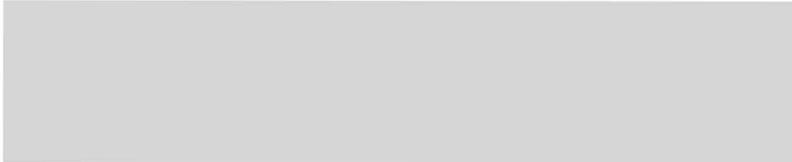


(b)(6)

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Service  
Administrative Appeals Office  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



DATE: JUN 12 2015

PETITION RECEIPT #: 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:



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

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

Thank you,

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 petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

## I. PROCEDURAL BACKGROUND

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a 48-employee "IT Consulting" company established in [REDACTED]. In order to employ the beneficiary in what it designates as a "Software Quality Assurance Engineer" 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 on October 1, 2014, concluding that the evidence of record did not establish that the proffered position qualifies as a specialty occupation. On appeal, the petitioner asserts that the Director's basis for denial 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 the supporting documentation filed with it; (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 and the petitioner's submissions on appeal. We reviewed the record in its entirety before issuing our decision.<sup>1</sup>

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. THE PROFFERED POSITION

On the Form I-129 the petitioner indicates that it seeks to employ the beneficiary as a full-time "Software Quality Assurance Engineer" at the rate of pay of \$64,000 per year. In addition, the petitioner states on that form that the beneficiary will work at the petitioner's business address, [REDACTED] from October 1, 2014 to September 18, 2017. On the H Classification Supplement to Form I-129 (Form I-129 Supplement H), the petitioner provides the following description of the proposed duties: "The beneficiary will render computer programming and system analysis duties. Provide technical support."

The Labor Condition Application (LCA) submitted to support the petition states that the proffered position title is "Software Quality Assurance Engineers and Testers [*sic*]," and that it corresponds to Standard Occupational Classification (SOC) code and title "15-1199, Computer Occupations, All

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

Other," from the Occupational Information Network (O\*NET). The LCA further states that the proffered position is a Level II position.

The petitioner submitted, *inter alia*, a letter of support, dated March 31, 2014, describing itself as a "business and technology consulting firm specializing in design, development, and delivery of end-to-end ERP solutions . . . ." The petitioner also stated the following about the proffered position:

In general, as Software Quality Assurance Engineer, the Beneficiary will confer with client management, customers, and staff to define system goals and then create necessary roadmaps, graphs, models, and other materials to document and present the steps necessary to realize system goals. The Beneficiary will specify inputs to be accessed by the system, design the processing steps, and format the output to meet user needs.

In response to the RFE, the petitioner submitted a letter, dated September 9, 2014, clarifying that "[t]he project to which we intend to assign [the beneficiary] is for our customer [REDACTED] with whom we have an SOW for the enhancement and development of Version 2.0 of their [REDACTED]'. The petitioner stated that the beneficiary "will be involved throughout the entire SDLC of the project, and his focus will be on providing the QA and Testing functions." The petitioner explained that the beneficiary will perform all work on this project from the petitioner's own premises. The petitioner further stated that "[t]he project is expected to extend till at least August 31, 2016. However, it is more than probable that with further enhancements and further modules being added onto this [REDACTED] . . . the project will be extended beyond this currently projected end date." The petitioner also stated that it "would not hire anyone without the minimum of a Bachelor's degree in Computer Science or Engineering or CIS or MIS or some other directly related field of study."

The petitioner submitted a letter, dated August 25, 2014, from the Chief Executive Officer (CEO) of [REDACTED] confirming that the beneficiary "will be providing Software Quality Assurance Engineer services to the project LMS Version 2.0 Enhancements," and that he will be providing these services from the petitioner's office. The letter further states that the beneficiary "will engage in the complex analysis, design, testing of software systems/applications," and specifically lists the following tasks:

- Performing database testing by executing SQL queries[;]
- Analyze requirements, Create test cases and execute test cases, log the defects[;]
- Creates complex test plans using templates and guidelines[;]
- Creates test cases and test scripts[; and]
- Documents all phases of the Systems QA process[.]

[REDACTED] CEO also stated that the proffered position requires at least a bachelor's degree "in an area such as Computer Science, Engineering or another closely related field."

### III. SPECIALTY OCCUPATION

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

#### A. Legal Framework

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires [(1)] 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 requires [(2)] 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, the 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

We find that the record of proceeding in this case does not contain sufficient information regarding the specific job duties to be performed by the beneficiary while assigned to the "LMS Version 2.0 Enhancements" project for the end-client [REDACTED]. The petitioner asserts that "[t]he SOW contains all details of the project scope, its proposed schedule, the many deliverables and products and services that must be provided at each stage, our responsibilities for successful delivery, and estimated costs"; however, we find that the SOW lacks the necessary level of details regarding the beneficiary's claimed assignment. For example, while the SOW broadly describes the activities to be completed and the overall positions constituting the petitioner's "team," it does not illuminate what specific tasks will be performed, which team member(s) will perform them, and the manner and means through which they will be achieved. In fact, the SOW does not identify the beneficiary or any of the individuals constituting the petitioner's "team" by name. Furthermore, the Master Services Agreement (MSA) executed by the petitioner and [REDACTED] states that a list of all of the petitioner's employees, consultants, and subcontractors providing services to [REDACTED] would be attached to the MSA; however, no such attachment is appended to the MSA.

The letter from the end-client confirming the beneficiary's assignment, too, is insufficient, as it does not describe the particular duties of the beneficiary in detail. It lists the beneficiary's services in overly broad and repetitive terms that do not appear to be specifically tied to the "LMS Version 2.0 Enhancements" project. To illustrate, the letter simply states that the beneficiary will "[p]erform database testing," "[c]reate test cases and execute test cases," "[create] complex test plans," "[create] test cases and test scripts," and "[d]ocument all phases of the Systems QA process." The letter does not further explain what each of these duties specifically entails, and how each duty specifically relates to the activities and timelines outlined in the SOW.

Nor has the petitioner submitted sufficient, credible explanations of the beneficiary's specific tasks with respect to the "LMS Version 2.0 Enhancements" project. In fact, the petitioner's descriptions of the proffered position and its constituent duties raise additional questions regarding the nature of the proffered position. For example, the petitioner described the proposed duties on the Form I-129 Supplement H as "render[ing] computer programming and system analysis duties. Provide technical support." Likewise, the petitioner stated in its initial support letter that the beneficiary "will confer with client management, customers, and staff to define system goals and then create necessary roadmaps, graphs, models, and other materials," and "will specify inputs to be accessed by the system, design the processing steps, and format the output to meet user needs." The employment agreement dated March 18, 2014 between the petitioner and the beneficiary lists his duties as including "analyzing the business requirements, designing and developing software solutions as per specific requirements." However, the letter from the end-client contains no such

job duties for the beneficiary. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Furthermore, the evidence of record does not sufficiently demonstrate what work the beneficiary would be doing for the entire validity period requested. The SOW specifies the delivery due date as August 31, 2016, and the petitioner has acknowledged that this date represents the "currently projected end date." On the other hand, the petitioner requested a validity period through September 18, 2017. Although the petitioner claimed that it is "more than probable that . . . the project will be extended beyond this currently projected end date," there is insufficient corroborating evidence that the project has actually been extended beyond the acknowledged August 31, 2016 due date.<sup>2</sup> We note that 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). 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. Therefore, even if the record contained sufficient evidence regarding the specific duties to be performed by the beneficiary, the petition could not be approved for the entire requested validity period.

Based on the lack of reliable, detailed information and documentation regarding the "LMS Version 2.0 Enhancements" project and the specific duties the beneficiary will perform on it, we cannot find that the petitioner has met its burden of proof in establishing that the beneficiary will be employed to exclusively perform in-house services on this project, as claimed. Thus, we find that the evidence of record is insufficient to establish the substantive nature of the work to be performed by the beneficiary.

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.

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<sup>2</sup> The end-client's letter vaguely states that this project is "an ongoing, long-term project that is expected to last at least the next three years." However, without additional explanation, including why this statement differs from the information found in the SOW, the end-client's letter is insufficient to corroborate the petitioner's claims.

Accordingly, as the evidence of record does not satisfy 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 and the petition denied.

#### IV. CONCLUSION AND ORDER

As set forth above, we agree with the Director's findings that the evidence of record does not establish that the proffered position qualifies for classification as a specialty occupation. For this reason, the petition will be denied and the appeal dismissed.<sup>3</sup>

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.

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<sup>3</sup> As the identified ground of ineligibility is dispositive of the appeal, we will not address any of the additional deficiencies we have identified on appeal.