



U.S. Citizenship  
and Immigration  
Services

(b)(6)



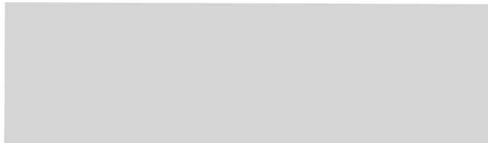
DATE: **JUL 01 2015**

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](http://www.uscis.gov/i-290b)) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

## I. PROCEDURAL BACKGROUND

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as an information technology business, with seven employees, established in [REDACTED]. In order to employ the beneficiary in what it designates as a programmer analyst 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 evidence of record did not establish that the proffered position qualifies as a specialty occupation. On appeal, the petitioner asserts that the Director's basis for denial was erroneous and contends that it satisfied all evidentiary requirements.

The record of proceeding contains: (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 Notice of Appeal or Motion (Form I-290B) and supporting documentation. We reviewed the record in its entirety before issuing our decision.<sup>1</sup>

For reasons that will be discussed below, we agree with the Director 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. SPECIALITY OCCUPATION

The primary issue is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a 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 regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements of a specialty occupation.

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

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

- (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 Petitioner and the Proffered Position

As noted above, the petitioner describes itself an information technology business, established in 2009 and employing seven people. In the letter submitted in support of the instant petition, the petitioner states:

[The petitioner] provides technical project and consulting solutions, making companies more successful through custom software development, technology platform implementations and business process optimization. [The petitioner] focuses on information technology as well as other business related human resources for its clients.

With respect to the proffered position, the petitioner states that the beneficiary will be employed as a programmer analyst, a position requiring a "minimum of a Bachelor's degree in Information

Technology or other related degree." The petitioner provides the following description of the duties of the programmer analyst:

The Programmer Analyst duties include developing, documenting, testing, modifying and maintaining new and existing software applications; apply standard techniques, procedures, and criteria to the development life cycle; bring applications and technology expertise to the specification and design development process; provide technical expertise on assigned applications, to include interfaces and interrelationships with other applications and systems; code, test and troubleshoot existing programs utilizing the appropriate hardware, database, and programming technology; analyze end user data and business needs to format final product and assure user-orientation; test and develop programming modifications; utilize applications expertise to participate in the design process as needed, then write new program code based on defined specifications; document programming problems and resolutions for future reference; maintain and modify programs; make approved changes by amending flow charts, develop detailed programming logic, and coding changes; write and maintain programming documentation, as well as operations and user guides (as required); analyze performance of programs and take action to correct deficiencies based on consultations with end users, Business Analysts and senior development team members; provide input to prolong application life or recommend replacement; confer with senior development team members to gain understanding of needed changes or modifications of existing programs; assist in resolution of questions of program intent, data input, output requirements, and inclusion of internal checks and controls; and proactively provide subject matter expertise regarding assigned applications to other members of the technology and business teams to assure understanding of interrelationships and dependencies.

The petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B. The petitioner indicates that the proffered position corresponds to the occupational category "Computer Programmers"-SOC (ONET/OES Code) 15-1131, at a Level I (entry level) wage.

The Director reviewed the submitted position information and issued an RFE, requesting additional information from the petitioner concerning the availability of in-house employment. In response to the Director's RFE, the petitioner further elaborated on the proffered position as follows:

[The petitioner] has sufficient specialty occupation work that is immediately available upon [the beneficiary's] entry into the United States through the entire requested H-1B period.

[The beneficiary] will work [on] client-based projects while employed with us, which can range from the testing of software applications, interface analysis, analyze program modifications, corrects to deficiencies. When not working on a client matter, [the petitioner] has sufficient specialty occupation work for in-house

projects, including writing and maintaining programming documentation as well as operations and user guides. If asked to do work at a client site, the LCA will be posted and [the petitioner] will maintain control of all work performed by the beneficiary.

We expect [the beneficiary] to work on the following projects immediately upon his employment:

- Redesign and reprogram our web presence;
- Integrate our web presence with our current applicant tracking system (Bullhorn) and add profile and social media integration;
- Develop mass text messaging integration and tracking within our current applicant tracking system (Bullhorn) and
- Develop time card approval and management system which integrates with back office software.

### C. Analysis

We find that the evidence of record does not demonstrate that the proffered position is a programmer analyst/computer programmer position. We make this finding primarily based upon the lack of sufficient information and evidence regarding the duties of the proffered position.<sup>2</sup>

The initial duties provided by the petitioner were generic in nature and did not reflect how such duties would be performed within the context of the petitioner's business. The description of the beneficiary's duties lacks the specificity and detail necessary to support the petitioner's assertion that the position is a specialty occupation. The abstract level of information provided about the proffered position and its constituent duties is exemplified by the petitioner's assertion that the beneficiary duties include "developing, documenting, testing, modifying and maintaining new and existing software applications; apply standard techniques, procedures, and criteria to the development life cycle." The petitioner's statements – as so generally described – do not illuminate the substantive

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<sup>2</sup> We note that even if we were able to conclude that the proffered position would be that of a computer programmer, the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)* does not support the assertion that the normal minimum entry requirement to become a computer programmer is the obtainment of a baccalaureate degree in a specific specialty, or its equivalent. Specifically, the *Handbook* states that some employers hire workers with an associate's degree, which does not establish that working as a computer programmer normally requires at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation. Therefore it would not be considered a specialty occupation, absent additional evidence from the petitioner that it met one of the criteria stated at 8 C.F.R. § 214.2(h)(4)(iii)(A). 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.

application of knowledge involved or any particular educational attainment associated with such activities. In addition, the petitioner claims that the beneficiary will "provide technical expertise on assigned applications, to include interfaces and interrelationships with other applications and systems" and will "code, test and troubleshoot existing programs utilizing the appropriate hardware, database, and programming technology." The statements do not provide any particular details regarding the demands, level of responsibilities and requirements necessary (such as knowledge of any specific programming language or expertise in a specific application or system) for the performance of these duties.

As detailed above, in response to the RFE, the petitioner asserted that while the beneficiary would be primarily working on "client-based projects," the petitioner has sufficient in-house work for the beneficiary such as: redesigning and reprogramming the petitioner's web presence, integrating the petitioner's web presence with the petitioner's current applicant tracking system, Bullhorn,<sup>3</sup> and adding functionality to their use of Bullhorn by introducing text messaging and social media integration. On appeal, the petitioner provided additional information regarding its in-house projects, stating that these projects may utilize the following programming languages: Java, ColdFusion, PHP, Python, Perl, Javascript, HTML, and CSS. However, a specialty occupation position is one that requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor or higher degree in the specific specialty as the minimum for entry into the occupation. There is no evidence that the knowledge of above-mentioned programming languages requires the attainment of a bachelor or higher degree in a specific specialty or its equivalent.

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.

As noted above, the petitioner states that the beneficiary will work primarily on "client-based projects" during the requested H-1B validity period. The petitioner asserts that such client projects will include the duties of a specialty occupation; however, the petitioner has not provided documentary evidence to establish the existence of client-based projects that the beneficiary will be engaged in. Further, the petitioner has not provided information from the purported end clients concerning the associated duties, timeframe for completion, or requirements to complete such projects. Going on record without supporting documentary evidence is not sufficient for purposes of

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<sup>3</sup> It appears that the director mistakenly considered Bullhorn to be a system owned and developed by the petitioner. However, Bullhorn, as later explained by the petitioner on appeal, is a third-party software suite that the petitioner utilizes in its daily business.

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)).

In response to the Director's RFE, the petitioner submitted copies of work orders for some of its current employees, asserting that these work orders were samples of the type of projects on which the beneficiary may be engaged to work. However, the submission of these work orders is not material to this case in that the petitioner is not asserting that the beneficiary will work on any of the specific projects discussed or that the beneficiary will be contracted to the same clients mentioned in the work orders.

Further, on appeal, the petitioner states:

[The petitioner] does not have an end user contract for [the beneficiary], as [the beneficiary] is not yet an employee. [The petitioner] cannot enter into binding contracts for an individual who is not yet an employee. To require such a contract from an employer in order to sponsor an H-1B is overreaching and not in accordance with the regulations governing H1B petitioner. [The petitioner] has a signed offer of employment by [the beneficiary], but cannot employ him until his H1B is approved. As such, [the petitioner] logically can't offer his services to third parties. [The petitioner] has provided detailed job descriptions of what [the beneficiary] will engage in, whether for in house assignments or 3<sup>rd</sup> party projects. All assignments will involve the same duties, knowledge, and technical expertise.<sup>4</sup>

While the petitioner's assertions may reflect the petitioner's business practice, the petitioner must still establish, with specificity, the duties of proffered position, in order to demonstrate that the proffered position is in a specialty occupation. Because the record of proceeding in this case is devoid of sufficient information regarding the specific job duties to be performed by the beneficiary for "client-based projects" and "3<sup>rd</sup> party projects," the petitioner has not established 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). We note that 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.

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<sup>4</sup> We note that the reference offer of employment does not discuss specific duties or placement.

Further, we find the record does not establish that the petitioner has available non-speculative work for the beneficiary in a specialty occupation. The Form I-129 states that the petitioner intends to employ the beneficiary as a programmer analyst from October 1, 2014 to August 24, 2017.

As discussed above, the petitioner has asserted that they will deploy the beneficiary on "client-based projects" and will also have him work on in-house projects when needed. The petitioner has not provided sufficient evidence to support the assertion that it has specialty occupation work available to the beneficiary for the duration of the H-1B validity period.

On appeal, counsel for the petitioner writes:

[The beneficiary] was hired to provide much needed assistance to internal computer projects at the company that his background, education and experience equip him to perform. [The petitioner] also will hire him as a consultant when contracts are secured requiring his services. [The petitioner] agrees to pay him the prevailing wage at all times and has sufficient in-house work to keep him employed when consulting contracts are secured that require the specific skills of [the beneficiary] for client projects. [The petitioner] is taking the risk that it will have 3 years work of employment. The Service should not deny an H1B based upon unknown risk that there is 3 years' worth of work. It can limit the H1B to a shorter term, but it cannot deny an employer the right to hire and provide in-house work to a highly skilled and much needed computer expert.

However, while the petitioner states that it could utilize the beneficiary's skills and expertise on these projects, the test to establish a position as a specialty occupation is not the education or experience of a proposed beneficiary, but whether the position itself requires at least a bachelor's degree in a specific specialty, or its equivalent. Here, the petitioner did not provide sufficient evidence for on-going projects that would require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor or higher degree in a specific specialty or its equivalent.

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). 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. Thus, even if it were found that the proffered position is a specialty occupation as defined at 8 C.F.R. § 214.2(h)(4)(iii)(A), the petitioner has not demonstrated that it has sufficient non-speculative work available in that position for the duration of the period requested.<sup>5</sup>

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<sup>5</sup> 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:

Therefore, we find that the petitioner has not established that the petition was filed for non-speculative work for the beneficiary, for the entire period requested, that existed as of the time of the petition's filing.<sup>6</sup>

### III. CONCLUSION AND ORDER

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.

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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).

<sup>6</sup> Since the identified basis for denial is dispositive of the petitioner's appeal, we will not address additional grounds of ineligibility we observe in the record of proceeding.