



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

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF M-I-T- LLC.

DATE: APR. 24, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a computer company with three employees, seeks to temporarily employ the Beneficiary as a “scrum master” under the H-1B nonimmigrant classification for specialty occupations. See Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director of the California Service Center denied the petition, concluding that the evidence of record does not establish that the proffered position qualifies as a specialty occupation.

On appeal, the Petitioner submits additional evidence and asserts that the Director erred in the decision. Upon *de novo* review, we will dismiss the appeal.

**I. 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) largely restates this statutory definition, but adds a non-exhaustive list of fields of endeavor. In addition, the regulations provide that the proffered position must meet one of the following criteria to qualify as a specialty occupation:

- (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.

8 C.F.R. § 214.2(h)(4)(iii)(A). We have consistently interpreted the term “degree” to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed 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”); *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

## II. PROFFERED POSITION

In the H-1B petition, the Petitioner stated that the Beneficiary will serve as a “scrum master.” In addition, the Petitioner stated that the Beneficiary would work for its end-client [REDACTED] located at [REDACTED] in [REDACTED] California. In response to the Director’s request for evidence (RFE), the Petitioner clarified the path of contractual succession as follows: Petitioner → [REDACTED] (vendor) → [REDACTED] (second vendor) → [REDACTED] (end-client).

The Petitioner provided the following job duties for the position (verbatim):

- Create, manage and communicate the necessary agile metrics of the team (Release
- Burnup, Sprint Burndown, and Velocity).
- Manage and report on the readiness of the backlog.
- Manage and report on the results of demos, retrospectives, and any other Scrum ceremony, ensuring visibility and follow-up on the results and the agreed actions.
- Create, manage and maintain the team’s scrum room and any other physical artifacts needed for the team performances.
- Manage and maintain virtual tools like Rally/Agile central, the Obstacle Board, and any other collaboration media (e.g. wiki, Jive etc.) needed for the team’s collaboration.
- Collaborate with the program manager to support corporate processes, providing any necessary artifact required by the [REDACTED]

According to the Petitioner, the proffered position requires a bachelor’s degree in computer applications, science, technology, engineering, or a related field.

### III. ANALYSIS

For the reasons set out below, we have determined that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation. Specifically, the record (1) does not describe the position's duties with sufficient detail; and (2) does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.

As a preliminary matter, the Petitioner's claim that a bachelor's degree in science is a sufficient for the proffered position is inadequate to establish that it qualifies as a specialty occupation. 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. There must be a close correlation between the required specialized studies and the position; thus, the mere requirement of a general degree, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility."). Thus, while a general-purpose bachelor's degree in science may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *Royal Siam Corp.*, 484 F.3d at 147.

Further, the Petitioner stated that a degree in one of several disparate fields (specifically: computer applications, science, technology, or engineering) is a sufficient for the position. Notably, in general, provided the specialties are closely related, e.g., finance and accounting, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same.

Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of degrees in disparate fields, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the Petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties.<sup>1</sup> Section 214(i)(1)(B) of the Act (emphasis added). The Petitioner has not made this showing. On the basis of the proffered position's educational requirement, we cannot conclude that the proffered position qualifies as a specialty occupation.

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<sup>1</sup> While the statutory "the" and the regulatory "a" both denote a singular "specialty," we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. See section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

In addition, as recognized by the court in *Defensor*, where the work is to be performed for entities other than the Petitioner, evidence of the client's job requirements is critical. *Defensor*, 201 F.3d at 387-88. The court held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the Petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the Beneficiary's services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

Here, the record lacks sufficient substantive documentation from the end-client regarding not only the specific job duties to be performed by the Beneficiary, but also information regarding whatever the client may or may not have specified with regard to the educational credentials of persons to be assigned to its project. The record does not contain sufficient probative documentation on this issue from (or endorsed by) [REDACTED] the company that will actually be utilizing the Beneficiary's services (according to the Petitioner) that establishes any particular academic requirements for the proffered position.

The Petitioner, thus, has not established the substantive nature of the work to be performed by the Beneficiary, which precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

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.

#### IV. EMPLOYER-EMPLOYEE RELATIONSHIP

Finally, we will briefly address the issue of whether or not the Petitioner will have a valid employer-employee relationship with the Beneficiary. The United States Supreme Court determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (quoting *Cmt. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

"In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by

which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

*Id.*; see also *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 445 (2003) (quoting *Darden*, 503 U.S. at 323). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968)).

As such, while social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control the Beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the Beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the Beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the Beneficiary's employer.

In this matter, a key element is who would have the ability to hire, fire, supervise, or otherwise control the work of the Beneficiary for the duration of the H-1B petition. Upon review of the record of proceedings, we find that the Petitioner has provided inconsistent information regarding the Beneficiary's supervisor. With the initial petition, the Petitioner submitted an itinerary for the Beneficiary, which states that [REDACTED] director of sales and strategy for [REDACTED] (the second vendor) will supervise the Beneficiary at the end-client location. However, in response to the RFE, the Petitioner stated that its information technology project manager, who in turn is supervised by its president, will supervise the Beneficiary. In addition, the Petitioner provided copies of the Beneficiary's monthly time sheets that have been signed by the president of the Petitioner. The Petitioner did not provide an explanation for this discrepancy.

Furthermore, the record of proceedings lacks sufficient documentation evidencing what exactly the Beneficiary would do for the period of time requested or where exactly and for whom the Beneficiary would be providing services.

In the instant matter, the Petitioner requested the Beneficiary be granted H-1B classification from October 2015, to October 2018. However, the Petitioner has not established the duration of the relationship between the parties. For instance, the itinerary for the Beneficiary states that her services will be needed from October 2015, to April 2016 (with possible extensions). In addition, the Petitioner submitted an agreement and purchase order between itself and [REDACTED] (the

vendor). The agreement states that it "shall commence on the date specified above and shall continue in effect with respect to each Purchase Order until terminated in accordance with the terms of this Agreement or of such Purchase Order ("the "Term")." The purchase order states the project start date as October 2015, and the end date as "6 Months with possibility of extension). Thus, it appears that the project may be completed in April 2016.

In response to the RFE, the Petitioner provided a letter from the vendor that states that the Beneficiary's "services will continue until August 31, 2017 with possible extensions as per the normal contract process." The Petitioner also submitted a letter from the second vendor that states that the "anticipated need for [the Beneficiary] is for 1 year" and that this "is an ongoing project." This letter also indicates that the project may be completed in 2017.

On appeal, the Petitioner asserts that "[e]ven in the unlikely event that the project terminates prematurely, Petitioner is a sound business with a volume of clients and project to which it may assign the beneficiary." In support of this assertion, the Petitioner submits two service agreements and a document entitled "Upcoming Projects Documentation." However, a 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.

Here, the record does not establish that the [REDACTED] project will continue through October 2018. While the Petitioner may be able to eventually locate some work for the Beneficiary, it did not establish that the petition was filed for non-speculative work for the Beneficiary that existed *as of the time of the petition's filing*.<sup>2</sup> There is insufficient documentary evidence in the record corroborating the

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<sup>2</sup> The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R.

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availability of work for the Beneficiary for the requested period of employment and, consequently, what the Beneficiary would do, where the Beneficiary would work, as well as how this would impact the circumstances of her relationship with the Petitioner. Thus, the evidence in this matter is insufficient to establish that the Petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii).

#### V. CONCLUSION

For the reasons outlined above, the Petitioner has not established eligibility for the benefit sought.

**ORDER:** The appeal is dismissed.

Cite as *Matter of M-I-T- LLC.*, ID# 325907 (AAO Apr. 24, 2017)