



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **SEP 11 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.

## I. FACTUAL AND PROCEDURAL BACKGROUND

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on April 3, 2013. In the Form I-129 visa petition, the petitioner describes itself as a business established in 2000. In order to employ the beneficiary in what it designates as a quality assurance analyst 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 found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE. Thereafter, counsel responded to the director's RFE. The director reviewed the information and determined that the petitioner failed to establish eligibility for the benefit sought. The director denied the petition on November 15, 2013, 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 asserted that the director's bases for denial of the petition were erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel's response to the RFE; (4) the notice of decision; (5) the Form I-290B and supporting materials; (6) our Notice of Derogatory Information/RFE; (7) and counsel's response to our Notice of Derogatory Information/RFE. We reviewed the record in its entirety before issuing our decision.

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 appeal will be dismissed. Furthermore, we will also address several additional, independent grounds, not identified by the director's decision, that preclude approval of this petition. Thus, the petition cannot be approved for these reasons as well.<sup>1</sup>

## II. THE PETITINER HAS NOT ESTABLISHED ELIGIBILITY FOR THE BENEFIT SOUGHT

### A. Prevailing Wage

The Labor Condition Application (LCA) filed with the Form I-129 indicates that the prevailing wage for the occupational category of Computer Systems Analysts – SOC (ONET/OES) code 15-1121, for a

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<sup>1</sup> We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Level I position in [REDACTED] CA, is \$43,909 per year. The prevailing wage source is listed as "OFLC Online Data Center."<sup>2</sup>

The LCA was submitted to the U.S. Department of Labor (DOL) on March 22, 2013 and certified on March 28, 2013.<sup>3</sup> However, a search of the Foreign Labor Certification Data Center indicates that the prevailing wage for the occupational category of "Computer Systems Analysts" for [REDACTED] County [REDACTED] CA) for the time period was \$62,733 per year at the time the petition was filed in this matter.<sup>4</sup>

Notably, on the Form I-129 petition and the LCA, the petitioner stated that it would pay the beneficiary a salary of \$50,000 per year. Thus, the petitioner's offered wage to the beneficiary is *below* the prevailing wage level for the occupational category in the area of intended employment by \$12,733.

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).

As noted below, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) specifies that certification of an LCA does not constitute a determination that an occupation is a specialty occupation:

Certification by the Department of Labor of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

While DOL is the agency that certifies LCA applications before they are submitted to U.S. Citizenship and Immigration Services (USCIS), DOL regulations note that the Department of

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<sup>2</sup> The Foreign Labor Certification Data Center is the location of the Office of Foreign Labor Certification (OFLC) Online Wage Library for prevailing wage determinations. *See* <http://www.flcdatacenter.com/> (last visited September 10, 2014).

<sup>3</sup> The Labor Certification Registry website is accessible on the Internet at <https://icert.doleta.gov> (last visited September 10, 2014).

<sup>4</sup> For additional information on the prevailing wage for "Computer Systems Analysts" in Alameda County, *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.flcdatacenter.com/OesQuickResults.aspx?code=15-1121&area=\[REDACTED\]&year=13&source=1](http://www.flcdatacenter.com/OesQuickResults.aspx?code=15-1121&area=[REDACTED]&year=13&source=1) (last visited September 10, 2014).



Homeland Security (DHS) (i.e., its immigration benefits branch, U.S. Citizenship and Immigration Services (USCIS)) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation . . . and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

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.

In response to the RFE, counsel states "[w]e would have been more than accommodating to explain and correct this (by submitting a different LCA, if possible) if this issue had been mentioned in [the beneficiary]'s RFE or denial, however[,] it was not." Counsel further stated "[a]s we cannot file an LCA with the initial intended date of employment year 2013, we made the intended dates 07/17/2014 - 04/30/2016." Counsel submitted a new LCA certified on July 23, 2014.

We note that there is no requirement for USCIS to issue an RFE or to issue an RFE pertinent to a ground later identified in the decision denying the visa petition. Title 8 C.F.R. § 103.2(b)(8) clearly permits the director to deny a petition for failure to establish eligibility without having to request evidence regarding the ground or grounds of ineligibility identified by the director. Further, as previously noted, we conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145. Second, even if the director had erred as a procedural matter in not issuing an RFE or Notice of Intent to Deny, it is not clear what remedy would have been available. A petitioner must establish eligibility at the time of filing a nonimmigrant visa petition. The appeal process is not intended to be a venue for a petitioner to make a material change to a petition. If the petitioner makes a material change to the terms of the beneficiary's employment, it must file a new petition with the appropriate fee(s) in accordance with the applicable statutory and regulatory provisions. We reiterate that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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).

In the instant case, at the time of filing the petition, the petitioner failed to establish that it will pay the beneficiary an adequate wage for his work if the petition were approved. As a result, even if it were determined that the petitioner overcame the other independent reasons for the denial of the petition (which it has not), the petition still could not be approved.

#### B. Dates of Intended Employment

In general, H-1B visas are numerically capped by statute. Pursuant to section 214(g)(1)(A) of the Act, the total number of H-1B visas issued per fiscal year may not exceed 65,000. Fiscal Year (FY) 2013



covers employment dates from October 1, 2012 through September 30, 2013, and FY 2014 covers employment dates from October 1, 2013 through September 30, 2014.

A non-cap exempt H-1B petition, requesting a start date during FY 2013, cannot be approved if it was filed after June 11, 2012. *See* 8 C.F.R. § 214.2(h)(8)(ii). For FY 2014, USCIS used a computer-generated random selection process for all cap-subject petitions received through April 5, 2013. The cap-subject petitions that were not randomly selected were rejected and returned. *Id.*

Again, a petitioner must establish eligibility at the time of filing the benefit request. *See* 8 C.F.R. § 103.2(b)(1). Specifically, the regulation states the following:

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions.

*Id.* 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. 1978). If the petitioner wishes to make any material changes to the terms and conditions of the employment as provided in the H-1B submission, it may file a new petition with the required fee(s) to reflect the changes. *See* 8 C.F.R. § 214.2(h)(2)(E). After a decision is rendered, a petitioner may not make material changes to an H-1B submission in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

On April 1, 2013, USCIS began accepting H-1B petitions filed for employment beginning in FY 2014. The petitioner submitted the instant H-1B petition on April 3, 2013; however, on the Form I-129 (page 5), the petitioner stated the dates of intended employment as May 1, 2013 to April 30, 2016. In other words, the petitioner's start date of May 1, 2013 falls under FY 2013.

Thereafter, in response to our RFE, counsel stated that "[d]ue to this being our first CAP filing, we made the intended dates of employment on the application match that of the LCA, not that of the fiscal year." Counsel further asserts "[w]e would have been happy to correct this error, if it had been mentioned in [the beneficiary]'s RFE or his denial, however it was not."

As discussed, there is no requirement for USCIS to issue an RFE or to issue an RFE pertinent to a ground later identified in the decision denying the visa petition. 8 C.F.R. § 103.2(b)(8). Again, the petitioner must establish eligibility at the time of filing a nonimmigrant visa petition. As the instant petition was filed for non-cap exempt employment within FY 2013, after the FY 2013 cap was reached, it cannot be approved.

### C. Attestation for Transportation Costs

Furthermore, in the instant case, the Form I-129 petition was not properly signed by the petitioner. Specifically, the petitioner failed to certify that it would be liable for the reasonable costs of return

transportation if the beneficiary is dismissed from its employment prior to the period of authorized stay.

The regulation at 8 C.F.R. § 103.2(a)(1) states, in pertinent part, the following:

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, and such instructions are incorporated into the regulations requiring its submission.

The instructions for Form I-129 state that the petition must be properly signed, and that a petition that is not properly signed will be rejected. Moreover, according to the instructions, a petitioner that fails to completely fill out the form will not establish eligibility for the benefit sought and the petition may be denied.

The regulation at 8 C.F.R. § 103.2(a)(2), which concerns the requirement of a signature on applications and petitions, states the following:

An applicant or petitioner must sign his or her benefit request. . . . By signing the benefit request, the applicant or petitioner . . . certifies under penalty of perjury that the benefit request, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct.

Pursuant to 8 C.F.R. § 103.2(a)(7)(i) and (iii), a petition which is not properly signed shall be rejected as improperly filed, and will not retain a filing date.

The regulation at 8 C.F.R. § 103.2(b)(1) provides, in pertinent part, the following:

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions.

The petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. All required petition forms must be properly completed and filed with any initial evidence required by applicable regulations and the form instructions. *Id.*

In the instant case, the petitioner failed to comply with the signature requirement. More specifically, the Form I-129 (page 12) contains a signature block that is devoid of any signature from the petitioning employer. This section of the form reads as follows:

As an authorized official of the employer, I certify that the employer will be liable for the reasonable costs of return transportation of the alien abroad if the alien is



dismissed from employment by the employer before the end of the period of authorized stay.

By failing to sign this signature block of the Form I-129, the petitioner has failed to attest that it will comply with § 214(c)(5) of the Act, which states the following:

In the case of an alien who is provided nonimmigrant status under section 101(a)(15)(H)(i)(b) or 101(a)(15)(H)(ii)(b) and who is dismissed from employment by the employer before the end of the period of authorized admission, the employer shall be liable for the reasonable costs of return transportation of the alien abroad.

The regulation at 8 CFR § 214.2(h)(4)(iii)(E) further states, in pertinent part, the following:

The employer will be liable for the reasonable costs of return transportation of the alien abroad if the alien is dismissed from employment by the employer before the end of the period of authorized admission pursuant to section 214(c)(5) of the Act. . . . Within the context of this paragraph, the term "abroad" refers to the alien's last place of foreign residence. This provision applies to any employer whose offer of employment became the basis for an alien obtaining or continuing H-1B status.

Thus, the petition was not properly filed because the petitioning employer did not sign the signature block certifying that it would be liable for the reasonable costs of return transportation if the beneficiary is dismissed from its employment prior to the period of authorized stay. Pursuant to 8 C.F.R. § 103.2(a)(7)(i), an application or petition which is not properly signed shall be rejected as improperly filed, and no receipt date can be assigned to an improperly filed petition.

In response to our RFE, counsel states that "[t]his was an over[sight] on our behalf, making the application non-complete, and therefore [it] should have been sent back with a rejection notice for us to fix the error." While the director did not reject the petition, we are not controlled by service center decisions. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 at 3 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 534 U.S. 819 (2001). We note that the integrity of the immigration process depends on the employer signing the official immigration forms. As previously mentioned, we conduct appellate review on a *de novo* basis, and it was in the exercise of this function that we identified this additional ground for dismissing the appeal. *See Soltane v. DOJ*, 381 F.3d 145. Thus, for this reason as well, the petition may not be approved.

#### D. The Form I-129 and the LCA

The petitioner did not submit a Form G-28 (Notice of Entry of Appearance as Attorney or Accredited Representative) with the Form I-129 petition. The Form I-129 and LCA were signed by Shawn A. Curtis, rather than by the petitioner.

The regulation at 8 C.F.R. § 292.4(a) provides the following (emphasis added):



An appearance must be filed on the appropriate form as prescribed by DHS by the attorney or accredited representative appearing in each case. *The form must be properly completed and signed by the petitioner, applicant, or respondent to authorize representation in order for the appearance to be recognized by DHS. . . .* When an appearance is made by a person acting in a representative capacity, his or her personal appearance or signature will constitute a representation that under the provisions of this chapter he or she is authorized and qualified to appear as a representative as provided in 8 C.F.R. 103.2(a)(3) and 292.1. Further proof of authority to act in a representative capacity may be required.

The regulations do not permit any individual who is not the petitioner to sign the Form I-129. The regulation at 8 C.F.R. § 103.2(a)(2) provides:

*Signature.* An applicant or petitioner must sign his or her benefit request. However, a parent or legal guardian may sign for a person who is less than 14 years old. A legal guardian may sign for a mentally incompetent person. By signing the benefit request, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the benefit request, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct. Unless otherwise specified in this chapter, an acceptable signature on [a] benefit request that is being filed with the USCIS is one that is either handwritten or, for benefit requests filed electronically as permitted by the instructions to the form, in electronic format.

In response to our RFE, counsel claims "[a]t the time of filing, I was the Acting General Counsel for [the petitioner], and therefore had signatory authority for all [of][the petitioner][']s documents." However, counsel did not submit documentary evidence to support his assertions. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Further, there is no regulatory provision that waives the signature requirement for a petitioning U.S. employer or that permits a petitioning U.S. employer to designate an attorney or accredited representative to sign the petition on behalf of the U.S. employer. Practically, the signature requirement reflects a genuine Form I-129 program concern regarding the validity of the temporary job offer contained in Form I-129 petition. To this end, the employer's signature serves as certification under penalty of perjury that the petition, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct. To be valid, 28 U.S.C. § 1746 requires that declarations be "subscribed" by the declarant "as true under penalty of perjury." In pertinent part, 18 U.S.C. § 1621, which governs liability for perjury under federal law, mandates that: "Whoever in any declaration under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true is guilty of perjury."

The probative force of a declaration subscribed under penalty of perjury derives from the signature of the declarant; one may not sign a declaration "for" another. Without the petitioner's actual signature as declarant, the declaration is completely robbed of any evidentiary force. *See In re Rivera*, 342 B.R. 435, 459 (D. N.J. 2006); *Blumberg v. Gates*, No. CV 00-05607, 2003 WL 22002739 (C.D.Cal.) (not selected for publication).

An entirely separate line exists for the signature of the preparer declaring that the form is "based on all information of which [the preparer has] any knowledge." Thus, the Form I-129 petition acknowledges that a preparer who is not the petitioner cannot attest to the contents of the petition and supporting evidence. Rather, the preparer may only declare that the information provided is all the information of which he or she has knowledge. Moreover, the unsupported assertions of an attorney do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The integrity of the immigration process depends on the actual employer signing the official immigration forms under penalty of perjury. Allowing an attorney to sign all petitions, notices of appearance (for the same attorney), appeals, and DOL applications on behalf of the petitioner based on a broad assignment of authorization would leave the immigration system open to fraudulent filings. There are prior examples where attorneys have been convicted of various charges, including money laundering and immigration fraud, after signing immigration forms of which the alien or employer had no knowledge. *United States v. O'Connor*, 158 F.Supp.2d 697, 710 (E.D. Va. 2001); *United States v. Kooritzky*, Case No. 1:02CR00502 (E.D. Va. December 11, 2002). For this additional reason, the petition cannot be approved.

## II. THE DIRECTOR'S BASIS FOR DENIAL OF THE PETITION

### 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). 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), 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.

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."

In a support letter dated April 1, 2013, counsel stated that the petitioner "provides highly skilled information technology professionals to companies all over the United States to fill their staffing needs." Counsel further stated that the petitioner "currently has a position for an in-house Quality Assurance Analyst." The proffered position is described as follows:

**Job Description:**

The Quality Assurance Analyst will evaluate and test new or modified software programs and software development procedures for [the petitioner]'s in-house development projects. The QA Analyst will verify that programs function according to user requirements. Working alone or with a team, the analyst will test computer programs for validity of results, accuracy, reliability and conformance to establishment standards.

**Responsibilities[:]**

- Write documentation to describe program evaluation, testing, and any

corrections.

- Gather requirements, analyze requirements and design workflows[.]
- Conduct compatibility tests[.]
- Recommend program improvements or corrections to programmers.
- Review new or modified programs, including documentation, diagram and flow charts, to determine if the programs will perform according to user request and conform to guidelines.

Upon review, we find that the petitioner did not provide sufficient information about the work to be performed and the beneficiary's specific role in the projects. For example, in response to the director's RFE, counsel for the petitioner claimed that the petitioner has "several in-house development projects occurring at any given time throughout the year." Counsel also stated that "[o]ne of [the petitioner]'s current projects is testing and development for a weight loss web site," "[t]his is a long-term project, which [the beneficiary] is committed to working on, pending his H-1B approval." However, counsel did not submit documentary evidence to substantiate his claims.

On appeal, counsel claimed that the petitioner has a long-term agreement with [REDACTED], and that the statement of work between the petitioner and [REDACTED] shows long-term project details which the beneficiary "is committed to working on in-house pending his H-1B approval." In support of this claim, counsel submitted a Master Professional Services Agreement with [REDACTED] signed on January 19, 2012. The effective date appears to have been altered in handwriting and is not clearly written. Further, Article 8 states that the agreement "will commence as of the Effective Date and will continue in full force and effect thereafter until either: (a) all Statement of Work hereunder are terminated or expired as provided therein; or (b) this Master Agreement is terminated as provided herein." Moreover, the agreement is followed by a document entitled "Amendment to SOW No.1." The amendment states:

"The number of resources that will be provided is as follows:

- a. One (1) Senior Engineer responsible for Storage Engineering & Backup Services
- b. Two (2) Backup and Storage administrators to be utilized exclusively for provisioning problem management and daily support duties."

Notably, the senior software engineer is named as [REDACTED]." In other words, neither the agreement nor the amendment names the beneficiary as one of the employees assigned to the contract, nor do these documents identify a quality assurance analyst position as a resource for the project. Moreover, the amendment does not state the length of the contract.

Counsel further claimed that the beneficiary will also be an active member of testing and development for a weight loss web site. On appeal, counsel claimed that the contract cannot be provided due to client confidentiality. However, while a petitioner should always disclose when a submission contains confidential commercial information, a claim of client confidentiality does not provide a blanket excuse for the petitioner's failure to provide such a document if that document is



material to the requested benefit.<sup>5</sup> Although a petitioner may always refuse to submit confidential commercial information if it is deemed too sensitive, the petitioner must also satisfy the burden of proof and runs the risk of a denial if it cannot provide sufficient evidence to support the approval of the petition. *Cf. Matter of Marques*, 16 I&N Dec. 314 (BIA 1977). Notably, any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). 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'r 1972)). Here, while counsel makes various assertions regarding the beneficiary's employment, the record lacks sufficient documentary evidence to support the claims.

In addition, as reflected in the descriptions of the position as quoted above, the proffered position has been described in terms of generalized and generic functions that fail to convey sufficient substantive information to establish the relative complexity, uniqueness and/or specialization of the proffered position or its duties. For example, in the support letter, counsel indicated that the beneficiary's duties include "writ[ing] documentation to describe program evaluation, testing, and any corrections." The petitioner's description is generalized and generic in that the petitioner fails to convey either the substantive nature of the work that the beneficiary would actually perform, any particular body of highly specialized knowledge that would have to be theoretically and practically applied to perform it, or the educational level of any such knowledge that may be necessary. The responsibilities for the proffered position contain generalized 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. The abstract, speculative level of information regarding the proffered position and the duties comprising it is exemplified by the phrases "gather requirements, analyze requirements and design workflows," "conduct compatibility tests," and "recommend program improvements or corrections to programmers."

Notably, the statements fail to establish the beneficiary's actual responsibilities, and they do not include any details regarding the specific tasks that the beneficiary will perform. Based upon a complete review of the record of proceeding, we find that the petitioner has failed 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. Consequently, these material omissions preclude a determination that the petitioner's proffered position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions. There is a lack of probative evidence substantiating the petitioner's claims with regard to the duties, responsibilities and requirements of the proffered position.

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<sup>5</sup> Both the Freedom of Information Act and the Trade Secrets Act provide for the protection of a petitioner's confidential business information when it is submitted to USCIS. *See* 5 U.S.C. § 552(b)(4), 18 U.S.C. § 1905. Additionally, the petitioner may request pre-disclosure notification pursuant to Executive Order No. 12,600, "Predisclosure Notification Procedures for Confidential Commercial Information." Exec. Order No. 12,600, 1987 WL 181359 (June 23, 1987).



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 satisfies any of the applicable provisions.

As described, we find that the job description does not provide a sufficient factual basis to convey a persuasive basis to discern the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire three-year period requested. Such lack of evidence, thus, fails to persuasively support any claim in the record of proceeding that the work that the duties and responsibilities of the position proffered here, would generate the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific performance specialty directly related to the demands of the proffered position.

### III. CONCLUSION

An application or petition that fails to comply with the technical requirements of the law may be denied by us even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 145 (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of our enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The petition must be denied for the above stated reasons, with each considered as an independent and alternate basis for the decision. 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.