

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



**U.S. Citizenship
and Immigration
Services**

(b)(6)

Date: **JUN 24 2013**

Office: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner:
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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

James Blingberg, Jr.
Ron Rosenberg,
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, (“the director”) initially approved the petition. Upon subsequent review and information received from the American Consulate in Dubai, United Arab Emirates, the director issued a Notice of Intent to Revoke (NOIR) approval of the petition and ultimately revoked the petition’s approval. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director’s decision will be withdrawn. The petition will be remanded for further consideration and action.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner describes itself as a 140-employee consulting and engineering firm specializing in telecommunications and wireless networks established in 2001. In order to employ the beneficiary in what it designates as a Network Systems and Data Communications Analyst 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 issued a NOIR on February 8, 2012 stating that the beneficiary did not possess a baccalaureate degree or equivalent in a specific field of study that is clearly related to the proffered position. Upon review of the petitioner’s response to the NOIR, the director determined that although the beneficiary holds a baccalaureate degree in a specific specialty, the evidence of record did not establish that the beneficiary has completed any job-related coursework or has relevant work experience to successfully perform the duties of the proffered position. On appeal, counsel for the petitioner contends that the director’s basis for revoking approval of the petition was erroneous.

The record of proceeding before the AAO contains: (1) the petitioner’s 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 notice of approval; (5) the NOIR; (6) the petitioner’s response to the NOIR; (7) the director’s revocation decision; and, (8) the Form I-290B, Notice of Appeal or Motion, with counsel’s letter and additional documentation. The AAO reviewed the record in its entirety before issuing its decision.

Upon review of the record, including the evidence submitted on appeal, the AAO finds that the petitioner has established that the beneficiary’s foreign baccalaureate degree in electrical engineering is equivalent to a bachelor of science degree in electrical engineering from an accredited U.S. university. The director’s decision, therefore, will be withdrawn. However, the petitioner has not provided sufficient evidence demonstrating that the proffered position is a specialty occupation. For this reason, the matter must be remanded to provide the petitioner the opportunity to address this issue.

As noted, the petitioner stated that it seeks the beneficiary’s services as a network systems and data communications analyst. The petitioner provided a Labor Condition Application (LCA) in support of the instant H-1B petition certifying the proffered position within the occupational classification of “Network Systems and Data Communications Analyst” - SOC (ONET/OES Code) 15-1081,¹ at a Level 1 (entry-level) wage. The LCA was certified on September 16, 2010 for a validity period of October 15, 2010 through October 14, 2013.

¹ The petitioner’s LCA identifies the SOC (ONET/OES Code) as 15-1081.00 – network systems and data

The petitioner, in its September 15, 2010 letter in support of the petition, stated that it is a consulting company hired by various clients in the telecommunications and wireless network industry as a contractor. The petitioner provided a copy of its contract with [REDACTED] and an addendum of the scope of work to be performed by the petitioner under the contract. The scope of work involved CW Drive Testing including the onsite collection of drive data in various markets. Neither the contract nor the different scopes of work provided to United States Citizenship and Immigration Services (USCIS) included sufficient detail to conclude that the petitioner would require a network systems and data communications analyst to perform specialty occupation duties for the petitioner.

Upon review, the director found the evidence insufficient to establish eligibility for the benefit sought and issued an RFE on October 25, 2010. With the RFE, the director notified the petitioner that additional documentation was required to establish that the proffered petition met the criteria for H-1B classification. In the November 22, 2010 response to the RFE, counsel for the petitioner explained that although the beneficiary's tasks would initially revolve around the post processing of its I [REDACTED] project, the beneficiary's duties did not rely solely on the petitioner's contract with [REDACTED]. Counsel noted that the petitioner was working on similar projects for other clients including [REDACTED] added that the petitioner is hired by these companies to perform specialized engineering services in the broadband wireless telecommunications industry to improve its clients' broadband wireless network. The petitioner provided a copy of its statement of work for [REDACTED] [REDACTED] as evidence of other ongoing projects. The petitioner also provided a job description noting that the beneficiary's major job functions would include:

- Network Systems Interface – Analyze, design, test and evaluate network systems and performance – 30 percent;
- Data Gathering and Handling – Observe, receive and obtain information from all relevant sources to identify, interpret and evaluate system and network requirements – 30 percent;
- Identifying Objects, Actions, Events – Identify information and analyze equipment and system performance to determine action needed to improve performance and output – 20 percent;
- Making Decisions and Solving Problems – 10 percent; and
- Communicating with Supervisors, Peers or Subordinates – 10 percent.

The petitioner also provided information describing the practical application of these functions and noted that the individual in the position would report to the president of the company and would be employed at the [REDACTED] California office in an engineering/network role. The job description listed the qualifications for the proffered position as a bachelor's degree in computer science, electrical engineering, or information systems. The petitioner's organizational chart showed the project manager (an RF engineer) and his/her subordinates including data

communications analyst; however, this code has since been revised and divided into three distinct occupations. The new SOC codes are: 15-1143.00 with the occupational title "Computer Network Architect"; 15-1152.00 with the occupational title "Computer Network Support Specialists"; and 15-1143.01 with the occupational title "Telecommunications Engineering Specialists."

processors (RF engineers), drive test coordinators, and drive test teams. The organizational chart reflected that the individuals in these positions would provide information to the individual in the network systems and data communication position.

In the NOIR, the director questioned the beneficiary's qualifications to perform the proffered position because the beneficiary's degree was in electrical engineering-power and he had been working as an MEP (Mechanical, Electrical, Plumbing) Technician. The director also noted that a generalized degree "absent specialized experience is insufficient to qualify an alien beneficiary in a specialty occupation."

In response to the NOIR, counsel for the petitioner referenced the "occupation code that is now parallel to the job duties performed in the instant case" and identified the correct occupational code as that of a "Computer Network Support Specialist which falls under the category of 'Computer Network Systems, and Database Administrator.'" Counsel also referenced the educational requirements set out in the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* in the chapter on Computer Network, Systems, and Database Administrators. Counsel included a copy of an excerpt from the 2010-2011 edition of the *Handbook* which reports:

Network and computer systems administrators often are required to have a bachelor's degree, although an associate degree or professional certification, along with related work experience, may be adequate for some positions. Most of these workers begin as computer support specialists before advancing into network or systems administration positions. (Computer support specialists are covered elsewhere in the *Handbook*.) Common majors for network and systems administrators are computer science, information science, and management information systems (MIS), but a degree in any field, supplemented with computer courses and experience, may be adequate.

* * *

For network architect and database administrator positions, a bachelor's degree in a computer-related field generally is required. . . .

For the record, the above requirements as outlined in the 2010-2011 edition of the *Handbook*, do not establish that the proffered position is a specialty occupation under the requirements set forth below. The *Handbook* reports only that network and computer systems administrators are often required to have a bachelor's degree but also indicates that a degree in any field supplemented with computer course work and experience is adequate. The *Handbook* also recognizes that some individuals in this position possess only an associate degree or certification. Such a report does not establish that the proffered position 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 demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, without further specification, does not establish the position as a specialty occupation. Cf. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). As such,

even if the petitioner established that the proffered position incorporated the duties of a network and computer systems administrator, which it has not, the instant petition could not be approved.

Counsel also provided three advertisements for network systems and data communication analyst positions and asserted that these job listings established that a minimum of a bachelor's degree in electrical engineering or a related field is a common requirement for the position. The first advertisement included in the record indicated that a candidate for a network and computer systems administrator should have a master of science degree in computer science or engineering or a master of science degree in Information Systems Technology or a related field. The second advertisement for a network systems and data communications analyst, from a company identified by the petitioner as a direct competitor, identified a bachelor's degree in engineering or telecommunications as the educational credential. The advertiser did not indicate whether the degree was required or preferred. The third advertisement for a senior network systems analyst indicated only that a bachelor of science degree in a computer related major or equivalent work experience was required. These advertisements, similarly, did not demonstrate that the proffered position is a specialty occupation. The advertisements either provided broad descriptions of the proposed responsibilities of the listed positions or failed to indicate that a bachelor's degree in a specific discipline is required.

Moreover, the petitioner did not provide any independent evidence of how representative these job advertisements are of the particular advertising employers' recruiting histories for the type of jobs advertised. Further, as they are only solicitations for hire, they are not evidence of the employers' actual hiring practices. It must also be noted that even if all of the job postings indicated that a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the petitioner failed to demonstrate what statistically valid inferences, if any, can be drawn from these few advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Further, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that “[r]andom selection is the key to [the] process [of probability sampling]” and that “random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error”).

As observed above, the director revoked approval of the petition, finding that the petitioner had not established that the beneficiary is qualified to perform in an occupation that requires a baccalaureate degree in a specific specialty. The director stated that as the beneficiary's college degree does not appear to be directly related to the duties of the proffered position, and the petitioner did not submit sufficient evidence establishing that the beneficiary had sufficient skills to successfully perform the proffered position, the record is insufficient to establish that the beneficiary is qualified for the proffered position. On appeal, counsel for the petitioner addressed the director's concerns regarding the beneficiary's work experience and specific coursework as set out in the beneficiary's transcript.

Upon review of the complete record, we find that absent a determination that the proffered position is in fact a specialty occupation, there is no basis upon which the director could have determined whether the beneficiary is qualified or unqualified to perform the duties of the claimed specialty occupation. USCIS is required to follow long-standing legal standards and determine first, whether the proffered position is a specialty occupation, and second, whether an alien beneficiary is qualified for the position at the time the nonimmigrant visa petition is filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation]."). Therefore, this matter must be remanded so that the director may issue a second NOIR. The director should request probative evidence to establish that the position proffered in this matter constitutes a specialty occupation.

In that regard, to meet its burden of proof, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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 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 simply rely 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 alien, 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.

The petitioner in this matter has not provided a consistent and probative description of the actual day-to-day duties of the proffered position and accordingly has not established that the proffered position is a specialty occupation. The record does not include consistent evidence establishing that the proffered position incorporates the duties of a network systems analyst, a computer network support specialist or a telecommunications engineering specialist. We observe, for example, that counsel in response to the director's NOIR identified the duties of the proffered position as corresponding most closely to that of a computer network support specialist, a position that does not normally constitute a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).²

We also note, as previously mentioned, that the petitioner submitted an LCA in support of the instant petition that designated the proffered position under the occupational title of "Network Systems and Data Communications Analyst" - SOC (ONET/OES Code) 15-1081, at a Level I (entry-level) wage.

The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the four wage levels.³ A Level I wage rate is described by DOL as follows:

Level I (entry) wage rates are assigned to job offers 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. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

The AAO, however, must question the level of complexity and independent judgment and understanding required for the position as the LCA is certified for a Level 1 entry-level position. The LCA's wage level indicates the position is actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on

² The 2012-2013 edition of the *Handbook*, in the chapter on computer support specialists, reports: "[b]ecause of the wide range of skills for different computer support jobs, there are many paths into the occupation. A bachelor's degree is required for some computer support specialist positions, but an associate's degree or postsecondary classes may be enough for others. After being hired, many workers enter a training program that lasts for several months." Accordingly, the *Handbook*, an authoritative source on which USCIS routinely relies, does not report that a bachelor's degree in a specific discipline is normally the minimum requirement to perform the duties of this occupation.

³ See DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. November 2009), available on the Internet at http://www.foreignlaborcert.dolceta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

The AAO finds that, fully considered in the context of the entire record of proceedings, including the requisite LCA, the petitioner failed to provide a consistent characterization of the nature of the proffered position and in what capacity the petitioner actually intended to employ the beneficiary.

The current record does not establish that the petitioner has satisfied the statutory requirement for a specialty occupation found at section 214(i)(l) of the Act and further has failed to satisfy any of the additional, supplemental requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, it cannot be found that the proffered position qualifies as a specialty occupation.

The director's decision will be withdrawn and the matter remanded for entry of a new decision. The director should issue a second NOIR and afford the petitioner reasonable time to provide evidence pertinent to the issue of the nature of the proffered position and to establish that the proffered position constitutes a specialty occupation. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's April 13, 2012 decision is withdrawn. The matter is remanded to the director for further action consistent with the above and entry of a new decision.