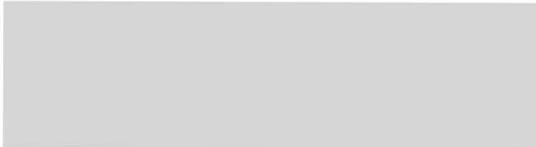




U.S. Citizenship
and Immigration
Services

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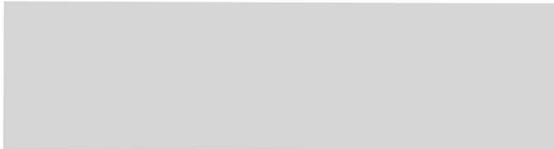
DATE: **JUL 08 2015**

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,

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. FACTUAL AND PROCEDURAL HISTORY

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a business technology solutions company established in [REDACTED] with one employee. In order to employ the beneficiary in what it designates as a communications systems engineer, 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, finding that the petitioner has not established that it would employ the beneficiary in a specialty occupation position. 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 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; 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.¹

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

The issue here is whether the petitioner demonstrated by a preponderance of the evidence that it will employ the beneficiary in a specialty occupation position.

A. 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

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 meet one of the following criteria:

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

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore

be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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

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

B. The Proffered Position

The petitioner indicated on the Form I-129 that it seeks the beneficiary's services as a communications systems engineer to work on a full-time basis for an annual salary of \$59,900 per year.

In a letter of support dated March 13, 2014, the petitioner stated that the beneficiary will be responsible for the following duties:

- Interviewing clients, determining their communication needs and performing business solutions. Well knowledge of programming languages as ColdFusion, HTML, Java Script, C++ and .Net for software creation for installation of var[ious] equipment according [to] customer needs [and] implementing internet services.
- Fiber optic manipulation and installation, implementation of access control, incorporating video communication and monitoring security configuration.
- Implementation of IP telephone installations incorporation telephone

- technology and implementation of custom platform per customer demand.
- Supervise site installation of emergency alarms, video cameras and configure each network using security protocols to allow internet communication.
 - Configuration of specialize router, bridges and switches. VPN and secure gateway implementation.
 - Guide technical projects and end-to-end communications system engineering activities, including system design, QC, test, and activities evaluation. This includes but is not limited to leading critical needs and capability assessments, early conceptual studies, trade studies, requirements and equipment integration, planning, and execution.
 - Analyze and bring new technologies to be competitive in the current market place.
 - Support the development of modeling and simulation tools and conduct analysis to evaluate the performance of specific communications systems.
 - Develop potential future concepts and technological solutions.
 - Provide systems engineering solutions to advance global connectivity.
 - Analyze advance technologies and apply them to enable evolution of existing communications systems to higher data rates, IP based solutions, and greater interoperability.
 - Maintain communications systems, trouble shooting and diagnose communication system issues.
 - Manage communications upgrades/installations.
 - Monitor communications system discrepancies, support test events requiring communication support participate in system integration planning, testing, and reporting.
 - Manage priorities, following up with clients to record any issues with system[s].
 - Design system and user manuals for equipment specifications and procedures to protect communications from failure, intrusion or misuse.
 - ight [sic] of the afore-mentioned job duties, we required someone with the equivalent of at least a Bachelor degree in Electrical Engineering and work experience in the job offered.

In response to the RFE, the petitioner submitted a revised and expanded job description. The petitioner did not explain the reasons for discrepancy in the job duties.

The petitioner also submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational classification of "Electrical Engineers" – SOC (ONET/OES) Code 17-2071, at a Level I (entry-level) wage. The LCA also indicated that the beneficiary will work at the petitioner's offices.

C. Analysis

For H-1B approval, the petitioner must demonstrate a legitimate need for an employee exists and to substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. It is incumbent upon the petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent, to perform duties at a level that requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.

We find that the evidence of record does not sufficiently establish the substantive nature of the proffered position. In establishing the position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner's business operations.

We first note that the petitioner did not provide any information with regard to the order of importance and/or frequency of occurrence with which the beneficiary will perform the described functions and tasks. Thus, the petitioner did not specify which tasks were major functions of the proffered position, and establish the frequency with which each of the duties would be performed (e.g., regularly, periodically or at irregular intervals). As a result, the petitioner did not establish the primary and essential functions of the proffered position, and which duties, if any, require 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.

Further, the petitioner has described the duties comprising the proffered position in generalized and generic terms that do not convey sufficient substantive information to establish the relative complexity, uniqueness and/or specialization of the proffered position or its duties. For example, the petitioner indicated that the beneficiary will "analyze and bring new technologies to be competitive in the current market place," "provide systems engineering solutions to advance global connectivity," and "develop potential future concepts and technological solutions." However, the petitioner did not further elaborate on the specific tasks, methodologies, and applications of knowledge that would be required in furtherance of these duties. The overall responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's business operations.

Moreover, 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 example, the petitioner's description of the job duties does not appear to be consistent with the occupational category of "Electrical Engineers." As noted, the petitioner indicated in the

LCA that the proffered position corresponds to the occupational category of "Electrical Engineers." According to the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*, electrical engineers "design, develop, test, and supervise the manufacturing of electrical equipment, such as electric motors, radar and navigation systems, communications systems, or power generation equipment" and "also design the electrical systems of automobiles and aircraft." The *Handbook* further states that electrical engineers typically "design new ways to use electrical power to develop or improve products" or "do detailed calculations to develop manufacturing, construction, and installation standards and specifications."² The petitioner did not explain how the beneficiary's duties such as "supervis[ing] site installation of emergency alarms, video cameras and configure each network using security protocols to allow internet communication" relate to the duties of an electrical engineer as described in the *Handbook*. On appeal, the petitioner asserts that the beneficiary will be responsible for the "design development and maintenance of technology for communications, ranging from telephones to internet systems, ensuring that all components of the system are successfully installed and connected." However, the petitioner has not provided sufficient evidence to establish the substantive nature of the proffered position. For example, the petitioner submitted copies of its service contracts with clients to establish its business operations. The "Terms of Service Agreement Contract" dated February 1, 2012 with Service Parcel Es Doral states that the petitioner's services will include "on call service" which entails the following:

- Support to help Guest or Resident to get connected to Internet, Wireless Setting instructions.
- Support the Company employees with any networking issue.
- Help New Residents to configure a new TV set to get the complete TV Line up available.
- Report any quality issue of any kind on any of the Systems included on the SAC.
- Generate for on Site Service tickets if it required

The services, as described above, do not appear to relate to the *Handbook's* description of an electrical engineer or explain the beneficiary's role in these types of services. Further, they do not provide a sufficient factual basis to persuasively support the claim that the position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the demands of the proffered position.

² We recognize the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. For more information about the occupational category of "Electrical and Electronics Engineers," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Electrical and Electronics Engineers, available on the Internet at (<http://www.bls.gov/ooh/architecture-and-engineering/electrical-and-electronics-engineers.htm>) (last viewed June 26, 2015).

We also find that the record did not establish relative complexity, specialization and/or uniqueness as distinguishing aspects of either the proposed duties or the position that they are said to comprise. As evident in the job description quoted above, the record of proceeding presents the duties comprising the proffered position in terms of relatively abstract and generalized functions. More specifically, they lack sufficient detail and concrete explanation to establish the substantive nature of the work and associated applications of specialized knowledge that their actual performance would require within the context of the petitioner's particular business operations.

This is further evidenced by the LCA submitted by the petitioner in support of the instant petition. The LCA indicates a wage level at a Level I (entry) wage, which is the lowest of four assignable wage levels.³ Without further evidence, the evidence does not demonstrate that the proffered position is complex or unique as such a position falling under this occupational category would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage.⁴ For example, a Level IV (fully competent) position is designated by DOL for employees who "use advanced

³ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance." A Level I wage rate is described as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

⁴ The issue here is that the petitioner's designation of this position as a Level I, entry-level position undermines its claim that the position is particularly complex, specialized, or unique compared to other positions *within the same occupation*. Nevertheless, it is important to note that a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation. In certain occupations (doctors or lawyers, for example), an entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty or its equivalent. That is, a position's wage level designation may be a consideration but is not a substitute for a determination of whether a proffered position meets the requirements of section 214(i)(1) of the Act.

skills and diversified knowledge to solve unusual and complex problems."⁵

The petitioner has not provided sufficient details regarding the nature and scope of the beneficiary's employment or any substantive evidence regarding the actual work that the beneficiary would perform. Without a meaningful job description, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. The tasks as described fail to communicate (1) the actual work that the beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. The petitioner's assertions with regard to the position's educational requirement are conclusory and unpersuasive, as they are not supported by the job descriptions or substantive evidence.

The record's failure to establish the substantive nature of the work 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.

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. The appeal will be dismissed.

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.⁶

ORDER: The appeal is dismissed.

⁵ For additional information regarding wage levels as defined by DOL, see U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

⁶ As the identified grounds of ineligibility are dispositive of the petitioner's appeal, we need not address any additional issues in the record of proceeding