March 25, 2013 letter, the petitioner's president asserted that the petitioner requires a minimum of a bachelor's degree or its equivalent in computer science, computer applications, engineering, information technology, management information systems, or a related area of study for the proffered position. This makes even more plain that the proffered position does not require a minimum of a bachelor's degree in a specific specialty or its equivalent.

The requirement of a bachelor's degree in engineering is inadequate to establish that a position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of degrees with generalized titles, such as engineering,¹ without further specification,

¹ The field of engineering is a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering. Therefore, besides a degree in electrical engineering, it is not readily apparent that a

does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). To prove 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. As explained above, USCIS interprets the degree 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. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in engineering 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).

The petitioner's assertion that an otherwise undifferentiated bachelor's degree in engineering would be a sufficient educational qualification for the proffered position demonstrates that the proffered position does not require a minimum of a bachelor's degree in a specific specialty or its equivalent. The director's decision must therefore be affirmed and the petition denied on this basis alone. Nevertheless, we will continue our analysis of the evidence pertinent to the specialty occupation issue.

The petitioner's president asserted that the petitioner would employ the beneficiary solely at its own address. However, the beneficiary's employment contract indicates that the petitioner contemplates that the beneficiary would work at the locations of other companies.

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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record with 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.* At 591-592.

The decision of denial found that the petitioner would employ the beneficiary at the locations of other companies. On motion, counsel provided evidence of work available at the locations of other companies to support the proposition that the petitioner has sufficient specialty occupation work to employ the beneficiary throughout the period of requested employment.

The petitioner has not offered a consistent version of where the beneficiary would work, the project or projects upon which the beneficiary would work, or the company or companies for whom the work would be performed. As was noted above, the court in *Defensor v. Meissner*, 201 F. 3d 384,

general degree in engineering or one of its other sub-specialties, such as chemical engineering or nuclear engineering, is closely related to computer science or that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the particular position proffered in this matter.

recognized that where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical.

In the instant case, the petitioner's president stated, in his March 25, 2013 letter that, in the proffered position, the beneficiary would "analyze customer needs." The petitioner's president thus made clear that the petitioner was then claiming that the beneficiary would work on other companies' projects.

In his September 26, 2013 letter, the petitioner's president stated that the beneficiary would, "solely perform services for our location" and that his duties might change over time dependent upon "whatever in-house project he works on."

On motion, counsel provided evidence of work on other companies' projects as evidence that the petitioner has sufficient work for the beneficiary. Counsel also described the petitioner's [REDACTED] project, a project never previously mentioned, as further evidence that the petitioner has sufficient work for the beneficiary. Counsel stated that the petitioner required "a full-time onsite resource to coordinate and manage the development, maintenance, and enhancement of the platform."

On appeal, counsel provided a description of the petitioner's [REDACTED] project and asserted that the petitioner "requires the services of two professionals in the U.S." for the [REDACTED] project.

As was stated above, 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The petitioner has not demonstrated that, when it filed the visa petition, it intended to assign the beneficiary to work on in-house projects or that, at that time, it had any in-house projects. Notwithstanding the contrary assertion of the petitioner's president, the evidence suggests that the petitioner may intend to assign the beneficiary to work at other companies' locations on those other companies' projects, although it may not yet have identified the project or projects to which it would assign the beneficiary. As the project or projects the beneficiary would actually work on have not been reliably identified, the duties the beneficiary would perform in the context of that project or those projects, and the complexity of those duties, cannot be determined.²

² We observe, however, that the petitioner asserted, on the LCA, that the proffered position is a Level I computer systems analyst position. The U.S. Department of Labor's *Occupational Outlook Handbook* (*Handbook*), which we recognize as an authoritative source on the educational requirements of the wide variety of occupations that it addresses, does not indicate that computer systems analysts, as a category, require a minimum of a bachelor's degree in a specific specialty or its equivalent. Further, a Level I position is an entry-level position for an employee who has only basic understanding of the occupation. See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at <http://www.foreignlaborcert.doleta.gov/pdf/>

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

The petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

V. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.