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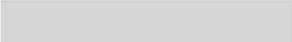
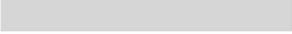
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



DATE: **AUG 07 2015** PETITION RECEIPT #: 

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:
NO REPRESENTATIVE OF RECORD

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

A handwritten signature in black ink, appearing to be "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

I. PROCEDURAL BACKGROUND

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a three-employee "consulting" company established in [REDACTED]. In order to employ the beneficiary in what it designates as a "Software Engineer" 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 concluding that the petitioner did not establish the availability of specialty occupation work at the time the petition was filed. On appeal, the petitioner asserts that the Director's basis for denial of the petition was erroneous and contends that it satisfied all evidentiary requirements.

The record of proceeding before this office contains the following: (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 Director's letter denying the petition; and (5) a Notice of Appeal or Motion (Form I-290B), a brief, and supporting documentation.

Upon review of the entire record of proceeding, we find that the evidence of record does not overcome the Director's ground for denying this petition.¹ We further find that the record of proceeding does not establish that the proffered position qualifies for classification as a specialty occupation. Accordingly, the appeal will be dismissed, and the petition will be denied.

II. THE PROFFERED POSITION

In a letter submitted with the petition dated April 1, 2014, the petitioner provided the following duties of the proffered position:²

- Experience with Business Requirements, Systems Requirements, Financial systems and analysis.
- Excellent analytical skills in understanding the business process, understanding the functional requirements and translating them to system requirement specifications.
- Wrote test plans, test cases and run scripts to see expected results for the User Acceptance.

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

² It appears that this list recites the skills, experience, and strengths of a certain individual rather than the list of proposed duties of the proffered position.

- Created and updated Requirement Traceability matrix table in order to trace project life cycle activities.
- Proficient in Business Statistics using SAS, SPSS
- Marketing Analytics – Cluster Analysis, Discriminant Analysis, Factor Analysis, Market Experiment, Price Optimization
- SAS-Proc Report, Freq, GPlot, GLM, Reg, SAS functions, formats, Macro basics, debugging MS Office – Excel, Powerpoint, Document
- My strengths include the ability to learn quickly, logical reasoning, creativity and attitude for excellence.
- Proven ability to work under pressure, prioritize and meet deadlines. Open to dynamic work environment and ability to work collaboratively with business users, testers, developers and other team members in the overall enhancement of software product quality.
- Good technical experience in MS Access, Excel, SQL and UNIX.

The letter also states that the proffered position requires at least a "Bachelor degree in the field of Computer Science/Engineering or related field."

On the Labor Condition Application (LCA) filed in support of the Form I-129, the petitioner indicated that the proffered position corresponds to the occupational classification "Software Developers, Applications"-SOC (ONET/OES Code) 15-1132 at a Level I wage.

In response to the Director's RFE, the petitioner provided a letter from the Manager- HR & Compliance at FutureTech Consultants dated October 22, 2014, stating that he anticipates using the beneficiary services on an "ongoing basis" to perform the following duties:

- Interact with Business Users to Business Requirements, System Requirements, Financial systems and analysis, to the assigned project;
- Understanding the business process, understanding the functional requirements and translating them to system requirement specifications.
- Write Test plans, test cases and run test scripts to see expected results for the User Acceptance.
- Create and update requirement Traceability matrix table in order to trace project life cycle activities.
- Marketing Analytics- Cluster Analysis, Discriminant Analysis, Factor Analysis, Market Experiment, Price Optimization
- Learn quickly, logical reasoning, creativity and attitude for excellence.
- Work under pressure, prioritize and meet deadlines. Open to dynamic work environment and ability to work collaboratively with business users, testers, developers, and other team members in the overall enhancement of software product quality.
- Good technical experience in MS Access, Excel, SQL, and UNIX.

III. SPECIALTY OCCUPATION

A. Legal Framework

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 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.

B. Analysis

We will first address, whether there was specialty occupation work available for the beneficiary at the time the Form I-129 was filed. For H-1B approval, the petitioner must demonstrate that a

legitimate need for an employee exists and that it has secured H-1B caliber work for the beneficiary for the entire period of employment requested in the petition.

On the Form I-129, the petitioner requested H-1B classification for the beneficiary for the period of October 1, 2014 to September 16, 2017. The LCA is certified for employment only at the petitioner's office located at [REDACTED] New Jersey; thus, the beneficiary may only work at the petitioner's office. With the visa petition, the petitioner submitted documents related to (1) the beneficiary's qualifications, (2) the beneficiary's husband, and (3) the April 1, 2014 letter referenced above. No contracts or other corroborative evidence of the proposed work the beneficiary would perform was submitted at that time.

On October 24, 2014, in response to the RFE, the petitioner provided a letter from the Manager-HR & Compliance at [REDACTED] dated October 22, 2014, stating that he anticipates using the beneficiary's services on an "ongoing basis." The letter, however, did not provide any details regarding the project to which the beneficiary would be assigned for the time period requested other than the primary responsibilities of the beneficiary.

The petitioner's response also included a copy of a contract, Custom Web Application Maintenance and Support Agreement, between itself and [REDACTED]. The contract was entered into on May 25, 2014 by the petitioner and [REDACTED]. Attached to the contract is an addendum describing a program and application maintenance service for "HMFA Web Applications" between May 25, 2014 and June 30, 2015 with an option to extend yearly. The addendum was signed on May 20, 2014 by [REDACTED] and on August 20, 2014 by the petitioner.³ The addendum provides a very brief and general description of services to be performed.

The instant petition was submitted on April 2, 2014. Thus, the petitioner's contract for services and attached addendum post-dates the petitioner's petition. On appeal, the petitioner states that the petitioner filed the present petition in "assumption of work." The petitioner, however, 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. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). As such, eligibility for the benefit sought must be assessed and weighed based on the facts as they existed at the time the instant petition was filed and not based on what were merely speculative facts not then in existence. The petitioner has thus not established that, at the time the petition was submitted, it had secured work for the beneficiary that would entail performing the duties as described in the petition and that was reserved for the beneficiary for the duration of the period requested.

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:

³ The execution dates of the agreement are both dated *after* the visa petition was filed.

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While the petitioner is certainly permitted to petition for H-1B classification on the basis of facts not in existence at the time the instant petition was filed, it must nonetheless file a new petition to have these facts considered in any eligibility determination requested, as the agency may not consider them in this proceeding pursuant to the law and legal precedent cited, *supra*.

We conclude that the record of proceeding provides an inadequate factual basis for us to determine that, at the time of the petition's filing, the petitioner had secured definite, non-speculative work for the beneficiary conforming to the petition's description of the proffered position. In view of the foregoing, the petitioner has not overcome the Director's basis for denying the petition. Accordingly, we will not disturb the Director's denial of the petition on this ground.

We also find that the evidence of record does not establish the substantive nature of the proffered position. USCIS 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 (in some instances) to comprise the duties of a specialty occupation, are not related to any actual services the beneficiary is expected to provide.

The petitioner claims in the LCA that the beneficiary will be performing the duties of a software developer, applications;⁴ however, the evidence submitted to corroborate the work to be

⁴ We recognize the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. The subchapter of the *Handbook* entitled "What Software Developers Do" states the following about this occupational category, in pertinent part:

performed by the beneficiary is devoid of software developing tasks. The Custom Web Application Maintenance and Support Agreement appears to be limited to maintenance and support to be provided by the petitioner to [REDACTED]. Specifically, the agreement states in the "Scope of Services" section that "[The petitioner] agrees to perform, and [REDACTED] agrees to accept, the maintenance and support services referred to in Exhibit A (Custom Programming and Application maintenance services for HFMA Web Applications) with respect to the Software." The addendum to that agreement provides the following:

Tasks performed as part of Monitoring:

1. Set up and maintenance of Production Environment
2. Weekly backups
3. 24/7 availability of the application
4. Maintaining the production environment up to date with regular software upgrades
5. Database Administration
 - a. Backups

Software developers are the creative minds behind computer programs. Some develop the applications that allow people to do specific tasks on a computer or other device. Others develop the underlying systems that run the devices or control networks.

Duties

Software developers typically do the following:

- Analyze users' needs, then design, test, and develop software to meet those needs
- Recommend software upgrades for customers' existing programs and systems
- Design each piece of the application or system and plan how the pieces will work together
- Create a variety of models and diagrams (such as flowcharts) that instruct programmers how to write the software code
- Ensure that the software continues to function normally through software maintenance and testing
- Document every aspect of the application or system as a reference for future maintenance and upgrades
- Collaborate with other computer specialists to create optimum software

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Software Developers, <http://www.bls.gov/ooh/computer-and-information-technology/software-developers.htm#tab-2> (last visited August 4, 2015).

- b. Performance Tuning
- 6. Modules
 - a. Website & Content Management
 - b. User Module
 - c. Admin Module
 - d. Reports Module

Without additional information describing the specific duties the petitioner requires the beneficiary to perform, USCIS is unable to discern the nature of the position and whether the position indeed qualifies as a specialty occupation. The job duties initially provided by the petitioner appear to be a list of the skills, experience, and strengths of a certain individual rather than the list of proposed duties of the proffered position. The duties provided in the [REDACTED] letter, the petitioner-provided duties, and the agreement/addendum tasks, taken as a whole, do not appear to be software developer, applications, duties. The evidence of record does not contain a sufficient explanation reconciling the statements made by the petitioner, [REDACTED] and the content of the agreement and addendum.

The petitioner has not provided sufficient detail regarding the nature and scope of the beneficiary's employment or substantive evidence regarding the actual work that the beneficiary would perform. Overall, the record does not establish the substantive nature of the work to be performed by the beneficiary, precluding 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.

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 for this additional reason.⁵

IV. CONCLUSION

As set forth above, we find that the evidence of record does not sufficiently establish that the petitioner had definitive, non-speculative work for the beneficiary at the time the petition was filed, and that the proffered position qualifies for classification as a specialty occupation. Accordingly, the appeal will be dismissed and the petition denied.

⁵ As the grounds discussed above preclude approval of the petition, we will not address additional issues and deficiencies that we observe in the record of proceeding.

An application or petition that does not 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 we conduct 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 the enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1037, *aff'd*, 345 F.3d 683; *see also BDPCS, Inc. v. Fed. Communications Comm'n*, 351 F.3d 1177, 1183 (D.C. Cir. 2003) ("When an agency offers multiple grounds for a decision, we will affirm the agency so long as any one of the grounds is valid, unless it is demonstrated that the agency would not have acted on that basis if the alternative grounds were unavailable.").

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, 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.