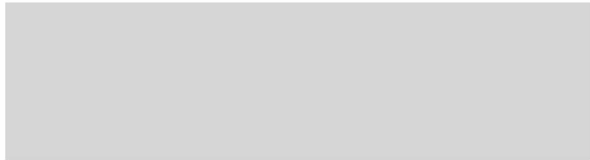






U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **MAY 28 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,

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 (AAO) on appeal. The appeal will be dismissed.

## I. FACTUAL AND PROCEDURAL HISTORY

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a 46-employee "software design and development" company established in [REDACTED]. In order to employ the beneficiary in what it designates as a software engineer position at a salary of \$75,000 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).

On September 5, 2014, the director denied the petition concluding that the petitioner did not establish that the proffered position qualifies for classification 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 this office contains the following: (1) the Form I-129 and supporting documentation; (2) the director's Request for Evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) a Notice of Appeal or Motion (Form I-290B), a brief, and supporting documentation.

Upon review of the entire record of proceeding, we find that the evidence of record does not overcome the director's ground for denying this petition.<sup>1</sup> Accordingly, the appeal will be dismissed, and the petition will be denied.

## II. PROFFERED POSITION

On the Form I-129, the petitioner stated that the proposed duties are "design and develop custom software application," and "maintain and modify software application, based on needs communicated by customers." The petitioner further indicated that the beneficiary will not work off-site. The petitioner did not state educational requirements<sup>2</sup> or provide additional information regarding the proffered position.

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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).

<sup>2</sup> To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent.

In the Labor Condition Application (LCA) filed in support of the Form I-129, the petitioner indicated that the proffered position corresponds to the occupational classification "Software Developers, Applications"-SOC (ONET/OES Code) 15-1132 at a Level II (qualified) wage. The LCA listed its address at [REDACTED] NY, and also listed another address at [REDACTED] NY, as places of employment. Notably, for the off-site location in [REDACTED] NY, the petitioner indicated that the prevailing wage level was Level I (entry level).

In response to the RFE, the petitioner submitted an affidavit explaining that the beneficiary will work on in-house projects. The petitioner stated that the beneficiary "may" engage in the following activities:

- a. Working on expanding and upgrading our company website. As you can see from our website, we have a number of sophisticated features built into it, which require advanced programming techniques to develop and maintain. However, we need to add numerous capabilities to that website in order to remain competitive. Such capabilities might include an interactive bidding page, allowing potential customers to input their information technology needs and requirements directly into our website, which would allow our firm to submit bid proposals with greater speed and accuracy. Because such software modules would by nature require sophisticated database development, a skilled software engineer would be required to create and upgrade such modules.
- b. Providing backup and support to employees working in the field. Many times consultants working at customers' worksites are confronted with technical issues which they require technical assistance to solve. The Beneficiary would evaluate issues submitted by consultants, determine if she could provide information herself to the consultant to resolve the issue, and if not, narrow the issue as much as possible to refer to one of the senior software engineers working in house or another engineer in the field to resolve the problem. Obviously, this type of task would require the skills of a software engineer.
- c. Assisting management with bid review and evaluation. Currently, [the petitioner's] management team reviews bid requests and formulates bid strategies. However, as our firm expands, we require additional staff to review bid proposals. Because the bids involve complicated software development, only a skilled software engineer would be able to determine the actual skills that would be required of consultants to fulfill the potential contracts, and ensure that our firm

has an accurate understanding of the complexity of the tasks that the bid would involve.

On appeal, the petitioner provided further details about the proffered position as follows:

- [The petitioner] currently supports an Oracle Data Warehouse project in New York remotely. [The petitioner's] staff has developed and maintained this project for last 10 years. Following are the activities that the resource will need to learn and perform

Oracle Data Warehousing & Application Support Activities

- Monitor daily load process of [REDACTED] data warehouse to ensure data is refreshed daily
- Bug Fixing, Minor enhancements
- Data Inquiries, data content
- Addressing Data Accuracy and Data Quality issues
- Tool Inquiries (Oracle Discoverer, Oracle Warehouse Builder)
- [REDACTED] Data Warehouse Inquiries
- Ad-Hoc Data load
- User Access (Add, Delete, Modify)
- Error messages (Oracle & Oracle tool related)
- Help design new warehouse objects such as warehouse tables, data mart tables, Discoverer Business Areas
- Manage Discoverer environment, including the maintenance of business areas and defining new joins, items, and tables
- Monitor and test backups
- Implement and maintain database security
- Plan growth and changes (capacity planning)
- Interface with Oracle Corporation for technical support
- Reboot the servers periodically

Software Maintenance Activities

- Installation, configuration and upgrading of Oracle server software and related products
  - Manage updates to Oracle software (database and application server)
  - Check logs
  - Periodically evaluate performance, using a statspack data
  - Manage statspack data
  - Monitor load statistics
- [The petitioner] current [sic] recently migrated all of its email services from Yahoo small business to Microsoft Office 365. The resource will help up finish the migration, maintain and support ongoing Office 365 email services. Training new user with the Office 365

- Developing and maintaining SharePoint Services
- Customization of SharePoint Sites
- Customization of Public Website
- Uploading/migration of shared documents to SharePoint sites
- Ongoing support for Office 365
- Configure SharePoint site to deploy document libraries to share documents among [the petitioner's] employees.

### III. SPECIALTY OCCUPATION

#### A. The Law

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

For H-1B approval, the petitioner must demonstrate a legitimate need for an employee exists and to substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition. It is incumbent upon the petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent, to perform duties at a level that requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.

The record of proceeding contains inconsistent information about the nature of the proffered position, which undermines the petitioner's credibility with regard to the services the beneficiary will perform, as well as the actual nature and requirements of the proffered position. When a petition includes numerous discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions.

The petitioner stated on the Form I-129 that the beneficiary would be employed as a software engineer. As previously discussed, the petitioner asserted in the LCA that the proffered position falls within the occupational category "Software Developer, Applications."

We recognize the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>3</sup> We reviewed of the information in the *Handbook* regarding the occupational category "Software Developers," including the sections regarding the typical duties and requirements for this occupational category.<sup>4</sup> Although the petitioner titled the position software engineer and categorized the occupational category as "Software Developers, Applications" on the LCA, upon review of the job description provided by the petitioner, we are not persuaded that the proffered position falls under the occupational category of "Software Developers."

<sup>3</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet at <http://www.bls.gov/ooh/>. Our references to the *Handbook* are to the 2014-2015 edition available online.

<sup>4</sup> For additional information regarding the occupational category "Software Developers," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Software Developers, on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/software-developers.htm> (last visited May 20, 2015).

<sup>5</sup> As the grounds discussed above preclude approval of the petition, we will not address additional issues and deficiencies that we observe in the record of proceeding.

The subchapter of the *Handbook* entitled "What Software Developers Do" states the following about this occupational category:

Software developers are the creative minds behind computer programs. Some develop the applications that allow people to do specific tasks on a computer or other device. Others develop the underlying systems that run the devices or control networks.

### **Duties**

Software developers typically do the following:

- Analyze users' needs, then design, test, and develop software to meet those needs
- Recommend software upgrades for customers' existing programs and systems
- Design each piece of the application or system and plan how the pieces will work together
- Create a variety of models and diagrams (such as flowcharts) that instruct programmers how to write the software code
- Ensure that the software continues to function normally through software maintenance and testing
- Document every aspect of the application or system as a reference for future maintenance and upgrades
- Collaborate with other computer specialists to create optimum software

Software developers are in charge of the entire development process for a software program. They begin by asking how the customer plans to use the software. They design the program and then give instructions to programmers, who write computer code and test it. If the program does not work as expected or people find it too difficult to use, software developers go back to the design process to fix the problems or improve the program. After the program is released to the customer, a developer may perform upgrades and maintenance.

Developers usually work closely with computer programmers. However, in some companies, developers write code themselves instead of giving instructions to computer programmers.

Developers who supervise a software project from the planning stages through implementation sometimes are called information technology (IT) project managers.

These workers monitor the project's progress to ensure that it meets deadlines, standards, and cost targets. IT project managers who plan and direct an



organization's IT department or IT policies are included in the profile on computer and information systems managers.

The following are types of software developers:

*Applications software developers* design computer applications, such as word processors and games, for consumers. They may create custom software for a specific customer or commercial software to be sold to the general public. Some applications software developers create complex databases for organizations. They also create programs that people use over the Internet and within a company's intranet.

*Systems software developers* create the systems that keep computers functioning properly. These could be operating systems that are part of computers the general public buys or systems built specifically for an organization. Often, systems software developers also build the system's interface, which is what allows users to interact with the computer. Systems software developers create the operating systems that control most of the consumer electronics in use today, including those in phones or cars.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Software Developers, on the Internet at <http://www.bls.gov/ooh/computer-and-information-technology/software-developers.htm#tab-2> (last visited May 20, 2015).

We find that the evidence of record does not establish the substantive nature of the proffered position. The petitioner submitted multiple versions of job duties that vary greatly. On the Form I-129, the petitioner claimed that the beneficiary "will design and develop custom software applications" and "maintain and modify software applications." However, in response to the RFE, the petitioner indicated that the beneficiary may engage in "working on expanding and upgrading company website" "providing backup and support to employees working in the field" and "assign management with bid review and evaluation." On appeal, the petitioner indicates that the beneficiary's duties include "Oracle Data Warehousing & Application Support Activities" and "Software Maintenance Activities," which include "[m]onitor daily load process of NYFH data warehouse to ensure data is refreshed daily," "[u]ser [a]ccess ([a]dd, [d]elete, [m]odify)," "[i]nstallation, configuration and upgrading of Oracle server software and related products" and more. The petitioner also indicates that the beneficiary will "maintain and support ongoing Office 365 email services" and also train new users. Such duties vary do not indicate that the beneficiary will design computer application or create custom software as described in the *Handbook* for Software Developers and thus, do not appear to fall within the occupational category "Software Developers."

We further note that the record of proceeding lacks documentation regarding the petitioner's business activities and the actual work that the beneficiary will perform to sufficiently substantiate the claim that the petitioner has H-1B caliber work for the beneficiary for the period

of employment requested in the petition. For example, the petitioner claims that it "responds to average of approx.. 75 Information Bids" and the beneficiary "will help in assisting management with bid review and evaluation." The petitioner also states that "[it] currently supports an Oracle Data Warehouse project in New York remotely," in which the beneficiary will also assist. However, the petitioner did not provide documents to substantiate its ongoing projects for the H-1B validity period. For example, it is not clear how many bids come in every year and if they will continue for the entire validity period. Further, the petitioner did not provide any information regarding the backup and support the employees in the field will need such as how often will they need support and what specific duties will be performed by the beneficiary in order to provide technical support. Finally, the petitioner did not provide any documentation regarding the "Oracle Data Warehouse project" such as contracts, information as to how long this contract with run and whether the beneficiary has a statement of work to perform work on this contract. 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)).

On appeal, the petitioner states that director erred by not putting proper weight to the photographs and the number of employees hired by the petitioner. We acknowledge that the petitioner submitted two photographs of two workers at their desks with computer equipment, and a corporate tax return from 2013. However, without any corroborating documentation of its ongoing projects, an unsigned tax statement and photographs do not establish that the petitioner has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

Further, as mentioned, while the petitioner asserted that the beneficiary will be employed in-house and will not be employed off-site, the petitioner provided an additional work location in the LCA. The petitioner did not explain the discrepancies.

As observed above, USCIS in this matter must review the actual duties the beneficiary will be expected to perform to ascertain whether those duties require at least a baccalaureate degree in a specific specialty, or its equivalent, as required for classification as a specialty occupation. To accomplish that task in this matter, USCIS must analyze the actual duties in conjunction with the specific project(s) to which the beneficiary will be assigned. To allow otherwise, results in generic descriptions of duties that, while they may appear (in some instances) to comprise the duties of a specialty occupation, are not related to any actual services the beneficiary is expected to provide.

Without additional information describing the specific duties the petitioner requires the beneficiary to perform, USCIS is unable to discern the nature of the position and whether the position indeed qualifies as a specialty occupation. Without a meaningful job description within the context of non-speculative employment, the petitioner may not establish any of the alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). The duties as described by the petitioner do not establish that the work proposed for the beneficiary actually exists. 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 (Reg. Comm'r 1978).

The petitioner has failed to provide sufficient details regarding the nature and scope of the beneficiary's employment or any substantive evidence regarding the actual work that the beneficiary would perform. Without a meaningful job description, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. The tasks as described fail to communicate (1) the actual work that the beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty.

The record's 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 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. The appeal will be dismissed and the petition denied for this reason.<sup>5</sup>

#### IV. CONCLUSION

The evidence of record fails to establish that the proffered position is a specialty occupation. Accordingly, the petition will be denied.

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.

<sup>5</sup> As the grounds discussed above preclude approval of the petition, we will not address additional issues and deficiencies that we observe in the record of proceeding.