



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JUL 31 2015**

PETITION RECEIPT#: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:



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, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

I. PROCEDURAL BACKGROUND

On the Form I-129 visa petition, the petitioner describes itself as a 385-employee software development and consulting company established in [REDACTED]. In order to employ the beneficiary in what it designates as a "Senior Consultant II, Quality Assurance" position at a salary of \$95,000 per year,¹ 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, concluding that the evidence of record did not establish that the proffered position qualifies as a specialty occupation.

The record of proceeding before us contains the following: (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 Form I-290B, Notice of Appeal or Motion, and supporting documentation.

Upon review of the entire record of proceeding, we find that the evidence of record does not overcome the director's basis for denying this petition.² Accordingly, the appeal will be dismissed, and the petition will be denied.

II. SPECIALTY OCCUPATION

To meet the petitioner's burden of proof in establishing the proffered position as a specialty occupation, the evidence of record must establish that the employment the petitioner is offering to the beneficiary meets the following statutory and regulatory requirements.

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:

¹ The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for use with a job prospect within the "Software Developers, Applications" occupational classification, SOC (O*NET/OES) Code 15-1132.

² In the exercise of our administrative review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010), unless the law specifically provides that a different standard applies.

- (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 Proffered Position

In its support letter, the petitioner stated that the beneficiary's duties would include the following:

The Senior Consultant II shall be responsible for engaging in one to several clients in the analysis, design, hands-on development and delivery of web-based application. In addition, the Senior Consultant II will provide technical direction and leadership in the architecture, design, development, and deployment of Microsoft solutions within [the petitioner's] client base.

More specifically, [the beneficiary] will be responsible for the following job duties:

- Develop, execute and maintain test plans for the product releases.
- Design, develop and maintain/enhance the QA automation software.
- Design, implementation and documentation of test cases and addition of these test cases to the automated test suites.
- Track and report on test status.

- Defect reporting and tracking.
- Demonstrated abilities to lead small QA teams in successfully participating in the release of software applications.
- Work with junior QA engineers to mentor them in the area of testing best practices and methodologies.
- Identify and execute the manual test coverage.
- Act as test coordinator and lead for selected projects[.]

The petitioner stated in the support letter that the proffered position requires a bachelor's degree in computer science or equivalent. The petitioner submitted the exact same duties in response to the Director's RFE.

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 "Software Developers, Applications" – SOC (ONET/OES) Code 15-1132. The petitioner indicated both on the Form I-129 and in the LCA that the beneficiary will work at the petitioner's location and did not provide additional work sites.

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.

In this matter, the petitioner indicated that the beneficiary will be employed in-house as a "Senior Consultant II, Quality Assurance." However, upon review of the record of proceeding, 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 period. Specifically, the petitioner did not submit a job description to adequately convey the substantive work to be performed by the beneficiary. While the petitioner has indicated that the beneficiary will be working on in-house client projects, and claimed that its "*business model is fluid and new assignments and contracts with end-clients are in constant negotiation*" (emphasis in the original), the petitioner has not submitted sufficient, credible evidence corroborating these assertions.³

³ In response to the Director's RFE, the petitioner stated that because of "confidentiality agreements" with its clients, the petitioner was not able to provide agreements or statements of work detailing the projects. Both the Freedom of Information Act and the Trade Secrets Act provide for the protection of a petitioner's confidential business information when it is submitted to USCIS. See 5 U.S.C. § 552(b)(4), 18 U.S.C. § 1905. Additionally, the petitioner may request pre-disclosure notification pursuant to Executive Order No. 12,600, "Predisclosure Notification Procedures for Confidential Commercial Information." Exec. Order No. 12,600, 1987 WL 181359 (June 23, 1987).

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

Furthermore, as reflected in the descriptions of the position as quoted above, the proffered position has been described in terms of generalized and generic functions 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 states that the beneficiary will "[d]evelop, execute and maintain test plans for the product releases" and "[d]esign, develop and maintain/enhance the QA automation software." The petitioner's description is generalized and

Although the petitioner submitted a "Change Order" from [REDACTED], it was not signed by the petitioner. Furthermore, this document indicated that the project for [REDACTED] ended on December 31, 2014, and that another change order would be required in the event [REDACTED] desired to extend the terms beyond that date. The record of proceeding contains no subsequent changer order. Nor does the record contain the October 15, 2011 Master Agreement pursuant to which the submitted change order was issued. The petitioner also submitted a "sample" statement of services (SOS) from Assurant, to which the petitioner refers as "*only illustrative of the type of projects [the beneficiary] may be assigned to.*" (Emphasis in the original). However, this SOS indicates that the project ended on August 27, 2014, prior to the filing of this petition.

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.

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).

generic in that the petitioner does not convey the substantive nature of the work that the beneficiary would actually perform, any particular body of highly specialized knowledge that would have to be theoretically and practically applied to perform it, or the educational level of any such knowledge that may be necessary. The abstract, speculative level of information regarding the proffered position and the duties comprising it is further exemplified by the phrases "[t]rack and report on test status," "[d]efect prevention through early involvement with project teams," "[d]efect reporting and tracking," "[w]ork with junior QA engineers," and "[a]ct as test coordinator and lead for selected projects." Furthermore, the stated duty of "[d]emonstrat[ing] abilities to lead small QA teams" is a job qualification, not a job duty. The 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.

Without additional information describing the specific duties the petitioner requires the beneficiary to perform, as those duties relate to specific projects, USCIS is unable to discern the nature of the position and whether the position indeed qualifies as a specialty occupation. Without a meaningful job description within the context of non-speculative employment, the petitioner may not establish any of the alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). The duties as described by the petitioner do not establish that the work proposed for the beneficiary actually exists.

Based upon a complete review of the record of proceeding, we find that the petitioner has not established (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. Consequently, 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.

The failure to establish the substantive nature of the work to be performed by the beneficiary consequently precludes a finding that the proffered position satisfies 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. 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.

On appeal, counsel asserts that USCIS approved other petitions that the petitioner had previously filed on behalf of other employees in similar positions. The Director's decision does not indicate whether the service center reviewed the prior approvals of the other nonimmigrant petitions. If the

previous nonimmigrant petitions were approved based on the same unsupported assertions contained in the current record, the approvals would constitute material and gross error on the part of the director. We are not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be "absurd to suggest that [USCIS] or any agency must treat acknowledged errors as binding precedent." *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the petitioner, we would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

As the record of proceeding does not establish that the petitioner 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. For this reason, the appeal will be dismissed.

III. CONCLUSION AND ORDER

The petition will be denied and the appeal dismissed for the above stated reasons.⁵ 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. The petition is denied.

⁵ As the grounds discussed above are dispositive of the petitioner's eligibility for the benefit sought in this matter, we will not address and will instead reserve our determination on the additional issues and deficiencies that we observe in the record of proceeding with regard to the approval of the H-1B petition.