



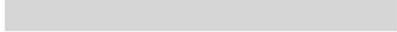
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **AUG 10 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:



INSTRUCTIONS:

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, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

I. PROCEDURAL BACKGROUND

On the Form I-129 visa petition, the petitioner describes itself as a 20-employee "IT & Engineering Consulting" company established in [REDACTED].¹ In order to employ the beneficiary in what it designates as a software engineer position at a salary of \$60,000 per year,² 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, concluding that the evidence of record did not establish that (1) the petitioner would have an employee-employer relationship with the beneficiary; and (2) the proffered position qualifies as a specialty occupation.

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

Upon review of the entire record of proceeding, we find that the evidence of record does not overcome the Director's bases for denying this petition.³ Accordingly, the appeal will be dismissed, and the petition will be denied.

II. SPECIALTY OCCUPATION

To meet the petitioner's burden of proof in establishing the proffered position as a specialty occupation, the evidence of record must establish that the employment the petitioner is offering to the beneficiary meets the following statutory and regulatory requirements.

¹ The record contains documentation from the State of Texas indicating that [REDACTED] requested permission to conduct business under the assumed name of [REDACTED] in February 2011, and as [REDACTED] in June 2014.

² The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the "Software Developers, Systems Software" occupational classification, SOC (O*NET/OES) Code 15-1133, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels.

³ In the exercise of our administrative review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010), unless the law specifically provides that a different standard applies.

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. The Proffered Position

In its support letter, the petitioner stated that the beneficiary's duties would include the following:

[The beneficiary's] specific duties will include: (i) analyzing requirements, procedures and problems to automate processing and to improve existing computer systems; (ii) designing, coding, testing, and implementing functionally appropriate applications and database parameters; [(iii)] conferring with company personnel to analyze current operational procedures, identify problems, and learn specific requirements; (iv) performing technical research on new and existing software products suitable to the Company's expanding needs; (v) testing and implementing system changes using programming techniques that preserve system integrity;

(vi) developing secure interfaces with sophisticated security solutions with detection and auditing capabilities; (vii) testing and troubleshooting technical issues on multiple operating platforms; (viii) training end-users and answering questions regarding use of various software applications; and (ix) modifying database programs to increase processing performance.

The petitioner further stated that the beneficiary's position "requires him to work both in-house and on client's site, and additional job duty may include travel to various local and national companies to provide software-developing services." In response to the RFE, however, the petitioner stated that the beneficiary would work solely in-house at the petitioner's Houston office. On appeal, counsel restated the petitioner's initial claim that the beneficiary would work both in-house and at a client's site.

C. Analysis

For H-1B approval, the petitioner must demonstrate a legitimate need for an employee exists and to 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 software engineer. 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.

The petitioner has provided inconsistent information regarding whether the beneficiary would be employed as an in-house employee or whether he would be assigned to off-site projects at an end-client's location. Although the petitioner initially stated that the beneficiary will not work off-site⁴ and stated that the address of the work location will be the same as the petitioner's address stated in Part I, in its support letter the petitioner stated that the proffered position would require the beneficiary to work "both in-house and on client's site, and additional job duties may include travel to various local and national companies to provide software-developing services." The petitioner did not explain this inconsistency. Furthermore, the petitioner did not specify a particular project upon which the beneficiary would work. Nor did the petitioner provide specific information regarding any particular end-client or project to which the beneficiary would provide services. 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,

⁴ On the Form I-129, the petitioner checked the box "No" to the question of whether the beneficiary would work off-site.

591-92 (BIA 1988). When a petition includes errors and discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id* at 591.⁵

In response to the Director's RFE, the petitioner submitted a document entitled "Master Professional Services Agreement" (Agreement) executed between the petitioner and [REDACTED] on May 15, 2012. According to this Agreement, the specified contract period would automatically renew for consecutive one-year terms until terminated by the parties. The petitioner referred to this agreement as a "sample" agreement. The petitioner also submitted documents entitled "Project Work Description," which identified specific employees of the petitioner assigned to specific projects in 2012. None of the documents in the record of proceeding identify the beneficiary as an employee assigned to a project.

On appeal, the petitioner submitted an agreement executed with [REDACTED] on August 13, 2014. The petitioner did not assert that the beneficiary would work on a project pursuant to this agreement. According to this agreement, the petitioner would provide individuals to [REDACTED] who would "work at [REDACTED] or places any individual for direct hire in any positions at [REDACTED]. The agreement further states that "candidate names, background, interview schedule, performance evaluation, reports, and historical data [shall] comply with [REDACTED] benchmark for work order approval under the [REDACTED] Agreement." However, the record of proceeding lacks detailed information regarding any project associated with [REDACTED] for which the petitioner would provide services. Nor did the petitioner submit any work orders identifying the beneficiary as the individual who would provide services pursuant to this agreement. The agreement between [REDACTED] and the petitioner provides no insight into the project to be performed for [REDACTED] or the duties related to such project.⁷ Moreover, the record does not contain any agreements between [REDACTED] and [REDACTED].

⁵ In addition, the uncertainty regarding the beneficiary's actual employment location calls into question the validity of the LCA.

⁶ Although the petitioner asserts that the beneficiary would be an in-house employee, the language of this agreement is in conflict with the petitioner's assertion.

⁷ Furthermore, this agreement would be insufficient to demonstrate that the petitioner secured specialty occupation work for the beneficiary at the time the petition was filed with USCIS.⁷ 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)(12). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). The agency made clear long ago that speculative employment is not permitted in the H-1B program. 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 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

Furthermore, the petitioner did not submit a job description which adequately conveys the substantive work to be performed by the beneficiary. Rather, the petitioner described 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 analyze "requirements, procedures and problems to automate processing and to improve existing computer systems," perform "technical research on new and existing software products suitable to the company's expanding needs," and test and troubleshoot "technical issues on multiple operating platforms." However, these statements provide no insight into the beneficiary's actual duties, nor do they include any information regarding the specific tasks that the beneficiary will perform for a specific project. The petitioner also states that the beneficiary will "modify" database programs, but does not explain the beneficiary's specific duties and responsibilities in relation to the project on which he will work.

This deficiency is again illustrated by the petitioner's statement that the beneficiary will train end-users regarding the use of various software applications. The petitioner does not describe the beneficiary's specific role in such training activities or explain how the training will be conducted and/or applied within the scope of the petitioner's business operations and the proffered position. 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. Accordingly, without further information, the petitioner has not credibly conveyed how it would be able to sustain an employee performing this duty at the level required for the H-1B petition to be granted. That is, the overall 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 within the petitioner's business operations.

This type of generalized description may be appropriate when defining the range of duties that may be performed within an occupational category, but it does not adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations and, thus, cannot be relied upon by a petitioner when discussing the duties attached to specific employment. 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 business

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.

operations, 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.

Without a meaningful job description, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. The tasks as described fail to communicate (1) the 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.

Based on the above reasons, including the lack of reliable, detailed information and documentation regarding in-house project and the specific duties the beneficiary will perform on it, we find the evidence of record insufficient to establish that the beneficiary will perform duties on an in-house project, as claimed. Similarly, the record does not contain sufficient information to establish an end-client and the duties the beneficiary would perform at an end-client's location. Thus, we find that the evidence of record is insufficient to establish the substantive nature of the work to be performed by the beneficiary.

The record of proceeding in this case does not contain sufficient information regarding an in-house project or a project at an end-client's location. The record does not establish the substantive nature of the work to be performed by the beneficiary, which 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 record of proceeding does not establish 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 reason, the appeal will be dismissed.

III. EMPLOYER-EMPLOYEE RELATIONSHIP

The Director also concluded that the record of proceeding did not establish that the petitioner meets the regulatory definition of a "United States employer" as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). We reviewed the record of proceeding to determine whether the petitioner has established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." *Id.*

More specifically, section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant in pertinent part as an alien:

subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . ., who meets the requirements for the occupation specified in section 214(i)(2) . . ., and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1)

The term "United States employer" is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows (emphasis added):

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) *Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and*
- (3) Has an Internal Revenue Service Tax identification number.

8 C.F.R. § 214.2(h)(4)(ii); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

The United States Supreme Court determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

"In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

Darden, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); *see also Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 445

(2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

As discussed above, although the petitioner claims that the beneficiary will be employed as an in-house employee, it also indicated that that the beneficiary would work off-site at end-clients' locations, and submitted two agreements into which it entered with various companies. It is not clear from the evidence submitted that there is an in-house project for the beneficiary to perform. The record contains insufficient information identifying a specific in-house project. Nor does the record contain sufficient information regarding a specific end-client to which the beneficiary might be assigned and information outlining in detail the nature and scope of the beneficiary's employment at an end-client's location. Therefore, the key element in this matter, which is who exercises control over the beneficiary, has not been substantiated. While the record contains multiple assertions regarding the petitioner's right to control the work of the beneficiary, simply 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). The record contains insufficient evidence to demonstrate that the requisite employer-employee relationship would exist between the petitioner and the beneficiary.

As such, while social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. Without further evidence of all of the relevant factors, we are unable to properly assess whether the requisite employer-employee relationship exists between the petitioner and the beneficiary. Therefore, the appeal is dismissed for this reason as well.

IV. CONCLUSION AND ORDER

The petition will be denied and the appeal dismissed for the above stated reasons.⁸ 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.

⁸ 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.