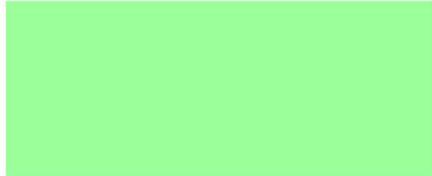
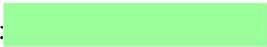


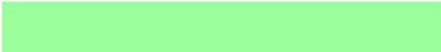


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **FEB 06 2015** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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 please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

I. PROCEDURAL AND FACTUAL BACKGROUND

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as an 8,000-employee "IT Consulting" firm established in [REDACTED]. In order to employ the beneficiary in what it designates as an "Applications Consultant-1" 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 that the petitioner failed to establish that the beneficiary is qualified for the proffered position. On appeal, counsel asserted that the director's basis for denial was erroneous and contended that the petitioner satisfied all evidentiary requirements. In support of these contentions, counsel submitted a brief and additional evidence.

We base our decision upon our review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

II. THE LAW

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), 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.

With respect to beneficiary qualifications, section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In implementing section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In addition, 8 C.F.R. § 214.2(h)(4)(v)(A) states:

General. If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

Therefore, to qualify an alien for classification as an H-1B nonimmigrant worker under the Act, the petitioner must establish that the beneficiary possesses the requisite license or, if none is required, that he or she has completed a degree in the specialty that the occupation requires. Alternatively, if a license is not required and if the beneficiary does not possess the required U.S. degree or its foreign degree equivalent, the petitioner must show that the beneficiary possesses both (1) education, specialized training, and/or progressively responsible experience in the specialty equivalent to the completion of such degree, and (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

III. EVIDENCE

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is an "Applications Consultant-1" position, and that it corresponds to Standard Occupational Classification (SOC) code and title 15-1132, Software Developers, Applications from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a wage Level II position.

With the visa petition, counsel submitted evidence that the beneficiary received a bachelor's degree in mechanical engineering from [REDACTED] in India and a master's degree in industrial engineering from [REDACTED] Texas.

Counsel also submitted (1) an organizational chart of the petitioner's operations; (2) an employment offer, dated October 21, 2013, sent by the petitioner to the beneficiary; (3) an employment agreement, which purports to have been executed by the petitioner's human resources director on October 21, 2013 and by the beneficiary on October 23, 2012;¹ (4) a letter, dated March 3, 2014, from [REDACTED] the petitioner's senior manager; and (5) a letter, dated March 31, 2014, from [REDACTED] the petitioner's immigration paralegal.

The October 21, 2013 employment offer states that in the event that the beneficiary is unable to satisfy the requirements of the requisite background investigation and unable to resolve any issues to the petitioner's satisfaction, the petitioner may, *inter alia*, assign the beneficiary to a different position. We observe that this would likely be contrary to the terms and conditions of H-1B employment.

In his March 3, 2014 letter, [REDACTED] states:

[The petitioner] wishes to employ [the beneficiary] for the position of Applications Consultant-1 with the following duties: participate in global rollouts and new implementations including process system design, Integration testing, user training and post go-live support; facilitate blue printing, design sessions and create functional requirements; perform gap-analysis against existing system as well as net new business requirements; responsible for develop functional specifications of WRICEF (Workflow, Report, Interface, Conversion, Enhancement and Forms; prepare testing strategy and scripts and perform unit, integration and regression testing. Coordinate and drive end-user training; deliver hands-on day –to –day global production support including coordinate with SME's offshore consultants and SAP OSS; configure SA{ MM/WM systems to meet clients business requirement including integration points FI, CO PROFFERED POSITION, SD, GTS and APO; design functional specifications for USER EXITS, BADI's, BAPI's and EDI&IDOCs; responsible for incident managements, change management and Root Cause analysis documentation repository.

[Verbatim.]

As to the location where the beneficiary would work, Mr. [REDACTED] stated:

[The beneficiary] will be working from [the petitioner's] office located at: [REDACTED]
Please note that [the beneficiary's] work activities in the U.S. will not be performed at a third party site.

¹ We believe that the beneficiary dated his signature incorrectly. All of the indices in the record suggest that it should have been dated on or about October 23, 2013.

Mr. [REDACTED] also stated that he would be "responsible for providing [the beneficiary] with access to the *work locations*" [Emphasis added.] We observe that the use of the plural suggests that the beneficiary will work in more than one location.

In her March 31, 2014 letter, [REDACTED] reiterated [REDACTED] description of the duties of the proffered position and the statement about the beneficiary working only at the petitioner's [REDACTED] Missouri location. She also reiterated that [REDACTED] "will be responsible for providing [the beneficiary] access to the *work locations*" [Emphasis added.]

On April 28, 2014, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation and evidence that the beneficiary is qualified to work in the proffered position. The service center provided a non-exhaustive list of items that might be used to satisfy the specialty occupation requirements.

In response, counsel provided: (1) an announcement of a vacancy in the proffered position; (2) three vacancy announcements for positions with other companies; (3) a Statement of Work (SOW) dated April 30, 2013 and executed May 3, 2013 by a representative of [REDACTED] and a representative of the petitioner; (4) a letter, dated June 11, 2014, from [REDACTED] signing as the petitioner's senior manager; and (5) a letter, dated June 12, 2014 from [REDACTED]

The announcement of a vacancy in the proffered position states: "Bachelor's degree required in Computer Science, Engineering or related."

The April 30, 2013 SOW indicates that [REDACTED] and the petitioner agreed that the petitioner would provide services to [REDACTED] over the ensuing five years. The SOW is subject to the terms of a Master Services Agreement (MSA) the petitioner and Ferro entered into on April 8, 2013, which MSA is not in the record. The SOW refers to certain schedules for a description of the work to be performed. Those schedules are not in the record.

In his June 11, 2014 letter, [REDACTED] stated that, if the visa petition is approved, he will be the beneficiary's supervisor. He reiterated that the beneficiary would not be assigned to any third party site. He reiterated the duty description previously provided and described ways in which various courses the beneficiary took in obtaining his college degrees contributed to his ability to perform those job duties. Mr. [REDACTED] further stated:

As the job duties described above are so specialized and complex, it is common in our industry that a Bachelor's degree in Computer Science, Industrial Engineering or related field is required to perform the duties.

In her June 12, 2014 letter, [REDACTED] reiterated, once again, the duties previously attributed to the proffered position. As to the educational requirements of the position, she stated:

As described above, the job duties that [the beneficiary] will perform are so specialized and complex that it is common in our industry a Bachelor's degree or above in Computer Science, Industrial Engineering or related field is required to perform the duties.

Ms. [REDACTED] cited the proffered position's vacancy announcement and the other vacancy announcements as evidence in support of that assertion. She cited the Ferro SOW as evidence that the petitioner would have sufficient specialty occupation work to which to assign the beneficiary, stating that the beneficiary would be working pursuant to that SOW.

The director denied the petition on June 26, 2014, finding, as was noted above, that the petitioner had not demonstrated that the beneficiary is qualified to work in the proffered position. On appeal, counsel submitted: (1) 12 additional vacancy announcements placed by other companies, (2) an evaluation of the educational requirements of the proffered position, and (3) a brief.

The evaluation of the educational requirements of the proffered position was prepared by [REDACTED], a professor at [REDACTED]. Professor [REDACTED] stated that he has served as associate professor of electrical and computer engineering and associate professor of materials science and engineering at [REDACTED].

Professor [REDACTED] reiterated the previously provided description of the duties of the proffered position and stated that the proffered position requires the performance of those duties. He discussed the computer and mathematical training and skills inherent to obtaining a degree in industrial engineering and concluded that the beneficiary's degree in industrial engineering is clearly relevant to the duties of the proffered position and that the beneficiary is qualified for the proffered position.

In the appeal brief, counsel cited the evaluation prepared by Professor [REDACTED] and the vacancy announcements as evidence that the beneficiary is qualified for the proffered position.

IV. ANALYSIS

A. SPECIALTY OCCUPATION ANALYSIS

USCIS is required to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether an alien beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation]."). Therefore, absent a determination that the proffered position is in fact a specialty occupation, there is no basis on which the director could have determined whether the beneficiary is qualified or unqualified to perform the duties of the claimed specialty occupation.

The materials submitted with the visa petition do not state any educational requirement for the proffered position. The announcement of the proffered position, submitted in response to the RFE, states that the proffered position requires a bachelor's degree in computer science, engineering, or a related field. In their June 11, 2014 and June 12, 2014 letters, Mr. [REDACTED] and Ms. [REDACTED] stated that the proffered position requires a bachelor's degree in computer science, industrial engineering, or a related field.

The educational requirement stated on the vacancy announcement, that the proffered position requires a bachelor's degree in computer science, any branch of engineering, or a related field, is apparently inconsistent with the statements of Mr. [REDACTED] and Ms. [REDACTED] that the proffered position a bachelor's degree in computer science, *industrial* engineering, or a related field. [Emphasis added.] However, they are easily reconciled if the related fields to which Mr. [REDACTED] and Ms. [REDACTED] referred include all branches of engineering. The evidence, considered in its entirety, indicates that the petitioner is asserting that a bachelor's degree in any branch of engineering would be a sufficient educational qualification for the proffered position.²

The requirement of a bachelor's degree in engineering is inadequate to establish that a position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of degrees with generalized titles, such as engineering,³ without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

The evidence indicates that the beneficiary would accept a degree in any branch of engineering as a sufficient educational qualification for the proffered position. That is not a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent. This, in itself, demonstrates that the proffered position does not qualify as a specialty occupation position. The visa petition must be denied on this basis alone.

Further, the petitioner claims in the LCA that the proffered position corresponds to SOC code and title 15-1132, Software Developers, Applications from O*NET. The petitioner has asserted that the

² That is, the vacancy announcement indicates that a degree in any branch of engineering would be a sufficient educational preparation for the proffered position, and the letters from Mr. [REDACTED] and Ms. [REDACTED] do not contradict that assertion.

³ The field of engineering is a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering. Therefore, besides a degree in electrical engineering, it is not readily apparent that a general degree in engineering or one of its other sub-specialties, such as chemical engineering or nuclear engineering, is closely related to computer science or that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the particular position proffered in this matter.

beneficiary would work on a project or on projects for [REDACTED] pursuant to the April 30, 2013 SOW in the record. However, the nature of the work to be performed pursuant to that SOW has not been revealed. As such, whether the work available to the beneficiary through that SOW would correspond to the duties performed by software developers is unknown to us. The dearth of evidence pertinent to the nature of the work to be performed pursuant to the April 30, 2013 SOW prevents us from determining the substantive nature of the duties of the proffered position.

The petitioner's failure to establish the substantive nature of the work⁴ 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 failed to establish that it has 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.

B. BENEFICIARY QUALIFICATIONS ANALYSIS

The basis for the director's decision of denial is her finding that the petitioner has not demonstrated that the beneficiary is qualified for the proffered position.

As was noted above, the record contains evidence that the beneficiary has a foreign bachelor's degree in mechanical engineering and a U.S. master's degree in industrial engineering.

⁴ The failure to demonstrate the substantive nature of the work the beneficiary would perform if the visa petition were approved also obviates discussion of some of the evidence presented. That is, the vacancy announcements provided, for instance, could be found to be relevant only if the petitioner were to demonstrate that the proffered position is similar to the positions announced in those vacancy announcements. Because the petitioner has not demonstrated the substantive nature of the work to be performed, the educational requirements stated in those vacancy announcements have not been shown to be relevant to the educational requirements of the proffered position, and those vacancy announcements, for instance, will not be further addressed.

Similarly, the evaluation of the proffered position is plainly based on the assumption that, in the proffered position, the beneficiary would perform the list of duties described in [REDACTED] March 3, 2014 letter, and reiterated elsewhere. Without evidence that the petitioner has any such duties for the beneficiary to perform, the evaluation has not been shown to be relevant to any material issue.

We observe that if the petitioner had demonstrated that the proffered position required a minimum of a bachelor's degree in a specific specialty or its equivalent, the petitioner would be obliged, in order for the visa petition to be approvable, to demonstrate, not only that the beneficiary has a bachelor's degree or its equivalent, but that the beneficiary has a minimum of a bachelor's degree or its equivalent *in that specific specialty*. See *Matter of Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968). For example, if the proffered position were shown to require a minimum of a bachelor's degree in computer science or its equivalent, the petitioner would then be obliged to show that the beneficiary has a minimum of a bachelor's degree in computer science or its equivalent.

Pursuant to the instant visa category, however, a beneficiary's credentials to perform a particular job are relevant only when the job is found to qualify as a specialty occupation. As discussed in this decision, the proffered position has not been shown to require a baccalaureate or higher degree in a specific specialty, or its equivalent, and has not, therefore, been shown to qualify as a position in a specialty occupation.

Because the finding that the petitioner failed to demonstrate that the proffered position qualifies as a specialty occupation position is dispositive, we need not further address the issue of the beneficiary's qualifications.

V. 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. The petition is denied.