



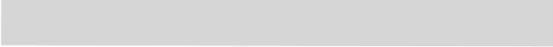
U.S. Citizenship
and Immigration
Services

(b)(6)



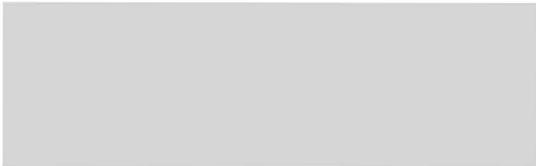
DATE: **JUL 30 2015**

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, 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

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a 12-employee "Computer Consulting" firm established in [REDACTED]. In order to continue 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 the evidence insufficient to establish that the proffered position qualifies for classification as a specialty occupation position. On appeal, the petitioner asserts that the Director's basis for denial was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before us contains: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the Director's denial letter; and (5) the Notice of Appeal or Motion (Form I-290B) and the petitioner's submissions on appeal. We reviewed the record in its entirety before issuing our decision.¹

II. SPECIALTY OCCUPATION

The issue is whether the evidence of record establishes that the petitioner will employ the beneficiary in a specialty occupation position.

A. Legal Framework

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:

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

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. The Proffered Position and Employment Locations

The Form I-129 requests employment from September 30, 2014 to September 29, 2017. The petitioner indicated that it is located in [REDACTED] NJ, but the beneficiary would work at [REDACTED] CA [REDACTED]. The Labor Condition Application (LCA) submitted to support the visa petition is certified for employment both at the petitioner's address in [REDACTED] NJ, and at the [REDACTED] California location. The LCA also states that the proffered position corresponds to Standard Occupational Classification (SOC) code and title 15-1131, Computer Programmers, from the Occupational Information Network (O*NET), at a wage level I (entry).

In a letter dated September 24, 2014, the petitioner stated that the beneficiary "will perform the job duties as a Programmer Analyst for [REDACTED] being implemented by [REDACTED] through [REDACTED] on H-

1B until 09/17/2017" and identified the work location as [REDACTED] CA [REDACTED]. The petitioner described the parties involved in the project as follows:

- a) [REDACTED] End User Client
- b) [REDACTED] Implementation Partner
- c) [REDACTED]-Secondary Vendor
- d) [The petitioner]-Petitioner Company

However, later in the letter, the petitioner also stated that "the certified LCA...clearly indicates that the beneficiary will be employed by the petitioner to work in-house as a Programmer Analyst on its POM project" at its location in [REDACTED] NJ.

The petitioner provided a letter from [REDACTED] dated September 22, 2014 which states that the beneficiary will be working as an "ETL lead" at the [REDACTED] CA location from September 2, 2014 to September 1, 2017. The petitioner also provided a letter from [REDACTED] dated September 16, 2014, which states that the beneficiary is a "contractor at [REDACTED] in [REDACTED] CA, and that the "anticipated need for [the beneficiary] is for 3 years." However, [REDACTED] also provided a purchase order dated August 29, 2014, which indicates that the beneficiary will be at [REDACTED] for "2+ months with possible extension" for its client, [REDACTED].

In response to the RFE, the petitioner reiterated that the beneficiary will be assigned at [REDACTED] for the duration of the employment and submitted letters from [REDACTED] and [REDACTED] that validated its claims. The petitioner also provided an itinerary which identified [REDACTED] address in [REDACTED], CA, as the venue where 100% of the beneficiary's time will be spent.

On appeal, the petitioner states that the beneficiary's assignment at [REDACTED] was terminated "unexpectedly" on November 26, 2014, and the beneficiary will be employed in-house for the duration of the requested employment period.

C. 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."

Upon review of the totality of the record, we find that 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 the work to be performed for [REDACTED]. Specifically, while the petitioner asserted that the beneficiary would be assigned at [REDACTED] in [REDACTED] CA for the duration of the requested employment, the purchase order from [REDACTED] indicates that the project duration is "2+ months with possible extension." On appeal, the petitioner submitted copies of emails from [REDACTED] which indicate that the beneficiary's report date at [REDACTED] was September 2, 2014, and that they received notification that the last day of service for the beneficiary at [REDACTED] is November 26, 2014. This is consistent with [REDACTED] purchase order describing the project duration as "2+ months with possible extension." Further, there is no information in the record to establish that the beneficiary's assignment at [REDACTED] was intended for the duration of the requested employment, and the termination in November 2014 was "unexpected." Notably, the petitioner did not submit documents such as contracts, statements of work, work orders, service agreements, or letters from the end-client to validate its claim. On appeal, the petitioner submitted a copy of email from [REDACTED] who appears to work for [REDACTED]. However, the purpose of the email is to recognize the beneficiary's effort in the project and does not provide any information about project ending "unexpectedly" or its originally intended duration. 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)). Therefore, the petitioner has not overcome the Director's decision on this issue.

On appeal, the petitioner claims that the beneficiary would work in-house at its [REDACTED] location. However, we find that the petitioner did not provide sufficient, credible evidence to establish in-house employment for the beneficiary for the validity of the requested H-1B employment.

The petitioner described the beneficiary's in-house projects as follows:

1. Petitioner's (through affiliate [REDACTED]) own product, Purchase Order Management (POM); and
2. [REDACTED], pursuant to a valid contract executed between the petitioner (through affiliate [REDACTED] Inc) and [REDACTED]

Notably, while the petitioner asserts that [REDACTED] is an affiliate, there is no record in the proceeding to establish its relationship with [REDACTED]. We note that the petitioner and [REDACTED] are located in the same building, but their suite numbers are different. Specifically, the petitioner is located at [REDACTED] and [REDACTED] is located at [REDACTED]. Further, there is no evidence that [REDACTED] has agreed to use the petitioner's personnel in developing the projects.

To corroborate the assertion that it is developing the POM project, the petitioner provided documents entitled Business Requirements Specification, Software Requirements Specification, High Level Design, System Test Plan, Kick Off Presentation – PO Management System V2. Notably, all the documents except Business Requirements Specification are on [REDACTED] letterhead.

To corroborate the assertion that it is developing the [REDACTED], the petitioner provided documents including a statement of work (SOW), invoice, and confidentiality agreement. However, the documents are executed between [REDACTED] and [REDACTED] and there is no evidence that the petitioner is a party to this project.

However, assuming *arguendo* that the [REDACTED] is an affiliate, the evidence still does not establish that the petitioner has in-house project for the duration of requested employment period. For example, the SOW from [REDACTED] indicates that it is "in effect from Nov-14-2014 until the later of completion and acceptance of the work or Dec-05-2015." Likewise, on appeal, the petitioner indicates that POM project is "projected to continue until December 31, 2015." The petitioner did not provide further evidence to establish that the petitioner would have additional projects for duration of the requested employment period.

Moreover, there are inconsistencies in the record that undermine the petitioner's credibility regarding the proffered position. For example, while the petitioner submitted the invoice from [REDACTED] to claim that the beneficiary will work on the project, the invoice explicitly states that it was paid for "offshore IT resources to support various IT projects" and there is no indication that the project was to be performed in the United States.

Further, the wage level designated by the petitioner does not correspond to the job description. As mentioned, the petitioner designated the proffered position on the LCA as a Level I (entry) position. In designating the proffered position at a Level I wage, the petitioner has indicated that the proffered position is a comparatively low, entry-level position relative to others within the occupation.²

² A Level I wage rate is described in DOL's "Prevailing Wage Determination Policy Guidance" 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.

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.

Thus, in accordance with the above DOL explanatory information on wage levels, the Level I wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results.

However, in its support letter dated September 24, 2014, the petitioner indicated that for [REDACTED] project, the beneficiary will "lead the offshore team and work[sic] on complex problems where analysis of situation requires in-depth fault analysis and trouble shooting skills" For the POM project, the petitioner indicates that the beneficiary will "[f]unction as the Onsite/Offshore Coordinator and Team Lead." Further, [REDACTED] described the beneficiary's project role as "ETL Lead." The petitioner's designation of the proffered position as a Level I, entry-level position is inconsistent with the job description, and raises additional questions regarding the substantive nature of the proffered position.³

A petition must be filed for non-speculative work for the beneficiary for the entire period requested that existed as of the time of the petition's filing. 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). Again, 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. Here, the petitioner did not submit sufficient credible documentary evidence that it had specialty occupation work available for the beneficiary for the duration of the requested time period.⁴

³ 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 relatively higher than 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.

⁴ 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:

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.

We further 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 proffered position.

That the petitioner did not 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. 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. The appeal will be dismissed and the petition denied.

III. CONCLUSION

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

ORDER: The appeal is dismissed.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).