



U.S. Citizenship
and Immigration
Services

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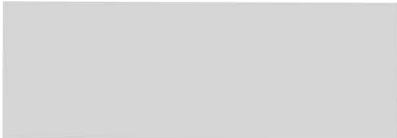
DATE: AUG 18 2015

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

I. PROCEDURAL BACKGROUND

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a software development and consulting firm established in [REDACTED] with 32 employees. In order to employ the beneficiary in what it designates as a programmer analyst, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on August 7, 2014, concluding that the evidence of record does not demonstrate that (1) a valid Labor Condition Application (LCA) was filed to cover all work locations;¹ (2) the proffered position qualifies as a specialty occupation; and (3) a bona fide offer of employment existed at the time of filing.²

The record of proceeding before us contains: (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 notice of decision; (5) the Form I-290B and supporting documentation for an appeal and supporting documentation. We reviewed the record in its entirety before issuing our decision.³

For the reasons that will be discussed below, we agree with the director's decision that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed.

II. SPECIALTY OCCUPATION

A. Legal Framework

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this

¹ Upon review of the file, we find that the LCA covers all work locations; therefore, we withdraw the Director's finding on this issue.

² The Director also found that the beneficiary did not maintain nonimmigrant status in the United States. On appeal, the petitioner asserts that the Director erred in finding that the beneficiary had not maintained his nonimmigrant status. However, we have no jurisdiction over this matter, as issues surrounding the beneficiary's maintenance of nonimmigrant status are within the sole discretion of the director. Accordingly, we will not address this issue.

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

regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. See *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); see also *COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-*

F-, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. See *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

B. The Proffered Position and Employment Locations

On the Form I-129, the petitioner indicated that it is seeking the beneficiary's services as a programmer analyst on a full-time basis at the rate of pay of \$60,000 per year. The petitioner stated that it is located in [REDACTED] VA, but the beneficiary will work at "client sites as assigned," and in [REDACTED] NC." The LCA filed in support of the petition indicates that the occupational classification for the proffered position is "Computer Programmers" – SOC (ONET/OES Code) 15-1131. The LCA is certified for work locations in [REDACTED] NC, and [REDACTED] VA.

In the letter dated March 29, 2014, the petitioner referred to the proffered position as a programmer analyst and also a QA analyst. The petitioner also stated that "[the beneficiary] currently has an assignment in [REDACTED] NC with the End Client, [REDACTED]. Our client, [REDACTED] has entered into agreement with us for the beneficiary's services in the position offered to the End client." The petitioner provided the following job description for the proffered position:

- Collaborate with business users on requirements clarification and development of test scenarios for testing of the IT applications.
- Participate in functional design reviews with the business users, developers, functional systems analysts, Test PM and Lead.
- Work closely with business users, systems analysts and development teams to map requirement functional design and test scenarios to develop standard test cases.
- Analyze web based and client server applications and processes to perform end-to-end testing.
- Develop the overall software test strategy, deploy test plans for operating environments, deploy test plans for applications, and deliver reporting on test results in order to enable efficient defect repair.
- Develop automation framework for regressing testing. Execute weekly user and end-to-end testing.
- Development of driver applications to support open source tools used in enterprise code development for supporting tools.
- Create Recovery scenarios to handle exceptions.
- Execute performance testing of several other in-house web based applications.
- Create and execute Load Runner scenarios for load, endurance, stress and capacity testing of web applications.
- Develop QTP web services scripts using HP service test tool for functional testing.

In response to the RFE, the petitioner stated that the project in [REDACTED] NC, was terminated and the beneficiary will be assigned to a new project. The petitioner further indicated that the beneficiary would work with [REDACTED] to provide services for a project with the [REDACTED] (the end client) and the services will be provided at the end client location in [REDACTED] and also at its office located in [REDACTED]

C. Discussion

In ascertaining the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R.

[REDACTED] and [REDACTED] VA are within the same metropolitan statistical area.

§ 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

As recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the end client's job requirements is critical. See *Defensor v. Meissner*, 201 F.3d at 387-388. That is, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location in order to properly ascertain the minimum educational requirements necessary to perform those duties. *Id* at 387-388. The court held that the former INS 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.

Upon review of the totality of the record, we find that the record lacks substantive evidence establishing that, at the time the petition was filed, the petitioner had secured non-speculative work for the beneficiary that corresponds with its claims regarding the work to be performed.

The petitioner initially indicated that the beneficiary would be working as a programmer analyst with [REDACTED] to work for the end client, [REDACTED] in [REDACTED] NC, through [REDACTED]. In support, the petitioner submitted a professional services agreement and a letter dated March 18, 2014 from [REDACTED]. The letter states "[p]lease accept this letter as a written confirmation that [REDACTED] has a direct contractual relationship with [REDACTED]. It further states [REDACTED] believes [the beneficiary]'s project will continue for an extended period of time." Notably, [REDACTED] is making claims on behalf of [REDACTED] to validate the beneficiary's assignment; however, there is no evidence in the record to establish that [REDACTED] has the authority to make claims on behalf of [REDACTED]. Moreover, the evidence in the record does not support [REDACTED] claims. Specifically, the record contains a document entitled an "Amendment to the Sub-Contracting Agreement" between [REDACTED] Limited located in India, and [REDACTED]. The document is substantially redacted, and there is no information in the document pertinent to the project in [REDACTED] NC, such as the scope of services, personnel, dates of service, work location and more. Moreover, the petitioner did not submit any documents from [REDACTED] the end-client, to corroborate the proposed assignment for the beneficiary. The record does not contain any information from the end-client regarding the proposed job duties to be performed at its location. In other words, at the time of filing, there is no evidence in the record that substantiates a bona fide assignment for the beneficiary in [REDACTED] NC.

As mentioned, in response to the RFE, the petitioner indicated that the beneficiary's assignment in [REDACTED] NC has been terminated. The petitioner further stated that the beneficiary will now be assigned to [REDACTED] in [REDACTED] through its client, [REDACTED].

In support, the petitioner submitted a Master Services Agreement (MSA) between [REDACTED] and [REDACTED], dated October 21, 2011. Under Article 1 – Scope of Work, the agreement stated that "each [REDACTED] Consultant shall provide professional services to Client as defined in the Statement of Work (SOW) attached hereto as Exhibit 'A' agree to and made part of this Agreement." It further states that "the attached SOW will define the general scope of the work to be performed including the duration and Client billing rates." The MSA is followed by a SOW, marked Exhibit A. However, information regarding name of the consultant, start date or period of performance is left blank and there is no additional information regarding the scope of work or the duration of the project.

The petitioner also submitted a subcontractor agreement between the petitioner and [REDACTED] entered into on March 27, 2014. Under Article 1 – Services, the agreement stated that "[the petitioner] agrees to perform for [REDACTED] the services listed in the Scope of Work (SOW) shown in Exhibit A, attached hereto and executed by both [REDACTED] and Subcontractor." However, Exhibit A is not attached and a SOW pursuant to this agreement is not provided.

Further, the petitioner submitted a letter dated July 22, 2014 from [REDACTED] Director of Business Development at [REDACTED] [REDACTED] indicated that the beneficiary will provide professional services as a QA Analyst/Software Test Engineer. Notably, this is inconsistent with the petitioner's claim that the proffered position is for a programmer analyst. The letter stated that "[b]ased on the intricate knowledge of the progression of [the beneficiary's] project, and the current phase of the project, [REDACTED] believes [the beneficiary's] project will continue for an extended period of time." We find that the letter does not provide sufficient information to establish that the beneficiary will be employed through September 8, 2017 as requested on the Form I-129. The petitioner did not provide sufficient documentation to establish the length of this project and whether the beneficiary would be placed on this project for the entire period of employment requested on the Form I-129. 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)).

[REDACTED] also provided a revised job description for the beneficiary as follows:

- Analyze the architectural infrastructure of the different applications and develop appropriate test cases.
- Develop and execute test cases for Regression, Cross-browser, User Interface, and Functional testing for all phases of the project.
- Test the UI on mobile, PC, tablets and Android platforms to ensure functionality meets the requirements and test the compatibility of the application across different web browsers (Google Chrome, Firefox and Internet Explorer).
- Troubleshoot and test Secure Browser application compatibility based on version

and environment.

- Test mobile applications in Native and Web environments and validate the mobile application functionality on physical smart phone hardware devices.
- Executive complex SQL queries and perform data fetches as and when required.
- Use software to log and report defects found on multiple platforms; submit detailed reports outlining the steps and requirements for reproducing defects to add to future test cases.
- Participate in defect fix verification and project status meetings.

We note that the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, its associated job responsibilities, or the requirements of the position. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather revised the job description and its position.

The petitioner also submitted email correspondence from [REDACTED] that mentioned the beneficiary's name as a possible team member for [REDACTED] however, it does not provide additional details regarding the beneficiary's position, proposed duties, requirements for the position or duration of the project.

Further, we note that for H-1B classification, the petitioner is required to submit written contracts between the petitioner and the beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the beneficiary will be employed. See 8 C.F.R. § 214.2(h)(4)(iv)(A) and (B). In response to the RFE, the petitioner submitted an employment letter. However, the employment letter is an offer for employment that is effective from February 26, 2014 to September 7, 2014. The Form I-129 requested employment until September 8, 2017, thus, this offer letter conflicts with the information on the Form I-129. 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).

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.⁵

We further find that the evidence of record does not establish (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. 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 proffered position.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary, therefore, precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion

⁵ 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 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 a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

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 4.⁶

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation.⁷

III. 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.

ORDER: The appeal is dismissed.

⁶ We note that even if we were able to conclude that the proffered position is a computer programmer position as designated in the LCA, the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)* does not support the assertion that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into positions within this occupational category. This passage of the *Handbook* reports that most computer programmers have a bachelor's degrees, but the *Handbook* continues by indicating that some employers hire individuals who have an associate's degree. Accordingly, as the *Handbook* indicates that working as a computer programmer does not normally require at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation, the *Handbook* does not support the proffered position as being a specialty occupation.

We recognize the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. All of our references to the *Handbook* are to the 2014 – 2015 edition available online.

⁷ Since the identified basis for denial is dispositive of the petitioner's appeal, we will not address other grounds of ineligibility we observe in the record of proceeding.