



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **JUL 30 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: SELF-REPRESENTED

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,

for Michael T. Kelly
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. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a technology consulting company established in 1997. In order to employ the beneficiary in a position to which it assigned "SAP HR Business Analyst" as the job title, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, concluding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation. On appeal, the petitioner contends that the director's finding was erroneous, and the petitioner submits a brief and additional evidence in support of this contention.

The record of proceeding before us contains: (1) Form I-129 and supporting documentation; (2) the director's RFE; (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B and supporting materials.¹

We reviewed the record in its entirety before issuing our decision.

Upon review of the entire record of proceeding, we find that the evidence of record as supplemented by the submissions on appeal does not overcome the director's grounds for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. FACTUAL AND PROCEDURAL HISTORY

The Labor Condition Application (LCA) that the petitioner submitted in support of the petition was certified for use with a job prospect within the "Management Analysts" occupational classification, SOC (O*NET/OES) Code 13-1111, and a Level I prevailing wage rate. The LCA also reflects that, as mentioned above, the petitioner assigned "[REDACTED] HR Business Analyst" as the position's job title.

In a letter of support dated March 29, 2013, the petitioner describes itself as a leading provider of complimentary tools, web solutions and consulting services to [REDACTED] users in Europe and the United States. It further claims that its [REDACTED] consulting services are designed "to assist customers through the complete solution life cycle, right from the stage of identifying requirements and designing the solution to implementation and post-implementation support." The petition was filed to newly employ the beneficiary at the petitioner's worldwide headquarters in the position of [REDACTED] HR Business Analyst.

This March 29, 2013 letter of support also described the proffered position as follows:

¹ We issued a Notice of Derogatory Information (NDI) to which the petitioner provided a satisfactory response. As the issue that was the subject of the NDI has been resolved, it is not a factor in our decision on appeal.

Our Business Analyst is a carefully selected professional who assumes a multitude of responsibilities and duties which include business analysis and design of [REDACTED] HR systems, evaluation and analysis of HR systems. Upon analysis and review, our candidate will prepare business requirements documentation and functional specifications for programmers. Our candidate will prepare training manuals and other documentation to assist clients with post productions.

Typical duties include:

- Gathered business requirements by conducting detailed interviews with the State's and [REDACTED] functional and development teams and examined existing business process and the flow of data in the [REDACTED] HR System.
- Conducting JAD sessions with various stakeholders like users, business experts and management staff for understanding requirements, vision, and scope and highly critical areas of the application.
- Adopted the **AGILE** software development methodology to acclimatize to the constantly and rapidly changing requirements environment.
- Prepared **Business Requirement Document** and used **Rational RequisitePro** to manage, analyze, and convert business requirements and created UML diagrams such as use case diagrams, activity diagrams, activity diagrams, and sequence diagrams using MS Visio.
- Performed **data analysis** to confirm the accuracy of data/population loaded in the [REDACTED] HR system designated for Load & Stress Testing.
- Worked closely with development and IT team to gather integration and technical test requirements.
- Coordinated with cross-functional teams for quality data and analysis and creating test reports based on the activities.
- Provided **weekly and monthly reports** on HR processes including payroll remuneration statements, vacation accruals, and new hires by departments.
- Performed **stress and load testing** using LoadRunner under UAT environment for approval of system.
- Created and structured **Test plan, test cases and test scripts** Load & Stress testing and testing of wide range of business process scenarios in [REDACTED] HR: **Employee Self Service (ESS), Manager Self Service (MSS), Payroll, Organization Management & Personnel Administration.**
- Coordinated with the IT team to provide & setup 18-20 VMs (Virtual Machines) needed to perform load and stress testing using **LoadRunner** of [REDACTED] HR functionalities like ESS & MSS time approvals, viewing remuneration statements, creating & maintaining [REDACTED] HR infotypes, etc.
- Provided the daily and weekly status reports to the management.
- Tracked and communicated **testing progress against deadlines**, and provided measurable results to management by using MS Project.

- Created an **Operation Checkout** process to keep track of and validate/coordinate all the activities responsible for the successful implementation and testing of the Phase I & II of the entire project.
- Provided professional training to State/Internal functional team on: LoadRunner, Performance Center, and Quality Center.

We recognize that the petitioner's support letter presented a comprehensive list of what the petitioner describes as the "typical duties of the position." However, we do not consider duty and position descriptions independently from the totality of the evidence in the record of proceeding. Rather, as part of our review we must first determine what the evidence of record shows about how many of the listed duties the beneficiary would actually perform. In this particular case, where the beneficiary would be providing services to clients, we look to see the extent to which the record documents the range of the listed services to be performed for each designated client. As will be seen in the decision below, after consideration of the submissions from or about each client, we do not find a sufficient factual basis for determining exactly what the beneficiary would do for each client, let alone a basis for determining that the performance of his duties for any of the clients would require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty.

We also note that the petitioner's letter of support asserted that the minimum educational requirement for this position is "an MBA or related" degree, and claims that the beneficiary meets these requirements by virtue of her foreign bachelor's degree in Information Systems and her MBA from [REDACTED]

The petitioner also submitted the following documents in support of the petition: (1) copies of the beneficiary's academic credentials; (2) a copy of the petitioner's federal income tax return for 2011; (3) a copy of a letter dated August 6, 2012 from [REDACTED] contract with the petitioner for consulting services; (4) a copy of a letter dated August 6, 2012 from [REDACTED] confirming its contract with the petitioner for consulting services; (5) a copy of a Collaboration Agreement for the [REDACTED] Extended Business Program between [REDACTED] and the petitioner; and (6) a copy of the petitioner's corporate brochure.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 16, 2013. The petitioner was asked to submit probative evidence to establish that it had sufficient specialty occupation work that was immediately available upon the beneficiary's entry into the United States through the entire requested H-1B validity period. The director outlined some of the types of specific evidence that could be submitted.

In response, the petitioner submitted, *inter alia*: (1) a copy of an Offer of Employment letter signed by the beneficiary on March 29, 2013; (2) a copy of a Master Consulting Agreement (MCA) between the petitioner and Saladino's; and (3) a copy of a Statement of Work prepared by the petitioner for [REDACTED]. The petitioner included no explanatory letter or statement clarifying the nature of its relationships with [REDACTED], and/or the manner in which the beneficiary's employment would be affected by such agreements.

On July 9, 2013, the director denied the petition, finding that the record contained insufficient evidence to demonstrate that sufficient specialty occupation work existed for the beneficiary for the duration of the requested period. In addition, the director found that, despite the submission of letters from and agreements with [REDACTED], the documentation in the record failed to provide a specific overview of the nature of the beneficiary's duties, such that they could be found to be those of a specialty occupation.

On appeal, the petitioner submits a one-page letter and additional documentation in support of the contention that the proffered position qualifies as a specialty occupation. The petitioner points out that the agreements with [REDACTED] and [REDACTED] are extendable up to three years, and further claims that the implementation process for these projects is currently ongoing. The petitioner concludes that once these projects "go live," the need for the petitioner's support services will be expected for up to three years.

Finally, on appeal the petitioner further claims, for the first time, that the beneficiary has been and will continue to be involved with [REDACTED] which the petitioner's brochure material on appeal describes as "yet another innovative, cost effective [REDACTED] HCM solution by [the Petitioner]." The petitioner's letter on appeal introduces [REDACTED] as follows:

[The petitioner] is partnered with software [REDACTED] with our company being responsible for the development, testing, and maintenance of this project. [The beneficiary] has been an integral part of this project; she has been on the project since inception, and has been leading the development. . . .

The documents submitted on appeal include a brochure about [REDACTED] and a one-page list of duties which appear under the heading "Job Duties for [the Beneficiary] on [REDACTED]"

The issue before us is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, and for the specific reasons described below, we agree with the director and finds that the evidence fails to establish that the position as described constitutes a specialty occupation.

II. THE LAW

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 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.

III. ANALYSIS

A. Preliminary Findings

In ascertaining 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."

Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires 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). We find that the petitioner has not done so.

Upon consideration of the totality of all of the petitioner's duty descriptions, position descriptions, explanations, and assertions, as well as the complete complement of documents submitted in support of the petitioner's specialty occupation claim, we find that the evidence in the record of proceeding does not establish relative complexity, specialization and/or uniqueness as distinguishing aspects of either the proposed duties or the position that they are said to comprise.

While the petitioner and counsel may claim otherwise, the record's descriptions of the proffered position and its duties do not elevate them above positions within the Management Analysts occupational group that are not so specialized, complex, and/or unique as to require either a person with at least bachelor's degree in a specific specialty, or the equivalent, or application of knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

First, the exact nature of the proffered position in this matter is unclear. As stated previously, the petitioner identifies the proffered position as that of a [REDACTED] HR Business Analyst," and classifies the position within the "Management Analysts" occupational classification, SOC (O*NET/OES) Code 13-1111. However, the duties of the proffered position as described by the petitioner appear to encompass duties associated with Information Technology services, rather than analyzing management issues. Moreover, we note that the petitioner refers to the beneficiary's position as that of a "Systems Analyst" on appeal.²

In addition to the question of the correct occupational classification of the proffered position, the record of proceeding presents the proposed duties in terms of relatively abstract and generalized functions. They lack sufficient detail and concrete explanation to establish the substantive nature of the work and associated applications of specialized knowledge that their actual performance would involve within the context of the petitioner's particular business operations. Take for example the following duty descriptions:

Worked closely with development & IT team to gather integration and technical test requirements

and

Coordinated with cross-functional teams for qualify data and analysis and creating test reports based on the activities.

² The occupation of "Systems Analyst" is included in the "Computer Systems Analysts" occupational classification, SOC (O*NET/OES) Code 15-1121, but not in the "Management Analysts" occupational classification that the petitioner's LCA specified as the pertinent occupational classification.

The evidence of record contains neither substantive explanation nor documentation showing the range and volume of such "requirements, nor does it define the nature of the "activities" upon which the test reports would be based. Likewise, the record does not illuminate the substantive work and associated applications of specialized knowledge that would be involved in serving the various teams in the manner referenced above. Finally, these statements are so generalized and vague that it is possible for them to pertain to either the duties of a Management Analyst and/or a Computer Systems Analyst, thereby rendering it impossible for us to determine the exact nature of the proffered position.

In establishing a position as qualifying as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner's business activities, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. The duties of the proffered position, and the position itself, are described in relatively generalized and abstract terms that do not relate substantial details about either the position or its constituent duties. Further, we find that the petitioner has not supplemented the job and duty descriptions with documentary evidence establishing the substantive nature of the work that the beneficiary would perform, whatever practical and theoretical applications of highly specialized knowledge in a specific specialty would be required to perform such substantive work, and whatever correlation may exist between such work and associated performance-required knowledge and attainment of a particular level of education, or educational equivalency, in a specific specialty.

Further, the petitioner did not specify the amount of time that the beneficiary would devote to each task. Thus, the petitioner did not specify which tasks are major functions of the proffered position, nor did it establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at irregular intervals). As a result, the petitioner did not establish the primary and essential functions of the proffered position.

In the instant case, 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. To the extent that they are described, 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 period requested, so as to persuasively support the claim that the position's work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the duties and responsibilities of the proffered position, or its equivalent. The job description fails to communicate (1) the actual work that the beneficiary would perform on a day-to-day basis; (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 has not provided sufficient details regarding the demands, level of responsibilities and requirements necessary for the performance of the duties of the proffered position.

Finally, as noted by the director, the petitioner has not established that it has sufficient specialty occupation work available for the beneficiary for the requested period of validity of the visa. The petitioner has provided numerous various documents indicating that the petitioner regularly

contracts with various clients for the provision of consulting services. Although the petitioner claims that the proffered position is an in-house position, the petitioner has not sufficiently described the proffered position to establish that specialty occupation in-house work exists for the beneficiary for the entire requested period of H-1B classification.

We note the petitioner's claim that the beneficiary's professional services would be required in-house on imminent projects for both [REDACTED]. However, as noted above, the weight of the documentation submitted with regard to these projects is questionable. The letters initially submitted with the petition from [REDACTED] are virtually identical, aside from the signatories and the dates of signature (August 6, 2012 and August 8, 2012, respectively). Both letters include identical lists of required duties, and both letters state that "[t]he expected time frame for the development and implementation of the project is from 6 months to 1 year duration with extensions up to 3 years." The high degree of similarity in the letters suggests one person as the common source of the letters' contents, and this in turn renders questionable the amount of personal knowledge and consideration that at least two of the authors applied before signing the letter. It is also appropriate to here note the speculative dimension of the letters, whose language (quoted just above) we read as indicating no more than "6 months" definite work.

Now, on appeal, the petitioner claims for the first time that it is responsible for the development of the [REDACTED] software, and that the beneficiary's role has been instrumental with regard to this project. However, aside from product overviews intercepted from [REDACTED] website, there is no additional information regarding the role of the petitioner and/or the beneficiary in terms of servicing the needs of this company, nor is there any additional documentation, such as a statement of work, outlining the exact tasks required of the beneficiary for such a project. Furthermore, the promotional material that the petitioner submits into the record on appeal presents [REDACTED] as software that has already been developed and is available on the market. As this is the case, it is not evident that the beneficiary would be performing all of the duties that the list on appeal ascribes to [REDACTED] nor can we glean from the [REDACTED] material either the particular types of substantive work that the beneficiary would perform for any particular timeframe or the scope and educational level of any body of highly specialized knowledge in a particular specialty that the beneficiary would need to theoretically and practically apply to perform such work.

We also find, therefore, that the documentation that has been submitted into the record of proceeding, including the [REDACTED] documents submitted on appeal, does not establish the extent, if any, that the beneficiary would actually perform the services that the petitioner attributes to the proffered position. None of the documentary evidence presents the individual client's requirements with sufficient specificity to show that the petitioner's performance obligations would require the petitioner to fill and utilize the particular Management Analyst position that is the subject of this petition.

We further find that the documents relating to [REDACTED] indicate that any particular services to be provided under the agreements would be specified in related Statements of Work (SOWs). However, the documents submitted into the record are not accompanied by SOWs or any exhibits or other type of addendum that may have been part of the formal agreements executed by the petitioner and its clients to delineate specific work to be performed.

The documents contained in the record, including the various letters and the MCA between the petitioner and [REDACTED] do not evidence contractual commitments to any particular services for any specific period. For example, the MCA with [REDACTED] signed on June 19, 2012, encompasses the possibility of a wide variety of possible services that might come within its Exhibits or related SOWs (as specified in Paragraph 1(a) of the agreement), but yet would not include the services that the petitioner states that the proffered position would provide. Additionally, we do not see any SOWs in the record that specify performance of the duties that the petitioner claims that the beneficiary would perform if the petition were approved.

Thus, we conclude that the record of proceeding provides an inadequate factual basis for us to even determine that, at the time of the petition's filing, the petitioner had secured for the beneficiary definite, non-speculative work conforming to the petition's description of the proffered position.

The petitioner has not demonstrated that it would have non-speculative employment for the beneficiary for the period requested on the H-1B petition, specifically May 1, 2013 until May 1, 2016.³ Specifically, although the petitioner claims that the beneficiary will be employed at its corporate headquarters for the duration of the requested period, there are also indications that other agreements and entities may be involved in the contractual scenario and the ultimate determination of the beneficiary's duties. Specifically, while the petitioner repeatedly claims that the beneficiary's employment is non-speculative by virtue of the extendable agreements with [REDACTED] we note that the MCA with [REDACTED] states, in Paragraph 1(d), that an affiliate of [REDACTED] may purchase, or an affiliate of the petitioner may perform, "[s]ervices hereunder by entering into a

³ The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

statement of work." Again, absent statements of work sufficiently outlining the nature and duration of the beneficiary's assignment(s) for the requested period, it cannot be determined that the instant petition was filed based on non-speculative work.

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). 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 Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). As noted above, the petitioner had not sufficiently described the available in-house projects that would occupy the beneficiary for the duration of the requested validity period of the visa. Without a sufficient description of the work to be performed, and in consideration of all of the evidence of record, we are unable to conclude that specialty occupation work is available for the beneficiary. Rather, the evidence of record indicates that it is more likely than not that the beneficiary would be assigned to an end-client with duties and requirements that have not been established.

B. Review of Criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)

Crucially, the petitioner has not established the nature of the proffered position and in what capacity the beneficiary will actually be employed. 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.

Nevertheless, assuming, *arguendo*, that the duties of the proffered position as described by the petitioner would in fact be the duties performed by the beneficiary, we will nevertheless discuss them and the evidence in the record of proceeding. We will first discuss the proffered position in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

We recognize the U.S Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁴ As we have discussed, the petitioner identified the proffered position under the occupational category "Management Analysts" - SOC (ONET/OES Code) 13-1111. We reviewed the *Handbook* regarding this occupational category, which states as follows:

⁴ All of our references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

Management analysts, often called management consultants, propose ways to improve an organization's efficiency. They advise managers on how to make organizations more profitable through reduced costs and increased revenues.

Duties

Management analysts typically do the following:

- Gather and organize information about the problem to be solved or the procedure to be improved
- Interview personnel and conduct on-site observations to determine the methods, equipment, and personnel that will be needed
- Analyze financial and other data, including revenue, expenditure, and employment reports
- Develop solutions or alternative practices
- Recommend new systems, procedures, or organizational changes
- Make recommendations to management through presentations or written reports
- Confer with managers to ensure that the changes are working

Although some management analysts work for the organization that they are analyzing, most work as consultants on a contractual basis.

Whether they are self-employed or part of a large consulting company, the work of a management analyst may vary from project to project. Some projects require a team of consultants, each specializing in one area. In other projects, consultants work independently with the client organization's managers.

Management analysts often specialize in certain areas, such as inventory management or reorganizing corporate structures to eliminate duplicate and nonessential jobs. Some consultants specialize in a specific industry, such as healthcare or telecommunications. In government, management analysts usually specialize by type of agency.

Organizations hire consultants to develop strategies for entering and remaining competitive in the electronic marketplace.

Management analysts who work on contract may write proposals and bid for jobs. Typically, an organization that needs the help of a management analyst solicits proposals from a number of consultants and consulting companies that specialize in the needed work. Those who want the work must then submit a proposal by the deadline that explains how they will do the work, who will do the work, why they are the best consultants to do the work, what the schedule will be, and how much it will cost. The organization that needs the consultants then selects the proposal that best meets its needs and budget.

See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Management Analysts," <http://www.bls.gov/ooh/business-and-financial/management-analysts.htm#tab-2> (last visited June 24, 2014).

As noted briefly above, the exact nature of the proposed duties in this matter are uncertain, thereby rendering it impossible for us to determine that the proffered position falls into the occupational classification of Management Analysts as the petitioner contends. Regardless, we note that even if the proffered position were established as being that of a Management Analyst, the *Handbook* does not indicate that, simply by virtue of its occupational classification, such a position qualifies as a specialty occupation in that the *Handbook* does not state a normal minimum requirement of a U.S. bachelor's or higher degree in a specific specialty or its equivalent for entry into the occupation of programmer analyst. Specifically, the *Handbook* states:

A bachelor's degree is the typical entry-level requirement for management analysts. However, some employers prefer to hire candidates who have a master's degree in business administration (MBA).

Few colleges and universities offer formal programs in management consulting. However, many fields of study provide a suitable education because of the range of areas that management analysts address. Common fields of study include business, management, economics, political science and government, accounting, finance, marketing, psychology, computer and information science, and English.

See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Management Analysts," <http://www.bls.gov/ooh/business-and-financial/management-analysts.htm#tab-4> (last visited June 24, 2014).

According to the *Handbook*, "many fields of study provide a suitable education" for entry into this occupation. As such, absent evidence that the position of management analyst satisfies one of the alternative criteria available under 8 C.F.R. § 214.2(h)(4)(iii)(A), the instant petition may not be approved for this reason.⁵

The petitioner has not established that the proffered position falls within an occupational category for which the *Handbook* (or other independent, authoritative source) indicates that at least a

⁵ It is also noted that, despite the petitioner's references to the proffered position in the alternative as that of a "Systems Analyst," that occupational classification also would not qualify as a specialty occupation under this criterion. Specifically, the *Handbook* states: "[a] bachelor's degree in a computer or information science field is common, although not always a requirement. Some firms hire analysts with business or liberal arts degrees who have skills in information technology or computer programming." See "Computer Systems Analysts," on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4>. Since there is no requirement for a degree in a specific specialty for entry into this occupational classification, the petitioner's references to the proffered position as a Systems Analyst would likewise not establish eligibility under this criterion.

bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Furthermore, the duties and requirements of the proffered position as described in the record of proceeding do not indicate that the position is one for which a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Thus, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, we will review the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As previously discussed, the petitioner has not established that its proffered position is one for which the *Handbook* (or other authoritative source) reports a standard industry-wide requirement for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter. Also, there are no submissions from professional associations within the petitioner's industry indicating that it has made a degree a minimum entry requirement. Furthermore, the petitioner did not submit any letters or affidavits from similar firms or individuals in the petitioner's industry attesting that such firms "routinely employ and recruit only degreed individuals."

Thus, based upon a complete review of the record of proceeding, we find that the petitioner has not established that a requirement for at least a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry for positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. The petitioner has therefore not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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

The petitioner submitted virtually no documentary evidence in support of its assertion that the proffered position qualifies as a specialty occupation. For example, there is limited evidence pertaining to the nature of the petitioner's business operations and, as previously stated, the exact role of the beneficiary and her level of responsibility has not been adequately described. We have reviewed the record of proceeding in its entirety and find that the petitioner failed to sufficiently develop relative complexity or uniqueness as an aspect of the proffered position.

A review of the record of proceeding indicates that the petitioner has failed to credibly demonstrate the duties the beneficiary will be responsible for or perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent. Additionally, we find that the petitioner has not provided sufficient documentation to support a claim that its particular position is so complex or unique that it can only be performed by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent.

Thus, based upon the record of proceeding, it does not appear that the proffered position is so complex or unique that it can only be performed by an individual who has completed a baccalaureate program in a specific discipline that directly relates to the proffered position. Specifically, the petitioner has not demonstrated how the duties of the position as described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties it may believe are so complex and unique. While a few related courses may be beneficial, or even required, in performing certain duties of the position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the proffered position.

The petitioner has indicated that the beneficiary's educational background and prior work experience will assist her in carrying out the duties of the proffered position. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself qualifies as a specialty occupation. In the instant case, the petitioner does not establish which of the duties, if any, of the proffered position would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment.

The evidence of record does not demonstrate that the proffered position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent. Consequently, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. To this end, we usually review the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position. In addition, we review any other documentation provided by the petitioner to satisfy this criterion of the regulations.

To merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. Upon review of the record of proceeding, the petitioner has not established a prior history of recruiting and hiring for the

proffered position only persons with at least a bachelor's degree in a specific specialty, or its equivalent.

While a petitioner may assert that a proffered position requires a specific degree, that statement alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the petitioner artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty, or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. In other words, if a petitioner's stated degree requirement is only designed to artificially meet the standards for an H-1B visa and/or to underemploy an individual in a position for which he or she is overqualified and if the proffered position does not in fact require such a specialty degree or its equivalent, to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

To satisfy this criterion, the evidence of record must show that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The petitioner makes no claim to have previously hired only specialty-degreed individuals for the proffered position and has not provided sufficient evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent. Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. In other words, the proposed duties have not been described with sufficient specificity to show that they are

more specialized and complex than management analyst positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent.

Moreover, the petitioner has designated the proffered position as a Level I position on the submitted LCA, indicating that it is an entry-level position for an employee who has only basic understanding of the occupation.⁶ That is, the Level I wage designation is indicative of a lower level position relative to others within the occupational category and hence one not likely distinguishable by such relatively specialized and complex duties as are required to satisfy this criterion. Such a higher-level position would likely require a higher wage-rate level and prevailing wage than a Level I. Without further evidence, petitioner has not demonstrated that its proffered position is one with specialized and complex duties. For instance, such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage.

The petitioner has submitted inadequate probative evidence to satisfy this criterion of the regulations. Thus, the petitioner has not established that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. We conclude, therefore, that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that 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.

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; *see e.g., 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.

⁶ 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.