



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUN 26 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,

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.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on April 8, 2013. On the Form I-129 visa petition, the petitioner describes itself as an information technology business with approximately 22 employees, established in 2000. In order to employ the beneficiary as a Programmer Analyst, 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: (1) the petitioner failed to establish that it will have sufficient work for the requested period of intended employment; and (2) the petitioner failed to establish that the proffered position qualifies as a specialty occupation. The petitioner submitted a timely appeal of the decision. On appeal, the petitioner contends that the director's basis for denial of the petition was erroneous and that the petitioner satisfied all evidentiary requirements.

The record of proceeding before us contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's notice denying the petition; and (5) the petitioner's Form I-290B, a brief, and supporting documentation. We have reviewed the record in its entirety before issuing this decision.

In the petition signed on March 27, 2013, and supporting documentation, the petitioner indicates that it wishes to employ the beneficiary as a Programmer Analyst on a full-time basis at a salary of \$85,000 per year. The petitioner indicates that the beneficiary will be employed at [REDACTED]. In the support letter dated March 27, 2013, the petitioner states that the beneficiary would be employed to perform the following duties:

- Use thorough understanding of object oriented concepts in order to review and write efficient, manageable code.
- Exercise ability to review and write complex design documents in order to carry them through the full lifecycle of development into working applications.
- Build and maintain systems and applications Integration of Software applications and provide install guides for production.
- Responsible for maintenance and trouble shooting of Java applications and servers as established as requirements.
- Software and platforms used include XML (XML Data Document Object, Retrieving XML directly from SQL Server)
- Languages
 - Java, J2ee, Websphere
- Engagement
 - Monitoring Processes Services and Events, Understanding User Groups and accounts
 - Web Application Development, Remote Desktop, Data Sharing, Auditing and Security
 - BI/DWH/Hadoop Ecosystem

- Lead complex projects with small and large teams covering various aspects of software development, process and methodology.

The petitioner lists the minimum requirements for the position of Programmer Analyst in its support letter as a "Bachelor's Degree in Computer Science, strong programming experience with Object-Oriented design and development of computer software in Microsoft .NET, SQL Server and enterprise applications as described above."

The petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The job title listed on the LCA is "Programmer Analyst" and the LCA designation for the proffered position corresponds to the occupational classification of "Computer Programmers" – SOC (ONET/OES Code) 15-1131.00, at a Level II wage.

With the initial petition, the petitioner submitted a copy of the beneficiary's Bachelor of Engineering degree in Mechanical Engineering from [REDACTED] in India awarded in April 1998.

On September 25, 2013, in response to the director's RFE, the petitioner provided additional supporting evidence, including the following documentation:

- A letter with a more detailed job description and explanation of the requirements of the proffered position, the beneficiary's qualifications and the availability of the specialty occupation.
- A sampling of contracts for development services, work orders and letters between the petitioner and various client companies.
- The petitioner's 2013 Form 941, Quarterly Federal Tax Return, and 2013 CA DE9C forms, Quarterly Contribution Return and Report of Wages.
- A copy of the IRS Form 5500-SF and Plan Sponsor Services Agreement evidencing the petitioner's 401(k) plan.
- Copies of promotional material for the petitioner.
- Printouts of postings and recruitment for Programmer Analysts.
- Evaluation of the beneficiary's educational credentials from [REDACTED] of [REDACTED] concluding that the beneficiary's Bachelor of Engineering degree from [REDACTED] is equivalent to a Bachelor of Mechanical Engineering degree from an accredited institution of higher education in the U.S.¹

In its response to the RFE, the petitioner provided a more detailed statement of the beneficiary's duties, as follows:

- Writing code for intranet web application using ASP.NET 2.0/3.5, HTML, and Hadoop Ecosystem.
- Writing code for desktop application using WPF, LINQ, and ADO.NET Entity

¹ Mr. [REDACTED] further concludes that the beneficiary's Bachelor of Engineering degree combined with the beneficiary's more than 15 years of professional experience and training in the field of Computer Information Systems are comparable to university-level training in Computer Information Systems.

Framework.

- Envisioning, gathering requirements, and estimating workload for said apps.
- Software and platforms used include XML
 - XML Data Document Object, Retrieving XML directly from SQL Server
 - .NET framework, SQL Server, Java/J2ee technologies
 - Creating Editing and Validating XML Documents using Big Data (Hadoop). HTML, AJAX, CSS and Query.
- Languages
 - C, Visual C#, java, .net, Hadoop
- Engagement
 - Monitoring Processes Services and Events, Understanding User Groups and accounts
 - Web Application Development, Remote Desktop, Data Sharing, Auditing and Security
 - BI/DWH/Hadoop Ecosystem
- This job entails leadership abilities as candidates will lead complex projects with small and large teams covering various aspects of software development, process and methodology.

The director reviewed the documentation and found it insufficient to establish eligibility for the benefit sought. The director denied the petition on November 6, 2013. The petitioner submitted a timely appeal of the denial of the H-1B petition.

For the reasons that will be discussed below, we agree with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed.

Offer of Employment

The director found that the petitioner failed to provide sufficient evidence to substantiate the validity of the petition from October 1, 2013 to September 14, 2016. We find that the petitioner failed to establish that the petition was filed for non-speculative work for the beneficiary that existed as of the time of the petition's filing for the entire period requested.

As noted above, on the Form I-129 and the LCA, the petitioner indicated that the beneficiary would be employed at [REDACTED]. The petitioner identifies this as the address of its client, [REDACTED]. No other work location is listed.

With the petition, the petitioner submitted a letter from its client, [REDACTED]. The letter is dated October 20, 2012 and is signed by [REDACTED] Technology Manager. This letter states that the petitioner has been tasked to deliver projects through at least December 2014. In support of this letter, the petitioner also submitted an Annotated Statement of Work (SOW) between the petitioner and [REDACTED] and dated October 1, 2012. The SOW describes the project, lists objectives and deliverables, provides a schedule and resources, and lists the location of services. The term of the SOW is listed as June 1, 2012 through December 30, 2014. However, the delivery schedule begins on October 1, 2012, with the last delivery date listed as September 29, 2013.

On appeal, the petitioner submits two additional letters from [REDACTED]. The first letter is dated August 1, 2013 and is signed by [REDACTED] Technology Manager. This letter states that the petitioner has been tasked to deliver projects through at least December 2015. The second letter is dated October 17, 2013 and is also signed by [REDACTED] Technology Manager. This letter states that the petitioner has been tasked to deliver projects through at least December 2016.

The petitioner submitted nine additional SOWs between itself and Wells Fargo. The SOWs are dated between October 1, 2012 and October 1, 2013. The start dates and delivery dates listed in the SOWs are between October 2012 and January 2014. None of the SOWs includes a term beyond December 30, 2013.

All of the letters from [REDACTED] state that, "[REDACTED] will not be issuing SOWs for individual technical resources. SOW's will be issued on a per project basis." However, the record does not contain any SOWs for projects with any deliverables due after January 2014. 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'l Comm'r 1972)).

The documentation provided does not cover the period of employment requested in the Form I-129. Rather it indicates that a project may last for an undetermined amount of time (possibly sometime in 2016). We find that this evidence fails to establish that the petition was filed for non-speculative work for the beneficiary that existed *as of the time of the petition's filing*.² There is insufficient documentary evidence in the record corroborating the availability of work for the beneficiary for the requested period of employment and, consequently, what the beneficiary would do and where the beneficiary would work, as well as how this would impact the

² 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).

circumstances of his relationship with the petitioner. 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). Moreover, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act.

The petitioner has not established that, at the time the petition was submitted, it had located H-1B caliber work for the beneficiary that would entail performing the duties as described in the petition, and that was reserved for the beneficiary for the duration of the period requested. We therefore cannot conclude that the petitioner has satisfied its burden and established eligibility at the time of filing the nonimmigrant visa petition pursuant to 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). As such, eligibility for the benefit sought must be assessed and weighed based on the facts as they existed at the time the instant petition was filed and not based on what were merely speculative facts not then in existence.

Thus, we conclude that the record of proceeding provides an inadequate factual basis for us to determine that, at the time of the petition's filing, the petitioner had secured definite, non-speculative work conforming to the petition's description of the proffered position, for the beneficiary, for the period requested on the H-1B petition, specifically October 1, 2013 until September 14, 2016.

Specialty Occupation

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. 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). 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.

The petitioner asserted that the beneficiary would be employed as a programmer analyst. However, 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.

Moreover, when determining whether a position is a specialty occupation, USCIS must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

When determining whether a proffered position qualifies as a specialty occupation, USCIS must determine, *inter alia*, whether the petitioner has (1) provided sufficient evidence to establish that the beneficiary will perform the duties of the proffered position as stated in the petition; and (2) established that, at the time of filing, it had secured non-speculative work for the beneficiary that is in accordance with the petitioner's claims about the nature of the work that the beneficiary would perform in the proffered position.

Here, as previously discussed, the petitioner has not established that the petition was filed for non-speculative work for the beneficiary that existed as of the time the H-1B petition was filed. The petitioner did not submit sufficient, probative evidence corroborating that, when the petition was filed, the beneficiary would be assigned to perform services pursuant to any specific contract(s), work order(s), and/or statement(s) of work (or other probative evidence) for the requested validity period and/or that the petitioner had a need for the beneficiary's services during the requested validity dates. There is insufficient documentary evidence in the record corroborating what the beneficiary would do, where the beneficiary would work, and the availability of work for the beneficiary for the requested period of employment. 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. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190). 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).

Thus, based upon a complete review of the record of proceeding, we find that the petitioner has failed to establish (1) the substantive nature and scope of the beneficiary's employment; (2) the actual work that the beneficiary would perform; (3) the complexity, uniqueness and/or specialization of the tasks; and/or (4) the correlation between that work and a need for a particular educational level of highly specialized knowledge in a specific specialty (or its equivalent). Consequently, this precludes a determination that the petitioner's proffered position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions.

That is, 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 entry into 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. Thus, the petitioner has failed to establish that the proffered position is a specialty occupation under the applicable provisions.

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 more likely than not constitutes a specialty occupation. The petitioner has not established 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. Accordingly, the appeal must be dismissed.

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.