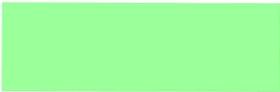


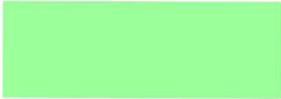
(b)(6)



U.S. Citizenship
and Immigration
Services



DATE: **JUN 20 2014** Office: CALIFORNIA 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. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as an "IT Product & Services" business established in 1997, with 245 employees. In order to employ the beneficiary in what it designates as a "Database Administrator" position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the grounds that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions and that the petitioner has sufficient work for the beneficiary for the requested period of intended employment. The petitioner filed a timely appeal of the decision. On appeal, the petitioner contends that the director's basis for denial of the petition was erroneous. In support of this contention, the petitioner submits a brief and additional evidence.

The record of proceeding before us contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's notice of decision; and (5) the petitioner's Notice of Appeal or Motion (Form I-290B), and documentation in support of the appeal. We reviewed the record in its entirety before issuing our decision.

For the reasons that will be discussed below, we agree with the director's decision 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.

I. PROCEDURAL AND FACTUAL BACKGROUND

In this matter, the petitioner indicated in the Form I-129 and supporting documentation that it seeks the beneficiary's services in a position that it designates as a database administrator to work on a full-time basis at a salary of \$50,107 per year. The petitioner stated on the Form I-129 that the dates of intended employment are from October 1, 2013 to September 25, 2016.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational classification of "Database Administrators" – SOC (ONET/OES) Code 15-1141. The petitioner designated the proffered position as a Level I (entry level) position.

Among the documents submitted with the petition is a letter of support dated April 2, 2013. In the letter of support, the petitioner stated that the beneficiary will be responsible for the following duties:

- Analyze, define, and gather requirements for several business functions &

processes in the organization.

- Execute, implement and maintain workflow and analytics systems using financial tools (like [REDACTED] [s]taffing process related tools and technical project management tools.
- Responsible for trouble-shooting, upgrading and the delivery of required functionalities & modules.
- Responsible for the configuration, implementation, administration and maintenance of all commercial-off-the-shelf (COTS) and custom databases, ensuring they conform to established standards.
- Reviews, evaluates and designs databases for custom in-house applications, ensuring they conform to established standards.
- Responsible for coordinating multiple projects and the applicable resources.
- Develops database standards and makes recommendations for management approval.
- Responsible for implementation and testing of database patches and upgrades.
- Monitors, maintains, documents, and predicts database performance to meet established service levels.
- Handling customer expectations, managing and guiding a team, organizing and conducting various training activities.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on April 8, 2013. The director asked the petitioner to submit evidence to demonstrate that the petitioner will have an employer-employee relationship with the beneficiary; that the proffered position is a specialty occupation; that the beneficiary qualifies for the position; and that the petitioner has sufficient work for the period requested.

In response to the director's RFE, the petitioner provided additional supporting evidence, including, among other things, the following:

- A letter from the petitioner, dated September 24, 2013, stating that the petitioner "controls the duties of [the beneficiary] as well as pays her total compensation." The petitioner further stated that it "purchased and implemented the [REDACTED] and [the beneficiary] has been selected to work as a Database Administrator. The Statement of Work portion lists all the business areas[,] the phases, projected annual revenues, start target, go-live target and provides additional details. . . .";
- A copy of the beneficiary's academic and work experience evaluation by Dr. [REDACTED] Associate Professor of Computer Applications and Information Systems, School of Business, [REDACTED] stating that the beneficiary has the equivalent of a bachelor's degree in computer information systems;
- A copy of a document entitled "Employment Agreement" entered into on March

25, 2013 between the petitioner and the beneficiary, which states the following:

1. Scope of Duties. Employee shall perform computer programming, software development, systems analysis, professional engineering, consulting, technical writing or other specialized technical work as he is directed to perform by Employer for Employer's Clients ("Clients") using his/her own discretion and independent judgment.

...

5. Hours. Subject to the provisions of Exhibit A, Employee shall typically work the same hours as Client's employees while performing work at the client's site, unless otherwise directed by Employer. . . .

...

6. Personal Services of Employee. Employee must personally perform all work as directed by Client or Employer. . . .

...

10. Direction, Supervision and Cooperation. In performing the work assigned by Employer, Employee will adhere to all applicable policies, procedures, and rules of both Employer and Client. Employee acknowledges Employer has the right to direct Employee as to when, where and how Employee is to perform work. In working on Client's project, Employee will ordinarily work as required by Employer in accordance with the directions of the Client. Employee will provide his/her immediate supervisor at Employer with progress and status reports of his/her work efforts as requested. Employee's performance is subject to review by both Employer and Client.

- A copy of the petitioner's employment offer letter to the beneficiary, dated March 25, 2013 (attached as Exhibit A to the Employment Agreement);
- A copy of a document entitled "[REDACTED] Change Project Form," between the petitioner and [REDACTED], dated September 7, 2012, indicating that the "Go Live" date is estimated to be on November 30, 2012;
- A copy of a document entitled "Statement of Work for [REDACTED] (SOW) dated September 7, 2012, entered into between the petitioner and [REDACTED]

The SOW refers to a "Base Agreement" and a service plan which the petitioner did not submit into the record of proceeding;

- A copy of a floor plan of an unidentified building; and
- A copy of the petitioner's promotional materials.

On October 30, 2013, the director denied the petition finding that the petitioner failed to establish (1) that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions; and (2) that it has sufficient work for the beneficiary for the requested period of intended employment.

On appeal, the petitioner submitted a brief¹ dated November 21, 2013, listing the same duties for the proffered position that were listed in its previously submitted support letter. The petitioner stated that the proffered position requires a "Bachelor's Degree with Oracle database administrator certification." In addition, the petitioner stated that "the in-house project is expected to continue through September 25, 2016 and included a table for the project timeline, as follows:

Business Areas	2012	2013	2014	2015	2016
Financial and Management Accounting *Phases – Prepare, Fine-Tune, Integrate & Extend, Test, Go-Live & Continuous Improvement [sic]		Oct 2012 – Oct 2014			
Sales (CRM) *Phases – Prepare, Fine-Tune, Integrate & Extend, Test, Go-Live & Continuous Improvement [sic]		Oct 2013 – June 2014			
Purchasing (ERP) *Phases – Prepare, Fine-Tune, Integrate & Extend, Test, Go-Live & Continuous Improvement [sic]		Nov 2013 – Nov 2014			
Business performance Management *Phases – Prepare, Fine-Tune, Integrate & Extend, Test, Go-Live & Continuous Improvement [sic]		Nov 2013 – May 2015			
Human resources *Phases – Prepare, Fine-Tune, Integrate & Extend, Test, Go-Live & Continuous Improvement [sic]		June 2014 – June 2016			

¹ The language in the brief indicates that the brief was prepared by the petitioner's counsel. However, the petitioner signed the brief, rather than counsel.

Communication & Information exchange *Phases – Prepare, Fine-Tune, Integrate & Extend, Test, Go-Live & Continuous [sic] Improvement [sic]	Oct 2014 – Oct 2016
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The petitioner also submitted a letter dated November 21, 2013, restating the duties of the proffered position and the project timeline, and submitted the previously submitted documents.

II. LAW AND ANALYSIS

A. Failure to Establish that Proffered Position Qualifies as a Specialty Occupation

We will now address the director's first basis for the denial, namely, 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.

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.

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

The petitioner stated in the Form I-129 that the beneficiary will be hired as an in-house employee, to work on a project for the petitioner, as a database administrator. However, the Employment Agreement indicates that the beneficiary will work on projects for the petitioner's clients. The Employment Agreement describes the scope of duties as "computer programming, software development, systems analysis, professional engineering, consulting, technical writing or other specialized technical work as he is directed to perform by Employer for Employer's Clients ("Clients") using his/her own discretion and independent judgment." In addition, paragraph 10 of the Employment Agreement states that "[i]n working on Client's project, Employee will ordinarily work as required by Employer in accordance with the directions of the Client. Employee will provide his/her immediate supervisor at Employer with progress and status reports of his/her work efforts as requested. Employee's performance is subject to review by both Employer and Client." Thus, although the petitioner asserts that the beneficiary will be an in-house employee, the Employment Agreement indicates otherwise. The petitioner did not provide an explanation for this inconsistency. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

The petitioner describes the proposed duties 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. The abstract level of information provided about the proffered position and its constituent duties is exemplified by the petitioner's assertion that the beneficiary will "[a]nalyze, define, and gather requirements for several business functions & processes in the organization." However, the statement provides no insight into the beneficiary's actual duties, nor does it include any information regarding the specific tasks that the beneficiary will perform. This is again illustrated by the petitioner's statement that the beneficiary's duties include "coordinating multiple projects and the applicable resources" without describing the multiple projects and resources. The petitioner also stated that the beneficiary would be "[h]andling customer expectations, managing and guiding a team, organizing and conducting various training activities." Again, the petitioner did not elaborate on who the customer is, what team the beneficiary would be managing and guiding, what training activities the beneficiary would be organizing and conducting, and who the beneficiary would

train. The petitioner provided no explanation as to how much time the beneficiary would spend on any of these activities and how these tasks are related to the functions of a database administrator. Thus, as so generally described, the description does not illuminate the substantive application of knowledge involved or any particular educational attainment associated with such application.

While this type of generalized description may be appropriate when defining the range of duties that may be performed within an occupational category, it cannot be relied upon by a petitioner when discussing the duties attached to specific employment for H-1B approval as it fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's operations. More specifically, in establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner's operations, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

Such generalized information does not in itself establish any necessary correlation between any dimension of the proffered position and a need for a particular level of education, or educational equivalency, in a body of highly specialized knowledge in a specific specialty. We also observe, therefore, that it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they are described by the petitioner, we find, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire three-year period requested, so as to persuasively support the claim that the proffered 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 duties and responsibilities of the proffered position.

In the instant case, the petitioner failed to provide sufficient details regarding the nature and scope of the beneficiary's employment or sufficient substantive evidence regarding the actual work that the beneficiary would perform. Furthermore, the petitioner did not provide the percentage of time that the beneficiary would spend performing each of the duties. Additionally, the petitioner did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the functions and tasks. Thus, the petitioner failed to specify which tasks were major functions of the proffered position, nor did it establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at irregular intervals). As a result, the petitioner did not establish the primary and essential functions of the proffered position.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary, therefore, 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. For this additional reason, the appeal will be dismissed and the petition denied.

We do not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. Therefore, we need not and will not address the beneficiary's qualifications further.

B. Speculative Employment and Failure to Establish Eligibility at the Time of Filing

Moreover, as noted by the director as a second basis for the denial, the evidence submitted fails to establish that the petitioner has sufficient work for the beneficiary for the requested period of intended employment. Although the petitioner requested, on the Form I-129, that the beneficiary be granted H-1B classification from October 1, 2013 to September 25, 2016, there is a lack of substantive documentation regarding work for the beneficiary for the duration of the requested period. In its support letter dated April 2, 2013, the petitioner does not indicate the employment dates. Furthermore, the Employment Agreement states that the beneficiary's employment would begin on October 1, 2013; however, it provides no end date for the employment period. Similarly, the employment offer letter states that the "tentative start date is October 1st, 2013" and does not state the end-date. On appeal, the petitioner states that "the in-house project is expected to continue through September 25, 2016" and submits a table for the project timeline. However, the petitioner submits no corroborating evidence demonstrating the availability of work for the beneficiary in such project. Without evidence supporting the petitioner's claims, the petitioner has not established that it has non-speculative work for the beneficiary. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In addition, the SOW indicates that the start date of Phase I of the project is September 14, 2012 and the Go-Live target date is November 30, 2012. The SOW does not provide information whether the project involves other phases that would go beyond November 30, 2012. Therefore, there is insufficient evidence in the record supporting the petitioner's assertion that the project would last until October 2016.

We find that the petitioner has not provided sufficient documentary evidence to demonstrate that it would employ the beneficiary for the entire H-1B period and has failed to establish the existence of work available to the beneficiary as a database administrator for the requested validity period. The petitioner also did not submit documentary evidence regarding any

additional work for the beneficiary. Thus, the petitioner has failed to establish that the petition was filed for non-speculative work for the beneficiary that existed *as of the time of the petition's filing*, for the entire period requested. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

III. CONCLUSION

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. As the grounds discussed above are dispositive of the petitioner's eligibility for the benefit sought in this matter, we will not address and will instead reserve our determination on the additional issues and deficiencies that we observe in the record of proceeding with regard to the approval of the H-1B petition.²

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.

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.

² 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 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).