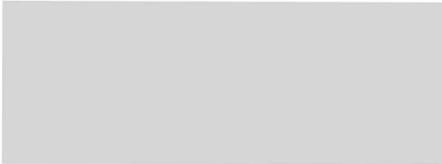




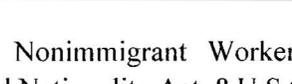
U.S. Citizenship
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Services

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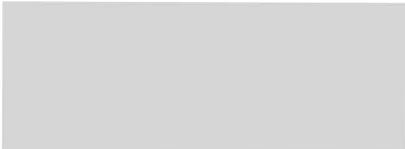
DATE: **AUG 07 2015**

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:



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 read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California 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 27-employee "IT" firm established in [REDACTED]. In order to employ the beneficiary in what it designates as a "Programmer Analyst" position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The Director denied the petition, finding the evidence insufficient to establish that the proffered position qualifies for classification as a specialty occupation position. On appeal, the petitioner asserts that the Director's basis for denial was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before us contains: (1) the Form I-129 and the supporting documentation; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the Director's denial letter; and (5) the Notice of Appeal or Motion (Form I-290B) and the supporting documentation. Upon review of the entire record of proceeding, we find that the Director did not err in denying this petition.¹ Accordingly, the appeal will be dismissed, and the petition will be denied.

II. THE PROFFERED POSITION

The Form I-129 states that the beneficiary will work at the petitioner's location in [REDACTED] Wisconsin from October 1, 2014 to August 29, 2017. In the Labor Condition Application (LCA) submitted to support the visa petition, the petitioner claims that the proffered position corresponds to the occupational category "Software Developers, Applications" SOC (ONET/OES) code 15-1132 at a Level I (entry) wage.

In a letter dated August 12, 2014, the petitioner stated that the proffered position "requires the theoretical and practical application of a body of specialized knowledge that can only be gained through completion of a Bachelor's degree in Management Information Systems, Computer Science or a related field (or its equivalent)." The petitioner also provided the following duties of the proffered position:

- Support application, senior application or business process consultants throughout a services engagement by constructing computer programs, either enterprise-wide or web.

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

- Learn basic application functionality from other [petitioner] team members.
- Write technical designs, logical program flow, database design, form/report layouts and actual code for new and existing systems by working closely with a senior application consultant, project leader and/or end-users.
- Contribute to instructions or manuals to inform end-users how computer programs execute.
- Understand basic business process and/or application solutions to support the operations of a business.
- Support other consultants and in some case author detailed system test procedures and execute those to prove out computer programs.
- Communicate with management and end-users in both verbal and written forms to clarify the intent of computer programs, suggest improvements and identify issues.
- Maintain familiarity with existing applications, business processes and technologies.

III. SPECIALTY OCCUPATION

The issue is whether the evidence of record establishes that the petitioner will employ the beneficiary in a specialty occupation position.

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

For H-1B approval, the petitioner must demonstrate that 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. It is incumbent upon the petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent, to perform duties at a level that requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.

In this matter, the petitioner indicated that the beneficiary will be employed in-house as a programmer analyst. However, upon review of the record of proceeding, we find that the petitioner did not provide sufficient, credible evidence to establish in-house employment for the beneficiary for the validity of the requested H-1B employment period. Specifically, the petitioner did not submit a job description to adequately convey the substantive work to be performed by the beneficiary.

For example, the petitioner did not provide any information with regard to the order of importance and/or frequency of occurrence the beneficiary would be performing the functions and tasks. The petitioner did not specify which tasks were major functions of the proffered position, and it did not establish the frequency 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.

Further, as reflected in the descriptions of the position as quoted above, the proffered position has been described in terms of generalized and generic functions that do not convey sufficient substantive information to establish the relative complexity, uniqueness and/or specialization of the proffered position or its duties. For example, the petitioner indicates that the beneficiary will "learn basic application functionality from other [petitioner] team members" and "understand basic business process and/or application solutions to support the operations of a business." The petitioner's description is generalized and generic in that the petitioner does not convey the substantive nature of the work that the beneficiary would actually perform, any particular body of

highly specialized knowledge that would have to be theoretically and practically applied to perform it, or the educational level of any such knowledge that may be necessary. The responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance. The abstract, speculative level of information regarding the proffered position and the duties comprising it is exemplified by the phrases "support application, senior application or business process consultants throughout a service engagement by constructing computer programs," "support other consultants and in some cases author detailed system test procedures and execute those to prove out computer programs," and "maintain familiarity with existing applications, business processes and technologies."

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. 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 duties as described by the petitioner do not establish that the work proposed for the beneficiary actually exists.²

² We further note that there the petitioner provided inconsistent information regarding the duties of the proffered position. Notably, in the LCA submitted with the petition, the petitioner indicated that the proffered position corresponds to the occupational category "Software Developers, Applications," SOC (ONET/OES) code 15-1132 at a Level I (entry) wage. A Level I wage rate is described as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

While the wage level indicates that the employee works under close supervision performing routine tasks that require only a basic understanding of the occupation, the petitioner indicated in response to the RFE the beneficiary will "*manage* the ongoing support contract with [the petitioner]'s offshore business partner" and "*review* ongoing needs and requirements...and *advise* the field consulting team." On appeal, the petitioner further claimed that "the petitioner has contracted [redacted] services, and Beneficiary will *oversee* these services." In other words, Level I wage-level designation appears to be inconsistent with the level of responsibilities required for the beneficiary. 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

Further, the petitioner has not established that it has non-speculative work for the beneficiary for the entire period requested that existed as of the time of the petition's filing. 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).

In the RFE dated May 27, 2014, the service center requested that the petitioner provide, *inter alia*: "evidence that demonstrates that [the petitioner has] sufficient specialty occupation work that is immediately available through the entire requested H-1B validity period" The service center provided a non-exhaustive list of evidence that might satisfy that request. That list included, "valid contracts, statements of work, service agreements, and letters between [the petitioner] and the ultimate end-client companies to whom the end-product or services worked on by the beneficiary will be delivered."

In response, the petitioner indicated that "[redacted] has been contracted to develop systems for Petitioner's use." The petitioner further asserted that the "[b]eneficiary will monitor these contracts, ensure code compliance, and assist with the integration of these new programs into the Petitioner's business practices." In support, the petitioner provided two copies of statement of work (SOW) between the petitioner and [redacted]. However, the first SOW was issued for 12 months of work to begin April 1, 2013; therefore, the work contracted for in that agreement appears to have ended before the beginning of the requested validity period of the instant petition. The second SOW was issued on April 1, 2014 for work to begin on April 1, 2014 and to continue for 36 months. However, neither the petitioner nor [redacted] signed the second SOW; therefore, there is insufficient evidence that it was ever ratified. Further, both SOWs state that they are addenda of a "Subcontractor Agreement" dated April 1, 2013; however, the subcontractor agreement is not in the record.

A petition must be filed for non-speculative work for the beneficiary for the entire period requested that existed as of the time of the petition's filing. 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). Again, 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. Here, the petitioner did not submit sufficient credible documentary evidence that it had specialty occupation work available for the beneficiary for the duration of the requested time period.³

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).

³ 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

Based upon a complete review of the record of proceeding, we find that the petitioner has not established (1) the actual work that the beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. Consequently, these material omissions preclude a determination that the petitioner's proffered position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions. There is a lack of probative evidence substantiating the petitioner's claims with regard to the duties, responsibilities and requirements of the proffered position.

That the petitioner did not 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.

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

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.

IV. CONCLUSION

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.⁴

ORDER: The appeal is dismissed.

⁴ Since the identified basis for denial is dispositive of the petitioner's appeal, we will not address additional grounds of ineligibility we observe in the record of proceeding.