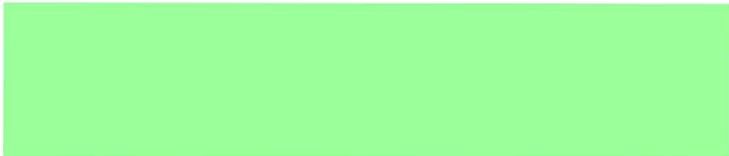


(b)(6)



U.S. Citizenship
and Immigration
Services



DATE: **JUL 30 2014** OFFICE: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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, and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

I. BACKGROUND

On the Form I-129 visa petition, the petitioner describes itself as a 20-employee software development company established in 2010. In order to employ the beneficiary in what it designates as a full-time Programmer Analyst position at a salary of \$26.18 per hour, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the "Computer Systems Analysts" occupational classification, SOC (O*NET/OES) Code 15-1121, and a Level I (entry-level) prevailing wage rate.

The director denied the petition, concluding that the evidence of record fails to establish that the proffered position qualifies for classification as a specialty occupation.

The record of proceeding before us contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation.

Based upon a complete review of the record of proceeding, we find that the evidence of record does not establish that the position as described constitutes a specialty occupation. Accordingly, the appeal will be dismissed, and the petition will be denied.

II. THE PROFFERED POSITION AND ITS CONSTITUENT DUTIES

In a letter dated March 20, 2013, the petitioner stated it is a software research and development company that also provides IT services.

In this same letter, the petitioner described the beneficiary's role as having responsibility for the following duties:

[C]ustom program development & implementation, system analysis & design. Identify and document business or test requirements to the support the project. Perform object-oriented analysis and preliminary design/development of the solutions for client service platform. Utilize object-oriented language and concepts and databases appropriate to the project. Perform object oriented analysis, design and development of software for client server platforms using computer skills. Analyzing users' data, general modes of operation, existing operation procedures, and problems and devising methods and approaches to meet the users' need based upon knowledge of project management, supply chain management, products, operation research, data

processing techniques, management information, and statistical, audit, and control systems. The position involves extensive use of modern computer languages. The incumbent creates new solutions and algorithms to manage and implement those solutions. Additionally he will provide software support, which includes testing, debugging and modifying software as per needs of the client.

The petitioner also stated the following with respect to the requirements of the proffered position:

The nature of these duties are extremely specialized and complex and require the theoretical and practical application of highly specialized knowledge. This knowledge is attained only through a Bachelor's Degree in Computer Science or Engineering, Management Information, Electrical/Electronics Engineering, or equivalent related field as a minimum requirement for entry into this specialty occupation. This degree requirement is common in the industry in parallel positions among similar organizations.¹

The record contains evidence submitted by the petitioner to document aspects of the proffered position, its constituent duties, and projects for the requested period of employment. The petitioner submitted two itineraries for in-house projects for [REDACTED]² its company brochure, an offer of employment letter addressed to the beneficiary, and a document entitled, "Project Scope and Marketing Analysis for [REDACTED]" as well as a blank employee performance review template on the petitioner's letterhead. In addition, the initial filing included a document entitled, "Employer-Employee Terms and Conditions & Right to Control," regarding the petitioner's right to control the beneficiary that also outlines an array of employment parameters.³ In addition, the record contains photographs of the petitioner's office, 2011 and 2012 tax returns for petitioner's contact manager, a letter dated July 2, 2013 explaining the project scope and marketing analysis, a lease, and a brief.

¹ The statement of duties and the corresponding requirements are presented here without correction.

² We find that while the petitioner may have employees working on the [REDACTED] projects, the documentation submitted does not clearly state whether the beneficiary will be directly involved in each project, whether the beneficiary will be assigned to specific phases of these projects, or the specialty occupation level work that might require the beneficiary's services. We also observe that the petitioner referred to the proffered position in its August 2, 2013 response to the RFE as a computer programmer without explanation.

³ On page three of this document, the petitioner states that the hourly pay equivalent is equal to the yearly pay as defined in the offer of employment, divided by 2080. We observe that the yearly pay offered to the beneficiary as stated in the offer of employment is \$65,000; when divided by 2080, the hourly quotient is \$31.25/hour, an hourly amount that is not memorialized on the LCA. This inconsistency is not explained by the petitioner. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The director denied the petition on November 5, 2013, concluding that the evidence of record failed to establish that the proffered position qualifies for classification as a specialty occupation. On appeal, the petitioner submits a brief and contends that the director's findings were erroneous, and presents the following iteration of job duties:

- a) Coordinate with Functional owners in understanding the functional specifications, convert and test object, and review deliverables;
- b) Prepare high level Code review check list, quality standards, and technical designs for the successful implementation of the project;
- c) Develop applications using Java, C, C++ programming; implement SAP R/3 ECC 6.0, ECC 5.0, 4.7c, versions as a Lead Technical role;
- d) Upgrade SAP R/3 from ECC 5.0 to ECC 6.0 version;
- e) Implement for Oil and Gas, IS-Retail, Banking and Real Estate Industries. Develop various custom objects as a lead developer in the areas of ABAP like Webdynpro, Reports, Report painter, ABAP Query, module pool programming, scripts, smart forms, Enhancements, Workflows; knowledge in SAP portals, Process Integration;
- f) Team Lead for the implementation of SAP R/3 and co-ordinate activities with the various teams
- g) Upgrade the SAP systems from ECC 5.0 to ECC 6.0;
- h) Implement the SAP Package Technologies; technologies: SAP ABAP, PI, Portal and SAP Net weaver Technologies. SAP CRM Web UI Developer and Techno functional, SAP Material.
- i) Management, Human Resources, Finance, Sales and Distribution Configuration, Domain knowledge in IS-Retail, Oil and Gas, and Banking Industries, Java, J2EE, C, C++ Programming.⁴

Counsel also provided an approximate percentage of time allocation of the proffered position's duties on appeal:

Customer relations	15-20%
Analyze and design software	20-30%
Coding and Customization	40-50%

III. SPECIALTY OCCUPATION

To meet its burden of proof in establishing the proffered position as a specialty occupation, the petitioner must establish that the employment it is offering to the beneficiary meets the following 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:

⁴ The statement of duties presented on appeal appear here without correction.

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

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

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

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

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

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

§ 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

Although the petitioner submitted itineraries for the [REDACTED] projects, and asserted that the beneficiary would work on these projects, we find that the information presented is unclear because it discusses the role of "resources" and the "candidates," but does not clearly state the beneficiary's role within the projects. In addition, the petitioner did not state how the beneficiary would allocate her time between the projects during the period of project overlap. The record of proceeding has a market analysis explaining the target industries for the petitioner's products. This information gives an indication of the petitioner's business plan, but it does not provide distinct detail about the proffered position. Although more detail was presented on appeal, we find that the stated details are not congruent with the prior iterations of the proffered position. At the outset, the position is framed as a Programmer Analyst within the "Computer Systems Analysts" occupational classification, and then it is described as a Computer Programmer in the RFE response. In the appeal brief, counsel lists duties that do not appear to be closely tied to the [REDACTED] or [REDACTED] projects, and the duties discuss, for the first time, that the beneficiary would be the

technical lead in application development, and a lead developer in the areas of ABAP, as well as the team lead with various teams.⁵

As such, we have determined that the descriptions of the position and its constituent duties do not in themselves reveal the substantive nature of the actual work that would be involved. Also, we find that the record of proceeding does not contain cogent information about any applications of a body of highly specialized knowledge in any specialty that would be required to perform such work. The records also does not contain a description about a necessary correlation between such work and the necessity for the beneficiary to hold at least a bachelor's degree, in a specific specialty or the equivalent, closely related to the nature of the proffered position as it would actually be performed.

The proffered position has been described in terms of inconsistent functions that fail to convey sufficient substantive information to establish the relative complexity, uniqueness and/or specialization of the proffered position or its duties. The overall description of the position does not reveal sufficient information regarding the associated educational requirements. The abstract level of information provided about the proffered position and its constituent duties is exemplified by the petitioner's claim that the beneficiary would be assigned to the [REDACTED] projects, but does not state how her time would be allocated between the two projects, and does not describe the extent of her involvement in the phases of each project. Notably, the petitioner did not submit probative evidence that demonstrates how working on these projects, as described in the record, would require the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent.

Likewise, as a corollary, we also find that the petitioner does not establish that the proposed duties, or the proffered position that they comprise, are more unique, specialized, and/or complex than computer systems analyst positions which may share those same generalized functions and yet not require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty, which requirement is essential for a specialty occupation as defined at section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

To the extent that they are described by the petitioner, we find, the proposed duties do not provide a sufficient factual basis to persuasively support the claim that the position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the demands of the proffered position.

The record of proceeding does not contain sufficient details regarding the nature and scope of the beneficiary's employment or any substantive evidence regarding the actual work that the beneficiary

⁵ On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

would perform to establish eligibility for the benefit sought. Without a meaningful job description, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. The tasks as described fail to communicate (1) the complexity, uniqueness and/or specialization of the tasks, and/or (2) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. The petitioner's assertions with regard to the position's educational requirement are conclusory and unpersuasive, as they are not supported by the job description or substantive evidence.

The record of proceeding does not sufficiently establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied on this basis.

IV. CONCLUSION AND ORDER

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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