



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **AUG 10 2015**

PETITION RECEIPT #: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[Redacted]

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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition. The matter is now before the Administrative Appeals Office (AAO) 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 49-employee "Advanced Computer Software Development & Consulting" business established in [REDACTED]. In order to employ the beneficiary in what it designates as a full-time "Sr. Quality Assurance Analyst " position at a salary of \$65,000 per year, 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 petitioner indicated on the Form I-129 that the beneficiary will work off-site at the address of [REDACTED], Minnesota.

The Director denied the petition, concluding that the evidence of record does not demonstrate that: (1) the proffered position qualifies for classification as a specialty occupation; and (2) the beneficiary is qualified for the proffered position. The petitioner now files this appeal, asserting that the Director's denial was erroneous.

The record of proceeding contains the following: (1) the Form I-129 and supporting documentation; (2) the Director's requests for additional evidence (RFEs); (3) the petitioner's responses to the RFEs; (4) the Director's letter denying the petition; (5) the Notice of Appeal or Motion (Form I-290B) and documentation in support of the appeal.

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 Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a senior quality assurance analyst, and that it corresponds to Standard Occupational Classification (SOC) code and title "15-1199, Computer Occupations, All Other" from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level II position. The petitioner later clarified that the proffered position has been classified even more specifically under the O*NET subset code and title of "15-1199.01, Software Quality Assurance Engineers and Testers."

The petitioner submitted, *inter alia*, a letter, dated June 4, 2014, describing the duties of the proffered position as follows:

We intend to employ the beneficiary . . . in the position of Sr. Quality Assurance

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

Analyst. As such, Sr. Quality Assurance Analyst will be required to plan, analyze, develop, program, test and document software computer programs. The following will be the duties he is expected to fulfill:

- Analyze business requirements and system design specifications to determine feasibility of testing services within time and cost constraints.
- Confer with business analysts, technical engineers, architects and others to design system and to obtain information on project limitations and capabilities, performance requirements and interfaces.
- Understand the system to lead testing and validation activities and develop test scripts.
- Develop, document and maintain test scripts and other test artifacts like the test data.
- Develop and maintain test plans for projects. Facilitate test plan review meetings with cross-functional team members.
- Interact with Business teams to analyze and test business applications.
- Execute and evaluate manual or automated test scripts and report test results.
- Analyze Extensible Markup Language and Oracle Databases to ensure the quality of the product.
- Identify issues and defects and log them in [REDACTED], escalate the issues to the project management for resolution.
- Ensure requirement traceability to defects and test scripts for quality coverage.

In the same letter, the petitioner stated that it has "the sole right to control the Beneficiary's work," including the ability to hire, fire, supervise, evaluate, and claim him for tax purposes. The petitioner affirmed that it is "solely responsible for the overall direction of the Beneficiary's work and has the sole authority to control the manner and means in which the work product of the Beneficiary is accomplished." The petitioner elaborated:

[The petitioner] further certifies that this employer-employee relationship will continue to [exist] even when [the beneficiary], at any given time, is assigned to a client location. In such an event, Petitioner will maintain right to control over when, where, and how the Beneficiary performs the job through inbuilt mechanisms such as periodic status reports, timesheets, performance evaluation, off-site supervision using phone calls, reporting back to main office, or site visit by the Petitioner.

The petitioner submitted a letter from the end-client, [REDACTED] of Minnesota, dated March 28, 2014, confirming the beneficiary's placement at [REDACTED] in the capacity of a senior quality assurance analyst. The letter listed the same job duties as those listed in the petitioner's letter dated June 4, 2014. It also stated that the beneficiary will be an employee of the petitioner. The letter concluded: "Although on-site manager assigns

general direction, [the petitioner] is responsible for [the beneficiary's] supervision off-site through timesheet approvals, status reports and calls and also for providing instruments or software on as and-when needed basis [*sic*]."

The petitioner also submitted a letter from the vendor, [REDACTED], dated March 31, 2014. The contents of this letter are identical to the March 28, 2014 letter from the end-client.

III. SPECIALTY OCCUPATION

We will now address whether the position proffered here qualifies for classification as a 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.

We note that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. See *Defensor v. Meissner*, 201 F.3d at 387-388. The court held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

B. Analysis

Here, the petitioner indicated that the beneficiary will be assigned to work off-site for the end-client, [REDACTED] of Minnesota, for the entire validity period requested. However, there is insufficient explanation and documentation illuminating what exactly the beneficiary would be doing for [REDACTED] of Minnesota.

For instance, the proffered job duties – as identically listed by the end-client, petitioner, and mid-vendor – are stated in overly broad and duplicative terms that fail to convey the substantive nature of the proffered position and its constituent duties.² The abstract level of information provided about the proffered position and its constituent duties is exemplified by the duty of "[a]nalyze business requirements and system design specifications to determine feasibility of testing services within time and cost constraints." There is no detailed description of the specific tasks the beneficiary will perform on a day-to-day basis and the complexity of such duties. There is no explanation of what these business requirements, system design specifications, and testing services are. As another example, the beneficiary is also responsible for "[understanding] the system to lead testing and validation activities and develop test scripts." However, there is no detailed explanation such as what "system" the beneficiary will be testing and validating, what specific tasks he will perform, the complexity of these tasks, and who the beneficiary will "lead." Numerous other job duties also involve the development of test scripts, test artifacts and test plans, but the petitioner has not sufficiently distinguished the job duties from one another.

² The use of identical language and phrasing across the letters suggest that the language in the letters is not the authors' own. Cf. *Surinder Singh v. BIA*, 438 F.3d 145, 148 (2d Cir. 2006) (upholding an adverse credibility determination in asylum proceedings based in part on the similarity of the affidavits); *Mei Chai Ye v. U.S. Dept. of Justice*, 489 F.3d 517, 519 (2d Cir. 2007) (concluding that an immigration judge may reasonably infer that when an asylum applicant submits strikingly similar affidavits, the applicant is the common source).

In addition, the petitioner has not identified the name, nature, and number of projects to which the beneficiary would be assigned at [REDACTED] of Minnesota. Both the letters from the end-client and the mid-vendor state simply that "[t]he duration of this project is ongoing and is expected to exceed three years," but provided no further details regarding the "project." And contrary to the statement in the end-client and mid-vendor letters that the beneficiary would be assigned to a "project" in the singular, the beneficiary's Employee Work Status Reports indicate that the beneficiary has already been assigned to multiple projects, including the [REDACTED] project that was implemented and closed out in November 2014, and a "new projected related to [REDACTED] - [REDACTED]

Significantly, the petitioner did not submit a copy of the Purchase Order under which the beneficiary was contracted to work for the end-client. According to the Supplier Partner Agreement between the petitioner ("Supplier Partner") and the mid-vendor, "[n]o work or services by Supplier Partner or Supplier Partner Personnel shall be subject to compensation by Contractor or Contractor's Client unless and until set forth in Purchase Orders signed by authorized representatives of each party." The same Supplier Partner Agreement indicates that a Purchase Order was executed on September 13, 2013, and attached as Exhibit A. Without the actual Purchase Order or other sufficient documentation from the end-client, the evidence of record does not adequately establish the beneficiary's actual job duties at [REDACTED] of Minnesota.

The evidence of record is also unclear as to what the beneficiary would be doing beyond his assignment at [REDACTED] of Minnesota. In particular, the petitioner's Employment Offer letter to the beneficiary states that "[w]e intend to employ you for designing, implementing and ensuring the Software Quality of Business systems at [the petitioner] and many of our *clients* (plural emphasized)." The Employment Offer similarly states that "[t]he overall function of the occupation is to develop and maintain software projects in-house . . . or with various related business *partners* (plural emphasized)." In contrast, the petitioner indicated that the beneficiary would only be assigned to work for [REDACTED] of Minnesota during the validity period requested. The petitioner has not identified any other end-clients to whom the beneficiary would be assigned. Nor has the petitioner specifically claimed that the beneficiary would be assigned to any of its own in-house projects.³ We further observe the provision in the petitioner's Employment Agreement with the beneficiary stating that "[a] description of the employee's duties is not commonly provided as they may change over time." Overall, the petitioner has not sufficiently explained and documented the job duties to be performed by the beneficiary for the entire validity period requested.

Based on the above, we find the evidence of record insufficient to establish the substantive nature of the work to be performed by the beneficiary. Consequently, we are unable to make 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

³ While the LCA listed the petitioner's office as one of two places of employment, the petitioner did not otherwise claim that the beneficiary would be working on-site at its office premises.

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 evidence does not satisfy 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 reason, the petition will be denied.

IV. EMPLOYER-EMPLOYEE RELATIONSHIP

Since the identified basis for denial is dispositive of the petitioner's appeal, we need not address another ground of ineligibility we observe in the record of proceeding. Nevertheless, we will briefly note and summarize it here with the hope and intention that, if the petitioner seeks again to employ the beneficiary or another individual as an H-1B employee in the proffered position, it will submit sufficient independent objective evidence to address and overcome this additional ground in any future filing.

The evidence of record is insufficient to establish that the petitioner will have an employer-employee relationship with the beneficiary. That is, the record of proceeding does not contain sufficient documentation describing the circumstances of the beneficiary's assignment at [REDACTED] of Minnesota. As previously discussed, the record does not contain the Purchase Order under which the beneficiary was contracted to work. While the letters from the end-client and mid-vendor contain identical statements regarding the petitioner's employer-employee relationship with the beneficiary, these letters provide little factual information describing *in detail* how the petitioner would supervise and otherwise control the beneficiary's day-to-day work performed at the client's worksite.

Moreover, there are inconsistencies with respect to the extent of the petitioner's control over the beneficiary's off-site work. The petitioner indicated in its June 4, 2014 letter that it has exclusive authority and control over the beneficiary, stating that it has the "sole right to control the Beneficiary's work" and that it is "solely responsible for the overall direction of the Beneficiary's work and has the *sole* authority to control the manner and means in which the work product of the Beneficiary is accomplished (emphasis added)." On the other hand, the letters from the end-client and mid-vendor state that the "on-site manager assigns general direction." We observe that all of the beneficiary's Employee Work Status Reports require the signature of a [REDACTED] of Minnesota employee or agent. Even the Employment Agreement between the petitioner and the beneficiary indicates that the beneficiary would receive some direction from the end-client(s) or

other parties.⁴ The petitioner has not explained and submitted competent evidence reconciling these apparent inconsistencies and pointing to where the truth lies.

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.*

The evidence is therefore insufficient to establish that the petitioner qualifies as a United States employer having an employer-employee relationship with the beneficiary. Thus, even if the proffered position were found to be a specialty occupation, the petition could not be approved for this additional reason.

V. BENEFICIARY QUALIFICATIONS

The Director also found that the beneficiary would not be qualified to perform the duties of the proffered position if the job had been determined to be a specialty occupation. However, a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the proffered position does not require a baccalaureate or higher degree in a specific specialty, or its equivalent. Therefore, we need not and will not address the beneficiary's qualifications further, except to note additional deficiencies with respect to the evaluation of academic qualifications and experience from Professor [REDACTED] Assistant Professor and Director of Graduate Program MS Strategic Design and Management, School of Design Strategies, at [REDACTED]

More specifically, there is insufficient evidence that Professor [REDACTED] has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(I). The letter from [REDACTED] Dean of the School of Design Strategies, [REDACTED] states that Professor [REDACTED] "is routinely responsible for evaluating the academic credentials of foreign applicants" and that "he has the authority to award credit based upon students' professional experience." The letter further states that [REDACTED] has divisions that allow for credit to be awarded based on experience." The letter does not specify, however, the type of credit he has the authority to award, and in which divisions of [REDACTED] he has authority to grant such credit. As such, we cannot conclude

⁴ For instance, under Part 5, "Conduct, Rights and Obligations," the Employment Agreement states that "[e]mployees are obligated to submit an itinerary of services to [their] supervisor at [the petitioner] at the beginning of [their assignment] with [the petitioner] or any one of its Clients." Part 7, "Employee Obligation," likewise states that "[employees] are obligated to submit [an] Itinerary of service at the beginning of [their] contract explaining [their] tasks, duties and responsibilities for the period of the contract."

that Professor [REDACTED] has authority to grant college-level credit in the specialty, as required by the plain language of 8 C.F.R. § 214.2(h)(4)(iii)(D)(I).

VI. CONCLUSION AND ORDER

As set forth above, we find that the evidence of record does not establish that the proffered position qualifies for classification as a specialty occupation. We also find insufficient evidence to establish an employer-employee relationship between the petitioner and the beneficiary. Accordingly, the petition will be denied.⁵

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.

⁵ As these issues preclude approval of the appeal, we will not address any of the additional deficiencies we have identified on appeal.