



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JAN 06 2015

OFFICE: VERMONT SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

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)

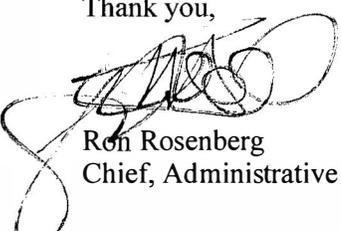
ON BEHALF OF PETITIONER:

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. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

I. FACTUAL AND PROCEDURAL HISTORY

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center on October 24, 2012. In the Form I-129 visa petition, the petitioner describes itself as a skilled nursing facility that was established in [REDACTED]. In order to employ the beneficiary in what it designates as a health educator position, 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 January 30, 2014, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that it satisfied all evidentiary requirements.

The record of proceeding contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the response to the RFE; (4) the notice of decision; and (5) the Form I-290B and supporting materials. We reviewed the record in its entirety before issuing our decision.

For the reasons that will be discussed below, we agree with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the appeal will be dismissed and the petition will be denied.¹

II. SPECIALTY OCCUPATION

A. The Law

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 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

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

- (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.

B. The Proffered Position

The petitioner stated in the Form I-129 that it seeks the beneficiary's services as a health educator on a full-time basis. In the Labor Condition Application (LCA) filed in support of the Form I-129, the petitioner indicated that the proffered position is "Health Educator," and designated the position under the occupational category "Health Educators" - SOC (ONET/OES) code 21-1091.²

The record of proceeding also contains a job description for a "Nurse Educator" (rather than a "Health Educator" – the job title that was provided by the petitioner on the Form I-129 and LCA). No explanation for the variance in the job title was provided. We note that the job description is not on the petitioner's letterhead, and is not signed or endorsed by the petitioner. Thus, the source of the description cannot be identified. The duties of the "Nurse Educator" are described as follows:

Conducts and analyzes the educational needs of the nursing staff as a basis to prioritize, design, coordinate/conduct educational programs or activities. Develops, implements, and evaluates education plans for the nursing staff. Plans and coordinates orientation programs for all nursing staff to ensure competence to deliver safe care and preceptor relationship integration into the department as defined by regulatory agencies and/or professional standards. Assesses the learning needs of all nursing staff members. Provides a written orientation plan for each new employee. Schedules new staff with mentor, communicating learner's needs and goals. Maintains competency assessment records. Provides input to management for employee's introductory review. Provides clinical development and training while fostering a preceptor/mentor role; formulating and delivering educational programs; assessment and demonstration of clinical procedures. (40%).

Identifies gaps between performance standards and actual performance. Identifies

² The LCA Case Number is [REDACTED]. It was signed by [REDACTED] on August 6, 2012. The petitioner reported this LCA Case Number on page 4 of the Form I-129.

work environment factors (both internal and external) that may impact performance. Identifies performance evaluation criteria/processes. Identifies educational and/or training strategies that impact performance. (10%)

Works closely with management and the nursing department to evaluate and implement appropriate staff competency assessment measures as required by accrediting and regulatory agencies. Develops appropriate monitoring tools that assess and document initial and on-going maintenance of clinical competencies. Supports and assists managers and/or preceptors in developing an effective process to implement these tools and serves as a mentor/coach to the managers and preceptors. Provides input on the assessment of initial competencies to managers and assist in work plan development. Obtains input from managers and front line staff for needed changes. Assists managers & employees in developing & revising nursing policies and procedures to meet evidenced based clinical or technological changes. Assists managers in the communication and implementation of new/revised policies & procedures to employees. Provides direct support to managers throughout remediation and performance management process, e.g. competency summary, remediation recommendations. Participate in competency related projects and committees. (20%)

Develops, purchases and implements clinical competency based curriculum programs/products to improve knowledge, skills & competencies needed by employees to meet needs. Designs, performances, analyzes needs assessments to include content research, task analysis, managers' and employees' needs, work environment, learning styles & constraints. Designs evaluative tools that measure knowledge/skill improvement and on-the-job behavior. Implements and delivers curriculum & supporting processes to facilitate learning of employees. Evaluates curriculum & supporting processes to improve performance, support career development and meet organizational needs. (20%)

Monitors progress and performance for quality assurance at regular intervals and as required to assure competence, e.g. shadowing, chart audits, return demonstration. Supports the development, implementation and sustainability of standard workflows. (10%)

C. Analysis

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.

When determining whether a position is a specialty occupation, we must look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. To ascertain the intent of a petitioner, USCIS looks 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. § 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."

That is, 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.

Here, the record of proceeding contains inconsistent information about the nature of the proffered position, which undermines the petitioner's credibility with regard to the services the beneficiary will perform, as well as the actual nature and requirements of the proffered position. When a petition includes numerous discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions.

For instance, in the Form I-129 and LCA, the petitioner indicated that the beneficiary would be employed as a "Health Educator." However, the job description submitted with the H-1B petition is for a "Nurse Educator." Further, throughout the record, counsel refers to the position as a "Nurse Educator" and, in response to the RFE, asserted that "[t]he paper work originally submitted to [USCIS] shows that the beneficiary had previously worked for the petitioner as a health educator but is currently being offered the position of nurse educator."³ Upon review, the record of

³ We note that on the Form I-129, the petitioner indicated in Part 2 that the most recent petition receipt number for the beneficiary was [REDACTED]. However, a search of USCIS records indicates that this receipt number is for a different beneficiary.

The petitioner provided inconsistent information about dates of intended employment. In the Form I-129, the petitioner stated that the dates of intended employment are from October 1, 2012 to September 30, 2015. However, in the LCA, the period of intended employment is from January 12, 2013 to January 11, 2016. No explanation was provided.

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

proceeding does not support counsel's assertion. As noted above, the petitioner stated the job title for the proffered position is "Health Educator" and designated the proffered position under the occupational category "Health Educators" on the LCA.⁴

The record lacks sufficient consistent details regarding the nature and scope of the beneficiary's employment or substantive evidence regarding the work that the beneficiary would perform. Further, the petitioner has not provided documentation sufficiently concrete and informative to demonstrate that the proffered position requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in the specific specialty, or its equivalent, as a minimum for entry into the occupation. The information regarding the proffered position does not communicate: (1) the substantive nature and scope of the beneficiary's employment within the petitioner's business operations; (2) the actual work that the beneficiary would perform; (3) the complexity, uniqueness and/or specialization of the tasks; and/or (4) the correlation between that work and a need for a particular educational level of highly specialized knowledge in a specific specialty.

Therefore, we are precluded from 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 entry into 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

submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

⁴ On appeal, counsel asserts that it "reviewed the labor condition application that was submitted and it was for the position of nurse educator and not health educator." She further claims that "a copy of the document is attached for your review." However, we note that counsel has provided an entirely new LCA that was not previously submitted with regard to this H-1B petition. The case number for the LCA submitted on appeal is [REDACTED] which differs from the case number stated on the Form I-129. This new LCA indicates that the proffered position is for a "Nurse Educator," and is designated under the occupational category "Registered Nurses" - SOC (ONET/OES) code 29-1111.

A petitioner (or counsel) may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Further, counsel's attempt to amend the petition on appeal is not properly before us. The regulations at 8 C.F.R. § 214.2(h)(2)(i)(E) state in pertinent part:

The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition.

The attempt to reconsider the original petition on appeal as a petition for a different job title and occupational classification is, therefore, rejected.

complexity of the specific duties, which is the focus of criterion 4. Thus, the petitioner has failed to satisfy any of the criteria under the applicable provisions at 8 C.F.R. § 214.2(h)(4)(iii)(A).

For the reasons related in the preceding discussion, the petitioner has not established 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.

III. BENEFICIARY'S 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. Therefore, we need not and will not address the beneficiary's qualifications further.

IV. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.¹²

ORDER: The appeal is dismissed.

¹² As the appeal will be dismissed for the reasons discussed above, we need not address the additional deficiencies that we observe in the record of proceeding that preclude approval of the petition.