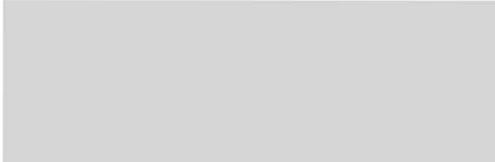


(b)(6)

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



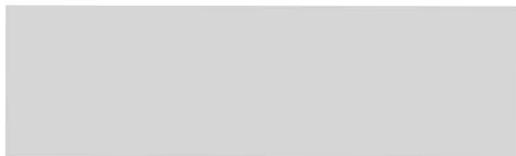
DATE: JUN 12 2015

PETITION RECEIPT #: [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 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 25-employee "IT Consulting & Software Development" company established in [REDACTED]. In order to employ the beneficiary in what it designates as a full-time "Programmer Analyst/.NET Developer" position at a salary of \$65,000 per year, 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 petitioner seeks to employ the beneficiary from October 1, 2014 through August 1, 2017.

The Director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a Request for Evidence (RFE). Thereafter, the petitioner responded to the Director's RFE. The Director denied the petition, finding that the evidence of record did not establish that the proffered position qualifies as a specialty occupation, and that the petitioner has sufficient work for the requested period of intended employment. The petitioner now files this appeal, asserting that the Director's decision was erroneous.

We base our decision upon our review of the entire record of proceeding, which includes: (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 Notice of Appeal or Motion (Form 290B) and submissions on appeal. We reviewed the record in its entirety before issuing our decision.¹

As will be discussed below, we have determined that the Director did not err in her decision to deny the petition. For this reason, the appeal will be dismissed, and the petition will be denied.

II. THE PROFFERED POSITION

The Labor Condition Application (LCA) submitted to support the petition states that the proffered position is a "Programmer Analyst/.NET Developer" and that it corresponds to Standard Occupational Classification (SOC) code and title "15-1121, Computer Systems Analysts," from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I (entry) position.

In a letter of support dated March 31, 2014, the petitioner described itself as a "global IT Solutions and services firm . . . providing best quality and cost effective IT solutions to fortune 1000 companies, mid-range companies and upcoming companies via its onsite, offshore and in house service models." With respect to the proffered position, the petitioner stated that the beneficiary

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

"will be working in-house from [the petitioner's] offices" to perform the following duties:

- Analyze complex user requirements, procedures and problems to automate processing and to improve existing computer systems: **20%**[;]
- Analyze current operational and engineering procedures, identify problems, and learn specific input and output requirements: **15%**[;]
- Analyze business procedures and problems to redefine data and convert it programmable form for electronic processing: **10%**[;]
- Plan and prepare technical reports and instructional manuals: **15%**[;]
- Upgrade completed system and correct errors to maintain system after implementation: **15%**[;]
- Study existing information processing systems to evaluate effectiveness and develop new systems to improve production, speed, and work flow: **15%**[; and]
- Conduct studies pertaining to development of new information to meet current project needs: **10%**[.]

[Verbatim.]

In response to the RFE, the petitioner submitted a letter, dated August 5, 2014, reiterating the same job duties as previously provided. The petitioner again asserted that the beneficiary "will be working on [the petitioner's] in-house project." In a separate letter dated August 11, 2015, the petitioner referred to a document entitled "Payment Processing and Financial Reconciliation System for Health Exchanges" as evidence of the "final software product" towards which the beneficiary will provide her services.

The petitioner stated that the minimum requirement for entry into the occupation is "at least a Bachelor's degree in Computer Science or Information Systems or a closely related equivalent combination."

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.

B. Analysis

We first 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. That is, while the petitioner indicated that the beneficiary will be working exclusively on its in-house project of developing a software product, the "Payment Processing and Financial Reconciliation System," the petitioner has not submitted sufficient, credible evidence corroborating these assertions.

In this matter, the record of proceeding presents the duties comprising the proffered position in terms of abstract and generalized duties. For example, the petitioner asserts that the beneficiary will spend 20% of her time on "[analyzing] complex user requirements, procedures and problems to automate processing and to improve existing computer systems." There is no further explanation of what specific tasks the beneficiary will perform in furtherance of this overarching duty, whose "user requirements" and "existing computer systems" will be involved, or what bodies of knowledge are required to perform these duties. Moreover, the petitioner has not specifically explained the duties and role of the proffered position in the context of the "Payment Processing and Financial Reconciliation System" project. For example, there is no explanation of how the same duty involving analyzing user requirements relates to the purported *in-house* development of the "Payment Processing and Financial Reconciliation System" product.

As evidence that the beneficiary will be assigned to the "Payment Processing and Financial Reconciliation System" project, the petitioner submitted the document "Payment Processing and Financial Reconciliation System for Health Exchanges," dated April 1, 2013. However, the petitioner has not sufficiently explained how this document relates to the beneficiary and the proffered position, and hence, is credible evidence of her claimed assignment. This document does not specifically reference the beneficiary or the proffered position. Instead, it depicts the "team structure" as consisting of one program director, one project manager, one technical architect, one business architect, three technical designers, three report designers, two application designers, two database designers, two test analysts, one process designer, three integration analysts, and three business analysts. The "Programmer Analyst/.NET Developer" position, which is the title of the proffered position, is not specifically listed as part of the overall "team."

Furthermore, the petitioner has not explained how the proffered job duties relate to the activities described in the "Payment Processing and Financial Reconciliation System for Health Exchanges" document. To illustrate, the "Effort Plan" and "High [L]evel Task Plan" subsections list the activities that constitute the "program components" and "major phases" of the overall program, each activity's scheduled start and completion dates, and the number of hours required to perform each duty. The petitioner has not specifically identified the role of the proffered duty within the "Effort Plan" and "High [L]evel Task Plan."

The petitioner also submitted screen-shots of its website as further evidence of the beneficiary's assignment. Many of these screen-shots briefly describe healthcare-related products that are "proposed" or on which the petitioner "has been working on providing." However, the petitioner has not specifically explained and documented how these briefly described products in the screen-shots relate to the "Payment Processing and Financial Reconciliation System."

Despite the petitioner's claim that the "beneficiary is being hired specifically to contribute to the ['Payment Processing and Financial Reconciliation System'] project" at the petitioner's business premises, the Employment Agreement between the beneficiary and the petitioner contemplates that the beneficiary's employment will necessarily include assignments to third-party clients/vendors. More specifically, clause 2, "Compensation; Reimbursement," states that the beneficiary's "compensation will be given as long as employee has been getting billable hours *from client/vendors* (emphasis added)." Clause 6, "Reimbursement of Expenses," specifies the amount of reimbursement owed to the petitioner if the beneficiary voluntarily leaves the company before completing twelve to eighteen months of service, as counted "from the first day of Employee's first assignment *at a client* (emphasis added)." The petitioner has not explained how (or if) the beneficiary would be compensated for in-house work not involving clients or vendors, or how the reimbursement of expenses would be counted if the beneficiary were not assigned to a client site. The specific language of the Employment Agreement, as highlighted above, undermines the petitioner's assertions regarding the beneficiary's exclusive in-house employment. 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 (BIA 1988).

Based on all of the above reasons, including the lack of reliable, detailed information and documentation regarding the "Payment Processing and Financial Reconciliation System" project and the specific duties the beneficiary will perform on it, we find the evidence of record insufficient to establish 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. 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 also agree with the Director that, even if the beneficiary would be working on the "Payment Processing and Financial Reconciliation System" project as claimed, the evidence of record is still insufficient to demonstrate that the petitioner has sufficient work for the beneficiary for the requested period of intended employment. In other words, the petitioner has not sufficiently established that it has definitive, non-speculative specialty-occupation work for the entire validity period requested.²

² 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

In this instance, the petitioner requested a validity period from October 1, 2014 to August 1, 2017. However, the "Payment Processing and Financial Reconciliation System" document reflects that the last activities for this project (including implementation and deployment) are scheduled to be completed by July 31, 2016. The petitioner has not explained what the beneficiary would be doing beyond July 31, 2016, when the project to which she is supposed to be exclusively assigned will conclude.

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.

C. Opinion Letter

We will now briefly address why we accord little probative weight to Dr. [REDACTED] opinion regarding the proffered position. Dr. [REDACTED] opinion is not based upon sufficient information about the programmer analyst/.net developer position proposed here. Dr. [REDACTED] does not relate any personal observations of the petitioner's operations or the work that the beneficiary will perform, nor does he state that he has reviewed any projects or work products related to the proffered position. Dr. [REDACTED] opinion does not relate his conclusions to specific, concrete aspects of this petitioner's business operations and its projects to demonstrate a sound factual basis for his conclusions about the duties of the proffered position and its educational requirements.

Accordingly, we conclude that Dr. [REDACTED] opinion letter is not probative evidence to establish the proffered position as a specialty occupation. We may, in our discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

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).

The regulation at 8 C.F.R. § 214.2(h)(9)(i)(B) also contemplates that speculative employment is not permitted stating that a "petition may not be filed. . .earlier than 6 months before the date of **actual need** for the beneficiary's services or training"

IV. CONCLUSION AND ORDER

The petition will be denied and the appeal dismissed for the above stated reasons.³ 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.

³ 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.