



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JUL 27 2015

PETITION RECEIPT #: 

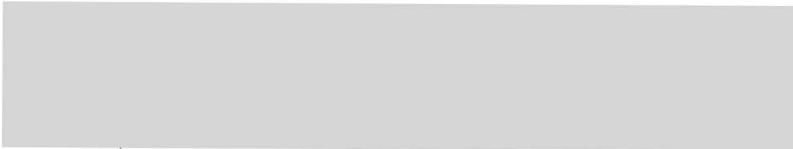
IN RE:

Petitioner: 

Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

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

I. PROCEDURAL BACKGROUND

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a two-employee business established in [REDACTED]. In a letter submitted in support of the petition, the petitioner describes itself as a consulting service and custom software development provider. In order to employ the beneficiary in a position it designates as a "Sr. System Architect," 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, determining that the evidence of record did not establish that the petitioner had work available in a specialty occupation; thus, the record did not establish that the job offered qualifies as a specialty occupation.

The record of proceeding includes: (1) the Form I-129 and supporting documentation; (2) the service center's RFE; (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Notice of Appeal or Motion (Form I-290B), the petitioner's brief and additional documentation. We reviewed the record in its entirety before issuing our decision.¹

Upon review of the totality of the evidence, we find that the evidence of record does not overcome the Director's grounds for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

II. THE PROFFERED POSITION

The petitioner identified the proffered position as a "Sr. System Architect" on the Form I-129, and indicated the beneficiary would work off-site. The petitioner attested on the required Labor Condition Application (LCA) that the occupational classification for the position is "Software Developers, Applications," SOC (ONET/OES) Code 15-1132, at a Level I wage. The LCA was certified on May 30, 2014, for a validity period from June 16, 2014 to June 15, 2017. The LCA identified the beneficiary's employment locations as: (1) [REDACTED], New Jersey (the petitioner's location); and (2) [REDACTED] Virginia.

In the letter of support, dated June 12, 2014 and referenced above, the petitioner described the beneficiary's duties and the educational requirements for the proffered position as follows:

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

Developing and implementing innovative software solutions to solve complex technical and business issues, providing user requirements definition, and transforming functional software requirements into detail designs.

More specifically, [the beneficiary] will prepare, write and develop detailed relationship database designs to be used in the implementation of the Oracle software applications. He is responsible for managing the servers and infrastructural changes to meet customer requirements.

[The beneficiary] will also manage the day-to-day operations of the PCC host computers by monitoring system performance, configuration, maintenance and repair. Ensures that records of system downtime and equipment inventory are properly maintained. Applies revisions to host system firmware and software. Works with vendors to assist support activities. Develops procedures to maintain security and protect systems from unauthorized use, acts of nature and user abuse. Develops procedures, programs and documentation for backup and restoration of host operating systems and host-based applications. Develops and coordinates project directions and schedules to maximize benefits and minimize impacts on the customer organizations. Provides leadership in planning and implementation of projects for computer operations and enterprise systems administration. He will manage technical software aspects of multiple strategic studies, undertake, large scale, complex strategy, and design efforts. He will architect, design, develop, and implement customer solutions.

The usual minimum requirement for performance of the job duties of this position with our company, as with any other similar organization, is a Bachelor's degree or equivalent in Computer Science or a related field such as CIS, MIS, Engineering or equivalent and some relevant experience or a Master's degree in lieu of the experience.

The petitioner noted that it anticipated that the beneficiary will work on a project for [REDACTED] LLC [REDACTED] Virginia and submitted a copy of its "Independent Consultant Agreement" with [REDACTED]. The petitioner also included an undated letter on [REDACTED] letterhead, signed by the president of the company, stating: "[a]s an Information Technology Professional, [the beneficiary] will work on the UNIX/Linux Administration" and that "this project is ongoing and expected to continue for an unspecified period of time." The president of [REDACTED] listed the beneficiary's job duties as:

- Design and integration and execution of new products/solutions with OSS/BSS systems.
- Manage configuration, administration, upgrade and maintenance of mid-range servers, SQL Clusters, network, DB and user access controls[.]

- Responsible for SQL Server Upgrades, Web Farm Upgrades, implementation of system administration and monitoring tools, and new database installations[.]
- Research and resolve complex problems encountered during the installation and operation of our software applications to ensure negligible impact on both client and internal operations[.]
- Interact with our clients on an as needed basis regarding technology issues and escalations[.]
- Maintain uninterrupted production systems and 99.9% application and system uptime[.]
- Improve and optimize overall system performance[.]
- Implement and maintain Information Security policies and procedures.
- Write UNIX Shell Scripts for cleanup, logging, file manipulation and transferring the files.
- Help on the infrastructure development which includes release management, server configuration etc.
- Responsible to Implement and manage secured networks using Routers, switches, firewalls & IDS, Configuration and administration of network services like Xen Virtualization, SAMBA, DNS, SMTP, POP3, Web Server, RADIUS, LDAP, NMS, Anti-Virus Mail Gateway, Backup, opensource software etc.

The Statement of Work (SOW) between the petitioner and [REDACTED] dated May 18, 2014, indicates that the petitioner will provide "Oracle BRM Technical Service" to [REDACTED]. The SOW provides that the "contract will be for 1 year starting from 1st Jul'2014 initially and extendable" and states that the purpose of the SOW is to "detail a contractual agreement whereby [the petitioner] will provide IT UNIX/LINUS Administration Technical Service to [REDACTED] for [REDACTED] use or that of its Customers." The SOW also indicates that the petitioner's consultant will provide technical support service including the first seven of the ten duties listed in the [REDACTED] letter and that either party can terminate the SOW upon a 15 day written notice.

III. SPECIALTY OCCUPATION

The primary issue in this matter is whether the proffered position qualifies as a specialty occupation. 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.

A. Legal Framework

To meet its burden of proof, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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

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

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

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must 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.

B. Analysis

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

§ 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."

One consideration that is necessarily preliminary to, and logically even more foundational and fundamental than the issue of whether a proffered position qualifies as a specialty occupation, is whether the petitioner has provided substantive information and supportive documentation sufficient to establish that, in fact, the beneficiary would be performing services for the type of position for which the petition was filed. Another such fundamental preliminary consideration is whether the petitioner has established that, at the time of the petition's filing, it had secured non-speculative work for the beneficiary that corresponds with the petitioner's claims about the nature of the work that the beneficiary would perform in the proffered position.

Here the petitioner provides a broad overview of the duties it expects the beneficiary to perform and anticipates that the beneficiary will work for a third party entity. In order to demonstrate that it has actual work for the beneficiary to perform, the petitioner submitted the Independent Consultant Agreement (ICA) with [REDACTED] the SOW between the two entities attached to the ICA, and a letter signed by [REDACTED] president. We find first that the record in this matter does not include sufficient evidence that [REDACTED] has specific projects that would engage the beneficiary for the duration of the petitioner's requested employment period. [REDACTED] refers generally to its clients and that the beneficiary would work on UNIX/Linux Administration Technical Services. The SOW does not identify [REDACTED]'s specific project or its particular client that currently requires the beneficiary's services. That is, there is no underlying documentation establishing that [REDACTED] currently has specialty occupation work available for the beneficiary to perform.

Although the petitioner submitted excerpts from [REDACTED]'s website identifying its leadership, its clients, and its portfolio of available methodologies, the record does not include evidence of agreements with specific clients for specific work to be performed.² We have reviewed the document titled "Key Projects by [REDACTED]" that lists five businesses and the services that it has provided to those business, again however, the underlying documentation establishing that this work was performed and is still ongoing is not supplied. We note, as well, that the petitioner submitted a copy of [REDACTED]'s proposal to perform services for [REDACTED], however, the record

² Regarding the beneficiary's work location we observe that [REDACTED]'s website identifies its location as in [REDACTED], Virginia as does its ICA with the petitioner. The beneficiary's offsite work location is identified as in [REDACTED], Virginia. Although the submitted SOW also identifies [REDACTED] address as in [REDACTED], Virginia, the record does not include evidence that [REDACTED] maintains separate offices. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

does not include [REDACTED]'s acceptance. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). The record does not include sufficient evidence describing particular projects that would require the services of the beneficiary. Rather, the generally described intended duties that the beneficiary is to perform are not related to any specific contracted work. For example, the SOW indicates that the beneficiary will provide technical support service to [REDACTED] and its client's staffs; however, the record does not include probative evidence that [REDACTED] has work in its offices or work for clients in other locations.

Upon review of the totality of the record, including the information from [REDACTED], we cannot conclude that a viable project existed when the petition was filed. The record lacks substantive evidence establishing that, at the time the petition was filed, the petitioner had secured non-speculative work for the beneficiary that corresponds with its claims regarding even the general nature of the work described in the submitted position descriptions. Again, without supporting documentary evidence, the petitioner has not met its burden of proof. *Id.* As the record in this matter is insufficient to substantiate the beneficiary's actual work for the duration of the requested period, we cannot conclude that the petitioner has established that it will employ the beneficiary in a specialty occupation for that period. The petitioner has not overcome the Director's decision on this issue.

Additionally, the petitioner's description of the beneficiary's duties sets out general functions and does not provide any context for the beneficiary's day-to-day duties. For example, the petitioner attests that the beneficiary will work offsite while also asserting that the beneficiary will manage the day-to-day operations of the PCC host computers, among other duties. However, the petitioner does not include any information regarding the PCC host computers or where these duties will take place. The petitioner asserts, generally that the beneficiary will manage servers, develop and coordinate project directions and schedules to maximize benefits and minimize impacts on customer organizations, manage technical software, and architect, design, develop, and implement customer solutions. The petitioner does not submit probative evidence of customers currently in need of these services.

Instead, as discussed above, the petitioner states that it anticipates that the beneficiary will work at a third party site and does not anticipate the beneficiary working at the petitioner's New Jersey location. Turning to the expectations of the third party for the beneficiary's work, the asserted third party, [REDACTED], provides a description that is sufficiently vague that the duties could include the duties of a number of information technology positions. In fact, [REDACTED] does not identify the position it describes for the beneficiary as a senior software architect or a software developer, applications, but categorizes the position as a general information technology professional. Additionally, [REDACTED] does not identify any degree requirements to perform the duties of the proffered position. It appears that basic technological skills are sufficient to perform the duties [REDACTED] ascribes to the position. Thus, even if considering the position in

which the petitioner anticipates that it will place the beneficiary, the evidence submitted does not establish that a bachelor's degree in a specific specialty, or its equivalent, is required.³

Upon review, we find that the evidence of record does not establish (1) the actual work that the beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. These material omissions preclude a determination that the petitioner's proffered position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions. There is a lack of probative evidence substantiating the petitioner's claims with regard to the duties, responsibilities and requirements of the proffered position.

It is not evident that the proposed duties as described, and the position that they comprise, merit recognition of the proffered position as qualifying as a specialty occupation. That is, the evidence of 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 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

³ On appeal, the petitioner notes that the Director did not analyze the advertisements it submitted in support of its assertion that the proffered position is a specialty occupation. However, as discussed, we find that the petitioner in this matter has not identified and detailed the specific duties the beneficiary would perform in the proffered position sufficiently to analyze and compare the proffered position to those in the submitted advertisements. However, even upon review of the six submitted advertisements, these advertisements do not support a contention that an entry-level software developer, applications, is a specialty occupation, but rather, they are indicative that such a position is not a specialty occupation.

For example, two of the advertised positions require skills and experience but do not identify a degree requirement. One advertisement indicates that a general bachelor's degree will qualify the applicant. A fourth advertisement requires a bachelor's degree in Computer Science and a minimum of two to five years of specific technical experience. A fifth advertisement requires a bachelor or master's degree in engineering, computer science or related field and 10 years of experience as a software architect. The sixth advertisement requires a master's degree in computer science, engineering, or information technology and one year experience as a software developer. We observe that three of the advertisements, contrary to the purpose for which they were submitted, do not require at least a bachelor's degree in a specific specialty, or its equivalent to perform the advertised positions. The remaining three advertisements appear to be more senior than the proffered position, a Level I (entry) position, as they require experience in addition to the requirement of a bachelor or master's degree. 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. The petitioner does not submit evidence establishing that the advertised positions are for positions in its industry, parallel to the proffered position and are positions in organizations similar to the petitioner. Thus, the advertisements submitted have little probative value.

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. Thus, the petitioner has not established that the proffered position is a specialty occupation under the applicable provisions.

The material deficiencies in the record regarding the actual duties of the proffered position require the dismissal of this appeal. The job descriptions do not persuasively support the claim that the position's day-to-day job responsibilities and duties would require the theoretical and practical application of a particular educational level of highly specialized knowledge in a specific specialty directly related to those duties and responsibilities. The overall responsibilities for the proffered position as described 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 operations. The petitioner has not demonstrated how the performance of the duties of the proffered position, as described by the petitioner, would require the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. We affirm the Director's determination that the petitioner has not provided a description of the actual work the beneficiary will perform and has not established that it has sufficient H-1B work for the requested period of intended employment. For this reason, the appeal will be dismissed and the petition denied.

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; *see e.g., Matter of Otiende*, 26 I&N Dec. at 128. Here, that burden has not been met.⁴

ORDER: The appeal is dismissed.

⁴ As the identified grounds of ineligibility are dispositive of the petitioner's appeal, we need not address the additional issues in the record of proceeding that also preclude approval of the petition.