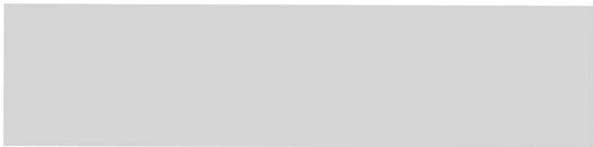




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAR 25 2015** OFFICE: CALIFORNIA SERVICE CENTER FILE:

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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner states it is a "structural engineering firm" established in [REDACTED] and currently employs seven¹ people and has a gross annual income of \$800,000. The petitioner states it wishes to hire the beneficiary as a nonimmigrant "cost estimator" and classify that position as 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 petitioner failed to demonstrate 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 and supporting documentation.

Upon review of the entire record of proceeding, we find that the evidence of record supports the director's decision to deny the petition for its failure to establish the proffered position as a specialty occupation. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. ANALYTICAL FRAMEWORK

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

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

¹ The letter of support submitted with the Form I-129 states there are six employees.

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 also 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 illogical and absurd 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 rely simply upon a proffered position's title. The specific duties of the 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 beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 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.

II. ANALYSIS

We will now discuss the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

A. 8 C.F.R. § 214.2(h)(4)(iii)(A)(I)

We will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied by establishing that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position that is the subject of the petition.

As noted above, the petitioner states that it is a "structural engineering firm." The petitioner's March 31, 2014 letter of support, filed with the Form I-129 states that the position requires a bachelor's degree in civil engineering. In response to the director's May 9, 2014 RFE the petitioner also provided the following list of job duties:

- Under supervision of principal engineers, perform and provide project review and pre-design services;
- Perform detailed quantity take offs by reliably identifying the quantities of the various materials involved in the project by analyzing the architectural plan, assign unit pricing for materials, equipment costs, to quantity factors and prepare cost estimates from concept through execution;
- Ensuring overall accuracy and completeness of estimate;
- Perform and provide structural calculations;

- Utilizing software such as AutoCad, [REDACTED] and other computer software to prepare structural drawings to calculate project estimates;
- Soliciting project pricing from vendors and/or sub-contractors;
- Collaborate and interface with engineers, architects and clients on project estimates;
- Performing additional assignments per supervisor's direction.

The petitioner asserts in the Labor Condition Application (LCA) that the proffered position falls under the occupational category "Cost Estimators" at a Level I wage. The petitioner's designation of the proffered position as wage Level I position is indicative of a comparatively low, entry-level position relative to others within the occupation and signifies that the beneficiary is only expected to possess 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. 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.

The above phrases and descriptions in the record of proceeding are generalized tasks performed by some cost estimators and track closely those duties listed in the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*² chapter on cost estimators. The *Handbook* states the following about this occupational category:

What Cost Estimators Do

Cost estimators collect and analyze data in order to estimate the time, money, materials, and labor required to manufacture a product, construct a building, or provide a service. They generally specialize in a particular industry or type of product.

Duties

Cost estimators typically do the following:

- Identify and quantify cost factors, such as production time, materials, and labor expenses;
- Travel to jobsites to gather information on materials needed, labor required, and other factors;

² We recognize the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. Our references to the *Handbook* are to the 2014 – 2015 edition available online. We hereby incorporate into the record of proceeding the excerpt of the *Handbook* regarding the duties and requirements of the occupational category "Cost Estimators."

- Read blueprints and technical documents in order to prepare estimates;
- Collaborate with engineers, architects, clients, and contractors on estimates;
- Consult with industry experts to discuss estimates and resolve issues;
- Use computer software to calculate estimates;
- Evaluate a product's cost-effectiveness or profitability;
- Recommend ways to make a product more cost effective or profitable;
- Work with sales teams to prepare estimates and bids for clients;
- Develop project plans for the duration of the project.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Cost Estimators," <http://www.bls.gov/ooh/business-and-financial/cost-estimators.htm#tab-2> (last visited Mar. 11, 2015).

The *Handbook* does not indicate that "Cost Estimators" comprise an occupational group for which at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. The subchapter of the *Handbook* entitled "How to Become a Cost Estimator" states that "[i]ncreasingly, employers prefer candidates who have a bachelor's degree." *Id.* at <http://www.bls.gov/ooh/business-and-financial/cost-estimators.htm#tab-4> (last visited Mar. 11, 2015). The *Handbook* does not state a degree in a specific specialty is a minimum requirement for entry into the career. The only "essential" qualification identified by the *Handbook* is a "strong background in mathematics." *Id.*

Although the beneficiary's bachelor's and master's degrees in civil engineering suggest he has the requisite background in mathematics, neither the *Handbook* nor the petitioner's submissions demonstrate that these degrees are the minimum entry requirements for the proffered position.³

Noting that the *Handbook* states that there is no specific degree requirement, and that some employees can qualify for the position without a degree, the record does not suggest that the instant position qualifies as a specialty occupation as defined in the regulations. *See id.* at <http://www.bls.gov/ooh/business-and-financial/cost-estimators.htm#tab-4> (last visited Mar. 11, 2015).

In addition, materials from DOL's Occupational Information Network (O*NET OnLine) do not establish that the proffered position satisfies the first criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A). O*NET OnLine is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a requirement for a given position, as O*NET OnLine's Job Zone Four designation (the one assigned to Cost Estimators) makes no mention of the specific field of study from which a degree must come.⁴ As was noted previously,

³ A beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

⁴ *See* the Job Zone section of the O*NET Summary Report for Cost Estimators, <http://www.onetonline.org/link/summary/13-1051.00> (last visited Mar. 11, 2015).

we interpret 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 proposed position.

As the evidence in the record of proceeding does not establish that at least a baccalaureate degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

B. 8 C.F.R. § 214.2(h)(4)(iii)(A)(2)

Next, we find that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or any other authoritative resource, reports an industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent.

The petitioner did provide nine job advertisements from different companies which will be addressed below.⁵

- [REDACTED], seeks an experience (non-manager) cost estimator. This position does not appear to be similar to the proffered job as it is not for a Level I (entry-level) employee.
- [REDACTED] seeks an experienced (non-manager) cost estimator and requires a bachelor's degree. The lack of a specific degree requirement does not establish that it is a specialty occupation. Further, the job is not similar to the proffered job as it is for an experienced estimator and not for an entry-level employee.

⁵ The petitioner also provided a resume for an architect named [REDACTED]. The relevance of this document is not established by the petitioner or by the record as a whole.

- [REDACTED] also seeks an experienced cost estimator, and not an entry-level employee. It does require a "related bachelor's degree" but does not specify what it deems to be "related."
- [REDACTED] seeks an estimator with a degree in civil engineering or construction management with five years of "heavy civil construction experience." [REDACTED] advertisement states that it "has built some of America's largest infrastructure projects; highways, bridges, dams, rail, power and other 'heavy civil' projects." The record does not establish that the petitioner's operations and the demands of the instant position are similar in size, scope, or complexity. In addition, [REDACTED] seeks an experienced estimator, not an entry-level employee.
- [REDACTED] advertisement for a construction estimator has job requirements that are largely unrelated to the instant position. Based on the disparity of the job requirements the record does not establish that the jobs are parallel or in organizations that are similar.
- [REDACTED] seeks a cost estimator and *prefers* that they have a bachelor's degree. On its face, this advertisement does not require a degree, let alone a degree in a specific specialty.
- [REDACTED] is a "cost consulting firm." From the record it is not clear if [REDACTED] is in the construction or engineering business, or solely a consultant (it cites litigation support and claims that its services include "analysis"). The job description for this position is not parallel to the proffered position. Thus, the petitioner has not established that the position is parallel or in a similar organization.
- [REDACTED] seeks an experienced cost estimator, not a Level I, entry-level, employee. It states it wishes to hire someone with a degree in construction, engineering, or architecture, but it will consider applicants with any degree if they have construction or design related experience. The lack of a requirement for a degree in a specific specialty does not support the petitioner's case.
- [REDACTED] seeks a cost estimator with over ten years of experience. This is not an entry-level position and is not parallel to the instant petition.

There are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

Therefore, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty as common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

Next, we find that the petitioner did not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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."

In this particular case, the petitioner has failed to credibly demonstrate that the duties the beneficiary will perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or the equivalent.

The petitioner has not established with sufficient evidence in the record that the job requirements can only be satisfied by someone with a degree in a specific specialty. The petitioner's assertions are further contradicted by its pronouncement that this position is a wage Level I job. Without further evidence, it is simply not credible that the petitioner's proffered position is complex or unique in comparison to others within the occupation, as such a position would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher prevailing wage. For instance, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."⁶

The documents in the record do not demonstrate that the proffered position or its proposed duties and responsibilities can be distinguished from other cost estimator positions and their associated duties that do not require either (a) the services of a person with at least a bachelor's degree in a specific specialty or (b) the application of knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty. Consequently, as it has not been shown that the particular position for which this petition was filed is so complex or unique that it can only be performed by a person with at least a bachelor's degree in a specific specialty, or its equivalent, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

C. 8 C.F.R. § 214.2(h)(4)(iii)(A)(3)

We turn next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or the equivalent, for the position.

The petitioner has provided no evidence, nor has it provided any arguments in its RFE response or appeal that it has only hired employees with a degree in a specific specialty for this position in the past.

⁶ For additional information on wage levels, 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.

As the record of proceeding does not present a history of recruiting and hiring only individuals with a bachelor's degree in a specific specialty, or the equivalent, for the proffered position, it does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

D. 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)

Next, we find that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specialty.

Again, we note that the petitioner classified this position as a wage Level I occupation on the LCA. This level is 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." This is incongruous with a claim that the instant position is so specialized or complex that it requires a degree in specific specialty.⁷ Without further evidence, it is simply not credible that the petitioner's proffered position is one with specialized and complex duties compared to others within the occupation as such a position would likely be classified at a higher-level, Level III (experienced) or IV (fully competent) position, requiring a substantially higher prevailing wage. As previously discussed, a Level IV (fully competent) position is designated by DOL for employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

For these reasons, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

III. CONCLUSION

As the petitioner has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

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.

⁷ We incorporate into the present analysis, and into the analysis of each criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), this decision's earlier comments and findings with regard to the evidentiary deficiencies of the petitioner's statements and documentary submissions about the proposed duties.