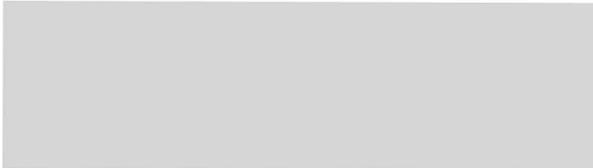




U.S. Citizenship  
and Immigration  
Services

(b)(6)



**JUN 30 2015**

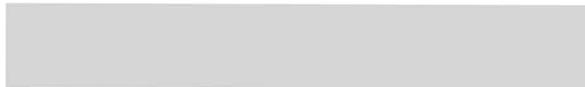
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PETITION RECEIPT #: 

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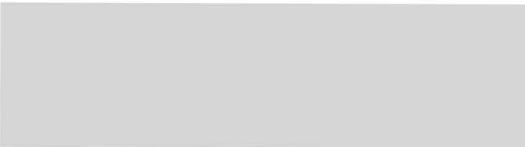
Petitioner:

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,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont 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 300-employee "Retail Merchandising Service" firm established in [REDACTED]. In order to continue to employ the beneficiary in what it designates as a "Software 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, 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.<sup>1</sup>

## II. THE PROFFERED POSITION

The petitioner claims in the Labor Condition Application submitted to support the visa petition that the proffered position corresponds to Standard Occupational Classification (SOC) code and title 15-1133, Software Developers, Applications, from the Occupational Information Network (O\*NET).

In a letter dated July 17, 2013, [REDACTED] who is identified elsewhere in the record as the petitioner's CFO, provided the following list of the duties of the proffered position:

- Modifying existing software to correct errors, to adapt it to new hardware or to upgrade interfaces and improve performance.
- Designing and developing software systems, using scientific analysis and mathematical models to predict and measure outcome and consequences of design.

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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).

- Consulting with engineering staff to evaluate between hardware and software, develop specifications and performance requirements and resolve customer problems.
- Analyzing information to determine, recommend and plan installation of a new system or modification to an existing system.
- Developing software system testing and validation procedures.
- Directing software programming and development of documentation.
- Consulting with customers or other departments on project status, proposals and technical issues such as software system design and maintenance.
- Advising customer about, or performing maintenance of software system.
- Coordinating installation of a software system.
- Monitoring functioning of equipment to ensure system operates in conformance with specifications.

Ms. [REDACTED] stated that the proffered position requires a bachelor's degree in computer information systems or a related field and "3+ years" of experience.

### III. 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:

*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. Analysis

We find that despite the service center's request for additional evidence documenting the work to be performed by the beneficiary, the record is devoid of substantial documentary evidence as to the specific duties of the proffered position. Given the lack of detail and corroborating evidence, we cannot determine that the proffered position reflects the duties of a software engineer.

The chief evidence of the duties the beneficiary would perform is the duty description provided by Ms. [REDACTED]. However, the evidence in the record, including that duty description, does not sufficiently establish the substantive nature of the duties of the proffered position. Many of the duties Ms. Bennett describes appear to have been copied, with only minor changes, from the O\*NET description of the duties of "Software Developers, Applications" at <http://www.onetonline.org/link/summary/15-1132.00>, which states:

Modify existing software to correct errors, allow it to adapt to new hardware, or to improve its performance.

Develop and direct software system testing and validation procedures, programming, and documentation.

Confer with systems analysts, engineers, programmers and others to design system and to obtain information on project limitations and capabilities, performance requirements and interfaces.

Analyze user needs and software requirements to determine feasibility of design within time and cost constraints.

Design, develop and modify software systems, using scientific analysis and mathematical models to predict and measure outcome and consequences of design.

Store, retrieve, and manipulate data for analysis of system capabilities and requirements.

Consult with customers about software system design and maintenance.

Supervise the work of programmers, technologists and technicians and other engineering and scientific personnel.

Coordinate software system installation and monitor equipment functioning to ensure specifications are met.

Obtain and evaluate information on factors such as reporting formats required, costs, and security needs to determine hardware configuration.

Determine system performance standards.

This type of generalized description may be appropriate when defining the range of duties that may be performed within an occupational category, but it does not adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations and, thus, generally cannot be relied upon by a petitioner when discussing the duties attached to specific H-1B employment. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of its business operations, as well as demonstrate a legitimate need for such an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. The petitioner has not done so here.

Moreover, the record contains insufficient evidence of the petitioner's business operations and the software services it provides. The petitioner has repeatedly stated that it "suppl[ies] software solutions in conjunction with in-store personnel to manage retail planograms for marketing services . . . [and] works to provide modern solutions to retail and marketing issues by creating GIS (Geographic Information Systems) software to map the layout of retail merchandise within a store." However, the petitioner has not provided any further explanation, corroborated by documentary evidence, detailing its GIS and other software solutions.

In the RFE issued on January 28, 2014, the service center stated, *inter alia*: "You have indicated that the beneficiary will be working on a project at your location. However, the record does not contain evidence documenting the project to which the beneficiary will be assigned." The service center requested, *inter alia*: "Provide evidence that you have specialty occupation work available

for the entire requested H-1B validity period." While the petitioner responded with evidence such as a copy of its lease and a list of its employees, the response did not include evidence corroborating its claim that it has specialty occupation work for the beneficiary to perform throughout the period of requested employment. For instance, the petitioner did not provide evidence sufficient to show that it has contracts for the provision of software engineering services throughout the period of requested employment. The record contains insufficient indication that the petitioner has in-house projects that require the performance of those duties or that other companies have contracted with the petitioner for the performance of such duties. In addition, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Finally, the petitioner's job description lacks sufficient detail to establish the associated application of specialized knowledge that its actual performance would require within the context of the petitioner's particular business operations. Merely claiming that the position requires a bachelor's degree in computer information systems (or related fields), without more, is insufficient to establish that the position requires the "theoretical and practical application of a body of highly specialized knowledge" to perform these claimed duties. *See* INA § 214(i)(1). 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)).

Thus, the record, as presently constituted, precludes a determination that the duties of the proffered position are those of a software engineer. There is insufficient basis upon which it can be determined that the petitioner has demonstrated a need for a software engineer and that the beneficiary will be performing the claimed duties of a software engineer.

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) and 103.2(b)(12). The failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for 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 evidence of record is devoid of sufficient, credible evidence of the actual job duties the beneficiary will perform, it does not demonstrate that the proffered position more likely than not requires a bachelor's or higher degree in a specific specialty or its equivalent as a minimum for entry. *See* INA § 214(i)(1). Thus, the petitioner has not met its burden of proof in this regard, and, therefore,

it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

#### IV. CONCLUSION

We recognize that this is an extension petition. The Director's decision does not indicate whether she reviewed the prior approvals of the previous nonimmigrant petitions filed on behalf of the beneficiary. If the previous nonimmigrant petitions were approved despite the same unsupported assertions and evidentiary deficiencies that are contained in the current record, those approvals would constitute material and gross error on the part of the Director. We are not required to approve applications or 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. 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 nonimmigrant petitions on behalf of a beneficiary, 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).

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.