



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **JUL 25 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as an enterprise engaged in the importation, distribution, and wholesale of natural stone and other construction materials that was established in 2003. In order to employ the beneficiary in what it designates as a MIS administrator 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 the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that it satisfied all evidentiary requirements.

The record of proceeding before us 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 notice of decision; and (5) the Form I-290B and supporting materials. We reviewed the record in its entirety before issuing our decision.

Upon review, we find that the petitioner has not established that the proffered position qualifies as a specialty occupation. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. FACTUAL AND PROCEDURAL HISTORY

In this matter, the petitioner seeks the beneficiary's services to serve in a position it designates as a MIS administrator on a full-time basis at the rate of \$45,885 per year.¹ In its support letter dated March 29, 2013, the petitioner states that the beneficiary "will be required to analyze, develop, and maintain our information database system and e-commerce website."² In addition, the petitioner states that the beneficiary will be responsible for performing the following duties and responsibilities in the proffered position:

1. Design, develop, and administrate [the petitioner's] database management system

¹ It must be noted for the record that in the Form I-129, the petitioner states that it has nine employees. The organizational chart shows that the petitioning company currently has a president, an assistant, an accountant, three sales employees, two transportation employees, and an MIS administrator (the beneficiary). However, the petitioner's Federal Income Tax Return for 2012 indicates that it paid \$60,000 to its officers (line 7) and \$115,464 in salaries and wages (line 8). The petitioner states that it will pay the \$445,885 which is approximately 40% of the total amount paid in salaries and wages to all of its employees in 2012.

² We observe that the petitioner references the proffered position as industrial designer in the letter of support. The record provides no explanation for this discrepancy. Thus, we must question the accuracy of the letter and whether the information provided is correctly attributed to this particular position and beneficiary.

- which involves in quotation, purchase order, inventory control, invoice and shipping management;
2. Manage the day-to-day system requests by maintaining existing portals, validating data import, creating new data import solutions, improving on existing data architecture, and developing the recovery plans for database management systems;
 3. Analyze the management information system performances, review system capabilities and limitations, and make recommendation on hardware/software upgrade if necessary;
 4. Implement and maintain [the petitioner's] networking structure including: LAN set up, Internet connection configurations, and fileserver and mail server management;
 5. Support and maintain [the petitioner's] computer systems, including installation, configuration, hardware, software and network support;
 6. Work closely with [the petitioner's] sales and marketing team members to design and maintain our company's storefront website [REDACTED] utilizing Social Media, SEO, SEM PR, Blog, Craigslist post, and Bulk mail;
 7. Provide consultation, technical support, and troubleshooting to [the petitioner's] computer end users and generate and prepare weekly system reports and documentation to the management; and
 8. Confer with the management to ensure the database management system, computer, and network system conform to end users' requirements and [the petitioner's] computing environment.

Further, the petitioner states that "this position normally requires the attainment of a Bachelor's degree in Computer Science, Information System, or a related field."

With the Form I-129 petition, the petitioner submitted a copy of the beneficiary's Master of Engineering degree and transcript from the [REDACTED]. In addition, the petitioner submitted a copy of the beneficiary's foreign diploma and transcript, as well as a credential evaluation from [REDACTED]. The evaluation indicates that the beneficiary's foreign education is "the equivalent of a Master's Degree in Electronics Engineering from an accredited institution of higher education in the United States."

In support of the petition, the petitioner also provided: (1) documentation regarding its business operations, including a copy of its Articles of Organization, printouts from its website, and its 2012 Income Tax Return; (2) an excerpt entitled "How to Become a Database Administrator" from the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*); (3) a printout from the Foreign Labor Certification (FLC) Data Center, Online Wage Library (OWL) for the occupational category "Database Administrators"; and (4) an offer letter from the petitioner to the beneficiary, dated March 20, 2013.

The director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE. The petitioner was asked to submit probative evidence to establish that a specialty occupation position exists for the beneficiary. The director outlined the evidence to be submitted.

Thereafter, counsel for the petitioner responded by submitting a brief and additional evidence. Specifically, counsel submitted, in part: (1) a document that provides additional information regarding the duties of the proffered position, along with the approximate percentage of time and hours per week that the beneficiary will spend performing each duty;³ (2) an organizational chart; (3) excerpts from the *Handbook* regarding computer support specialists, database administrators, information security analysts, web developers, and computer network architects; (4) job vacancy announcements; (5) a letter from [REDACTED]; (6) a letter from [REDACTED] Sales Manager for [REDACTED]; (7) printouts from www.allbusinessschools.com and www.educationcenteronline.org; (8) a copy of the petitioner's newspaper advertisement for the position of information technology MIS administrator; (9) the resume and Employee Earnings Record of [REDACTED]; (10) an article regarding the petitioner; and (11) the petitioner's rental agreement.

The director reviewed the information provided by counsel to determine whether the petitioner had established eligibility for the benefit sought. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent). The director denied the petition. Counsel submitted an appeal of the denial of the H-1B petition. With the brief, counsel submitted copies of unpublished AAO decisions, a prevailing wage determination, and an additional job vacancy announcement, along with copies of previously submitted documents.

II. LABOR CONDITION APPLICATION

Upon review of the record of proceeding, we find that there are additional issues not identified in the director's decision that preclude approval of this petition. Specifically, beyond the decision of the director, we find that the petitioner (1) failed to submit a Labor Condition Application (LCA) that corresponds to the petition; and (2) failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the applicable statutory and regulatory provisions. Thus, the petition cannot be approved for these reasons as well. They are considered independent and alternative bases for denial of the petition.

More specifically, the petitioner submitted an LCA in support of the instant H-1B petition in which the petitioner designated the proffered position under the occupational classification "Database Administrators" - SOC (ONET/OES Code) 15-1141 at a Level I. The LCA was certified by DOL and signed by the petitioner on March 27, 2013.

³ It must be noted that the expanded job description for the proffered position is not on the petitioner's letterhead and it is not endorsed by the petitioner. The record of proceeding does not indicate the source of the additional duties and responsibilities (and the percentages of time and hours per week allocated to each duty) that are attributed to the proffered position.

In response to the RFE, counsel claims that "the description of the work demonstrates that the beneficiary responsibilities are a combination of the more sophisticated and demanding aspects of the following specialty occupations: Database Administrator (80%) [and] . . . Computer Network Architect/Web Developer."

When the duties of a proffered position involve more than one occupational category, DOL provides guidance for selecting the most relevant O*NET code classification. The "Prevailing Wage Determination Policy Guidance" states the following:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification If the employer's job opportunity has worker requirements described in a combination of O*NET occupations, the [determiner] should default directly to the relevant O*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the [determiner] shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

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/NPWHC_Guidance_Revised_11_2009.pdf.

Thus, if the petitioner and its counsel believed the proffered position was described as a combination of occupations, then according to DOL guidance the petitioner should have chosen the relevant occupational code for the highest paying occupation.⁴ Here, the prevailing wage for

⁴ On appeal, the petitioner provided a copy of a prevailing wage determination that was issued after the director's decision. The request is for an application for permanent employment certification application, rather than for an H-1B petition.

The regulations at 20 C.F.R. § 655.731(a)(2)(ii)(A)(3) state that when an employer obtains a prevailing wage determination from the National Prevailing Wage Center, DOL will accept that wage as correct and will not question its validity, i.e. the employer is granted "safe harbor" in connection with the request. However, obviously, this "safe harbor" cannot be accorded to employers who fail to fully and/or accurately describe the position, including such aspects as the tasks, work activities, knowledge, skills, and specific vocational preparation (education, training, and experience) that are considered by DOL for its determining of the nature of the job and wage level.

In the instant case, there are significant discrepancies between the information provided in the prevailing wage request and the information provided to USCIS regarding the position. For instance, the job description provided in response to the RFE includes numerous additional bullet points and job duties. Furthermore, in the H-1B submission, the petitioner claimed that the position requires a bachelor's degree; however, in the prevailing wage request the petitioner asserted that it requires a master's degree. No explanation for the variances was provided.

"Database Administrators" is lower than the prevailing wage for "Web Developers" and "Computer Network Architects."

As stated on the LCA, the Online Wage Library lists the prevailing wage for "Database Administrators" as \$45,885 per year at the time the petition was filed in this matter, for a Level I position in the area of intended employment. The prevailing wage for "Web Developers" and "Computer Network Architects" – SOC (ONET/OES Code) 15-1179 position is listed as \$46,738 per year for a Level I position.⁵ Thus, according to DOL guidance, if the petitioner believed its position was a combination of the occupations, it should have chosen the relevant occupational code for the highest paying occupation. However, the petitioner selected the occupational category for the lowest paying occupational category for the proffered position on the LCA. Notably, the petitioner indicated on the Form I-129 that it would pay the beneficiary a full-time annual salary of \$45,885. This is an insufficient salary for a position that the petitioner represents pertains to an occupational category with a prevailing wage of \$46,738.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. *See* section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A).

The petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct occupational category and wage level in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act. Therefore, the petitioner has failed to establish that it would pay an adequate salary for the beneficiary's work, as required under the Act, if the petition were granted.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit an LCA that corresponds to the claimed duties and requirements of the proffered position, that is, specifically, that corresponds to the occupational category that the petitioner ascribed to the proffered position and to the wage corresponding to such a level of work, responsibilities and requirements in accordance with the pertinent LCA regulations.

Therefore, for these reasons, even if it were determined that the petitioner overcame the director's basis for denial of the petition (which it has not), the petition could not be approved.

The prevailing wage determination classified the position at a Level II. The prevailing wage for "Database Administrators" at a Level II is \$59,072 and for "Web Developers" and "Computer Network Architects" at a Level II is \$60,674.

⁵ For additional information regarding the prevailing wage for this occupation in [REDACTED], see the All Industries Database for 7/2012 - 6/2013 at the Foreign Labor Certification Data Center, Online Wage Library on the Internet at <http://www.flcdatcenter.com/OesQuickResults.aspx?area=28140&code=15-1179&year=13&source=1> (last visited July 24, 2014).

III. THE DIRECTOR'S BASIS FOR DENIAL OF THE H-1B PETITION

We will now address the director's basis for denial of the petition, namely that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, we agree with the director and find that the evidence fails to establish that the position as described constitutes a specialty occupation.

A. The Statutory and Regulatory Provisions for a Specialty Occupation Position

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. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

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 illogical and absurd 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), the 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.

B. The Proffered Position

The issue before us is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. To make this determination, we turn to the record of proceeding. To ascertain the intent of a petitioner, USCIS must look 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. 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."

Upon review, we note that the record of proceeding contains inconsistent information regarding the minimum requirements for the proffered position. In the March 29, 2013 letter of support, the petitioner stated that the position requires "a Bachelor's degree in Computer Science, Information System, or related field." In response to the director's RFE, the petitioner provided a copy of its newspaper advertisement, which stated that a "Master's degree in CS, MIS or rel." is required. With the appeal, the petitioner provided a prevailing determination request in which it claims that it requires a master's degree in "CS, MIS or related" for its MIS administrator position. No explanation for the variances was provided.

Further, the proposed duties fail to convey the relative complexity, uniqueness and/or specialization of the proffered position or its duties. The abstract level of information provided about the proffered position and its constituent duties is exemplified by the petitioner's assertion that the beneficiary will "[w]ork closely with [the petitioner's] sales and marketing team members to design and maintain our company's storefront website." It must be noted that according to the petitioner's organizational chart, it does not have any marketing team members. Also, the petitioner's statement does not include information regarding the specific tasks that the beneficiary will perform as the term "work closely" could cover a range of functions. Further, the petitioner repeatedly references its database management system and claims that a candidate "must have very strong knowledge and experience with large-scale customer databases MS SQL Database management and MS Exchange Server." The petitioner does not, however, demonstrate how the performance of this duty would require the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent.

The petitioner claims that the beneficiary will "[a]nalyze the management information system performances, review system capabilities and limitations, and make recommendation on hardware/software upgrade if necessary." The petitioner's statements do not convey pertinent details as to the actual work involved in these tasks. The petitioner does not explain the beneficiary's specific role and how his work will be conducted and/or applied within the scope of the petitioner's business operations. Furthermore, the petitioner fails to convey how a baccalaureate level of education (or higher) in a specific specialty, or its equivalent, would be required to perform these tasks. Upon review, the overall responsibilities for the proffered position contain general

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 within the petitioner's particular business operations. We observe, therefore, that it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation.

Further, the petitioner has not provided substantive evidence regarding the work that the beneficiary would perform. The record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. The record fails to establish (1) the actual work that the beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. The petitioner's assertions with regard to the position's educational requirement are conclusory and unpersuasive, as they are not credibly supported by the job descriptions or substantive evidence.

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 satisfies 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.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), 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.

IV. CONCLUSION AND ORDER

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.