



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUN 21 2013

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)

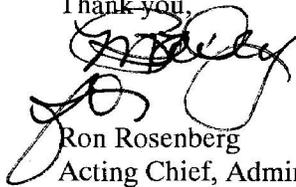
ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a "sequenced streaming of software content" company established in 2010. In order to employ the beneficiary in what it designates as a software engineer position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

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

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

The primary issue for consideration is whether the petitioner's proffered position qualifies as a specialty occupation. 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.

¹ The AAO notes that it issued an RFE on April 1, 2013 because it was unable to determine that the petitioner is a corporation in good standing. In response, the petitioner *for the first time* notified USCIS that it had changed its name and its address. No explanation was provided for electing not to notify USCIS of the changes. Petitioners who have filed an application or petition with USCIS but have not yet received a decision (a "pending" case) should notify USCIS of any change of address as soon as possible after moving.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R.

§ 214.2(h)(4)(ii), 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.

In the petition signed on May 16, 2012, the petitioner indicates that it is seeking the beneficiary's services as a software engineer on a full-time basis. In the May 16, 2012 letter of support, the petitioner states that it is offering the beneficiary the position of Software Engineer and that he will be "focusing on designing and developing [the petitioner's] new client-based software technology, enabling users to start interacting with web-based content, even while it is being downloaded." In addition, the petitioner states the following regarding the duties of the proffered position:

Specifically, [the beneficiary] will be a member of our software engineering team responsible for specifying, designing, and implementing software components and subsystems comprising the core components of our proprietary software technology. He will specifically be responsible for the building of scalable, highly sophisticated software applications for the internet to allow [the petitioner's] technology to be integrated to the download of web applications. [The beneficiary] will be responsible for utilizing his specialized knowledge of computer system scalability, networking, and optimization of content delivery through the use of compression algorithms over network for delivery to client machines. He will utilize specific networking concepts including TCP/IP, HTTP, x86, and RPC to design and develop a novel content distribution network that enables users to run software even while they are downloading the same software. [The beneficiary] will be required to use his educational background in computer technology to design and implement innovative software solutions for data collection and analysis, troubleshoot programming issues, and ensure the optimal efficiency of our software infrastructure

through development, testing, and debugging.

The petitioner also states that "this position requires at a minimum a Bachelor's degree in Computer Science, Software Engineering, or a related field."

With the initial petition, the petitioner submitted a copy of the beneficiary's foreign degree and transcripts, as well as a credential evaluation from [REDACTED]. The evaluation states that the beneficiary's foreign education is equivalent to "a four-year Bachelor of Science Degree in Computer Engineering from an accredited college or university in the United States."

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The AAO notes that the LCA designation for the proffered position corresponds to the occupational classification of "Software Developer, Applications" - SOC (ONET/OES Code) 15-1132, at a Level I (entry level) wage.

The director found the evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on June 5, 2012. The petitioner was asked to submit documentation to establish that a specialty occupation position exists for the beneficiary. The director outlined the specific evidence to be submitted. The AAO notes that the director specifically requested the petitioner to submit evidence that it has sufficient specialty occupation work that is immediately available upon the beneficiary's entry into the United States.

On August 2, 2012, counsel responded by submitting a brief and additional documentation. Specifically, counsel submitted evidence in support of the petition, including the following: (1) an employment agreement between the petitioner and the beneficiary dated July 19, 2012; (2) a Test License Agreement between the petitioner and [REDACTED] effective January 16, 2012; (3) a copy of the petitioner's Independent Appraisal Report dated March 6, 2012; (4) a copy of the petitioner's bank statement from June 1, 2012 to June 29, 2012; (5) a copy of the petitioner's Employer's Quarterly Federal Tax Return for 2012 (Quarter 1); and (6) printouts from the petitioner's website.²

The director reviewed the information provided in response to the RFE to determine whether the petitioner had established eligibility for the benefit sought. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. In addition, the director determined that the record was insufficient to substantiate that the petitioner has sufficient work for the requested period of intended employment. The director denied the petition on August 16, 2012. Counsel for the petitioner submitted an appeal of the denial of the H-1B petition.³

² The AAO observes that the petitioner did not submit all of the pages of the Independent Appraisal Report. No explanation for failing to provide the entire document was provided.

³ With the appeal, counsel provided copies of previously submitted documents and new evidence. With regard to the new documentation submitted on appeal that was encompassed by the director's RFE, the AAO

The issue before the AAO is whether the petitioner has provided sufficient evidence to establish that it would employ the beneficiary in a specialty occupation position. The AAO will first make some preliminary findings that are material to this decision's application of the H-1B statutory and regulatory framework to the proffered position as described in the record of proceeding.

The petitioner in this matter provided a list of the beneficiary's proposed duties. As observed above, USCIS in this matter must review the actual duties the beneficiary will be expected to perform to ascertain whether those duties require at least a baccalaureate degree in a specific specialty, or its equivalent, as required for classification as a specialty occupation. To accomplish that task in this matter, USCIS must analyze the actual duties in conjunction with the specific project(s) to which the beneficiary will be assigned. To allow otherwise, results in generic descriptions of duties that, while they may appear to comprise the duties of a specialty occupation, are not related to any actual services the beneficiary is expected to provide.

In that regard, the AAO has reviewed the information in the record regarding the petitioner's sequenced streaming of software content business. Upon review of this information, the AAO finds that the record of proceeding lacks documentation regarding the petitioner's business activities and the actual work that the beneficiary will perform to sufficiently substantiate the claim that the petitioner has H-1B caliber work for the beneficiary for the period of employment requested in the petition. That is, the record does not include sufficient work product or other documentary evidence to confirm that the petitioner has ongoing projects to which the beneficiary will be assigned. Thus, the petitioner has not provided the underlying documentation necessary to corroborate that the beneficiary would perform the claimed duties set out in the petitioner's letter of support. 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)). Furthermore, the AAO notes that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). Evidence that the petitioner creates after the issuance of an RFE is not considered independent and objective evidence for establishing eligibility

notes that this evidence is outside the scope of the appeal. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. See 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(1), (8), and (12). The 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).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533. If the petitioner had wanted the submitted evidence to be considered, it should have submitted it with the initial petition or in response to the director's request for evidence. *Id.* The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, the AAO need not consider the sufficiency of such evidence submitted for the first time on appeal.

for the benefit sought.

The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, 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).

Without statements of work describing the specific duties the petitioner requires the beneficiary to perform, as those duties relate to specific projects, USCIS is unable to discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program. Again, going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Without a meaningful job description within the context of non-speculative employment, the petitioner may not establish any of the alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO acknowledges the petitioner's assertion that the position of software engineer requires a theoretical and practical application of highly specialized knowledge; however, an assertion without supporting evidence is insufficient for a petitioner to satisfy its burden of proof. The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

While the petitioner submitted an employment agreement, a Test License Agreement, an Independent Appraisal Report, a bank statement, and printouts from its website in response to the director's RFE, those documents do not establish the substantive nature of the work to be performed by the beneficiary and that the proffered position qualifies as a specialty occupation. Specifically, the documents do not indicate that the beneficiary would be working on the petitioner's products as asserted by the petitioner.

In response to the RFE, counsel claims that "[the petitioner] is currently in the midst of several license agreements with major companies." Counsel further states that "[m]ost of these license agreements are still in process and therefore confidential."

While the petitioner never specifically claimed that the license agreements were privileged, the AAO notes that the petitioner claimed that the license agreements were confidential. While a petitioner should always disclose when a submission contains confidential information, the claim 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.⁴ Although a petitioner may always refuse to submit confidential information if it is deemed too sensitive, the petitioner must also satisfy the burden of proof and runs the risk of a denial. *Cf. Matter of Marques*, 16 I&N Dec. 314 (BIA 1977).

In addition, in response to the RFE, counsel states that "[t]o ensure that the company has sufficient staff to continue to develop these products [the petitioner] is licensing to major companies like [REDACTED], as well as projected new work in the future, [the petitioner] is actively hiring technical staff, including [the beneficiary]." The AAO also observes that the Independent Appraisal Report, submitted in response to the RFE, indicates that "[t]he Company plans to enter into 12-24 months of committed contract with monthly billing." While the AAO reviewed and considered the evidence submitted, the AAO again notes 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.

On appeal, counsel asserts that the petitioner "absolutely has sufficient software development work to provide to [the beneficiary] upon his entrance to the United States and fully expects to continue to have this work throughout the duration of his H-1B status." However, 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).

⁴ 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).

For the reasons discussed above, it cannot be found that the proffered position qualifies as a specialty occupation. The AAO therefore affirms the director's finding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

Next, the AAO will consider whether the petitioner failed to establish that it had sufficient work during the requested validity period for the beneficiary to perform when the petition was filed. By not submitting evidence demonstrating the work that the beneficiary will perform, the petitioner precluded the director from establishing whether the petitioner has made a *bona fide* offer of employment to the beneficiary and that it has sufficient work for the beneficiary to perform for the duration of the petition. Furthermore, there are no contracts or other evidence in the record demonstrating that the petitioner had projects for the petitioner to work on during the requested validity period. Therefore, beyond the decision of the director, the AAO finds that the petitioner has failed to establish that it has made a *bona fide* offer of employment to the beneficiary.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO 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 1043, *aff'd*, 345 F.3d 683; *see also Soltane v. DOJ*, 381 F.3d 145 (noting that the AAO conducts appellate review on a *de novo* basis).

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

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met.

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