



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

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

MATTER OF T-S-ITG- LLC

DATE: AUG. 4, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an IT consulting services firm, seeks to employ the Beneficiary as a “programmer analyst” under the H-1B nonimmigrant classification for specialty occupations. *See* 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 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 did not establish that the proffered position qualifies as a specialty occupation position. Specifically, the Director found that no credible position was available for the Beneficiary, and that the labor condition application (LCA) did not support the petition.

On appeal, the Petitioner submits additional evidence and asserts that the Director erred denying the petition.

Upon *de novo* review, we will dismiss the appeal.<sup>1</sup>

## I. SPECIALTY OCCUPATION

### A. Legal Framework

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term “specialty occupation” as an occupation that requires:

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<sup>1</sup> We follow the preponderance of the evidence standard as specified in *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). A petitioner must show that what it claims is “more likely than not” or “probably” true. To determine whether a petitioner has met its burden under the preponderance standard, we consider not only the quantity, but also the quality (including relevance, probative value, and credibility) of the evidence. *Id.* at 376; *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm’r 1989).

- (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).

#### B. Proffered Position

The Petitioner stated that the proffered position is a programmer analyst position. Although the Petitioner's address is in [REDACTED] New Hampshire, the Form I-129, Petition for a Nonimmigrant Worker, states that the Beneficiary would work at [REDACTED] in [REDACTED] Montana. Other evidence in the record indicates that this is a location of [REDACTED] (end-client), and that the Beneficiary would be working on a project identified as [REDACTED] for the duration of the requested employment.

On the LCA<sup>2</sup> submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category "Computer Programmers," corresponding to the Standard Occupational Classification code 15-1131 at a Level I wage.<sup>3</sup>

In a letter of support, the Petitioner identified the following as the duties of the proffered position:

[The Beneficiary] as a Programmer Analyst will be responsible for developing and enhancing code unit testing as well as generating test reports. He will be involved in creating high level and low level design as well as data-modeling for change request. He will be actively co-ordinating with the database and software configuration management team to ensure smooth execution of the project.

Below are a breakdown of [the Beneficiary's] specific job duties and the percentage of time spent on each of the activities totaling to 100%.

**The Beneficiary will spend 20% of his time on the following Job Duties**

- Liaise with senior staff at [REDACTED] to translate their requirements into elegant solutions.
- Designing and documenting all types of applications consistent with established specifications
- Identify and define technical, operational and data analysis requirements

**The Beneficiary will spend 55% of his time on the following Job Duties**

- Program in C++, C# to manage high volumes of raw data
- Development of C# Web & Console applications with a mix of GUI and server-side development
- Apply technical expertise to investigate and resolve software issues
- Develop XML web services
- Produce mainstream/extensible software components that operate as part of a large multi-process system

<sup>2</sup> The Petitioner is required to submit a certified LCA to USCIS to demonstrate that it will pay an H-1B worker the higher of either the prevailing wage for the occupational classification in the "area of employment" or the actual wage paid by the employer to other employees with similar experience and qualifications who are performing the same services. See *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 545-546 (AAO 2015).

<sup>3</sup> A Level I wage rate is generally appropriate for positions for which the Petitioner expects the Beneficiary to have a basic understanding of the occupation. This wage rate indicates: (1) that the Beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; (2) that he will be closely supervised and his work closely monitored and reviewed for accuracy; and (3) that he will receive specific instructions on required tasks and expected results. U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://flcdatcenter.com/download/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://flcdatcenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf). A prevailing wage determination starts with an entry level wage and progresses to a higher wage level after considering the experience, education, and skill requirements of the Petitioner's job opportunity. *Id.*

- Translate processes into WYSIWYG user interfaces
- Program in C++, C# to perform data analytics and develop real time display dashboards and reports
  - Ensure the code is scalable and meets performance requirements through performance tuning
  - Maintenance, Enhancing, debugging existing architecture to support various programming and Web scripting languages
    - i. Languages C, C++, MFC, ATL, COM, Win 32 programming
    - ii. Web Script Languages: HTML 5.0, JavaScript, PHP, CSS, Ajax, XML, and Web Frameworks
- Maintain [REDACTED] databases
- Database/Languages: Oracle 9i, 10g, SQL Server, PLSQL, and MySQL

**The Beneficiary will spend 25% of his time on the following Job Duties**

- Perform functional testing of the system on a full installation that replicates real world use
- Develop simulation tools for testing and validation
- Produce unit tests to verify the behavior and resilience of code
- Provide content for functional and technical documentation

**C. Analysis**

We find that the evidence of record is insufficient to demonstrate that the duties of the proffered position are in fact associated with a specialty occupation. That is, the Petitioner has not submitted sufficient, credible evidence to establish that the [REDACTED] project is a *bona fide* project, and that the Beneficiary will be exclusively assigned to it.

Preliminarily, we find that the Petitioner did not sufficiently address the discrepancies and concerns raised by the Director regarding the documentary evidence filed in support of the project. The Petitioner asserts that the Beneficiary will be employed as a programmer analyst on the [REDACTED] project for the end-client, which it claims is specifically tailored to create a technology infrastructure, namely, a suite of web-based software programs for Native American communities. In support of this assertion, the Petitioner submitted a 51-page document entitled '[REDACTED]' (project document), which it claims is the overview of the intended project upon which the Beneficiary will work. The Petitioner also submitted a copy of its Independent Contractor Supplier Agreement (ICSA) with the end-client, along with a Statement of Work (SOW), indicating the Beneficiary would be responsible for "implementation of modules using Dot Net and C#" in accordance with the ICSA.

Upon review, the Director found that a large portion of the project document was plagiarized from various Internet sources, and issued a Notice of Intent to Deny (NOID) based on this derogatory

information. Specifically, the Director provided the links to the websites from the plagiarized material was obtained, and afforded the Petitioner the opportunity to address these issues.

In response, the Petitioner asserts the Director's findings were unsupported, and contends that the Director did not disclose what software or other tools were used to determine that the 51-page project document was plagiarized or otherwise copied from outside sources. The Petitioner submits letters from both the end-client as well as its own president, in addition to a new "technical" document, in an attempt to establish eligibility and demonstrate that the documentation provides represents a legitimate, *bona-fide* project.

The Director found the Petitioner's response unpersuasive, and found that the evidence submitted in response to the NOID did not overcome the derogatory findings noted. Specifically, the Director noted that the end-client's president specifically stated that he "may not have properly cited or quoted texts from such reports about the digital divide." He further points out that the Director did not raise any issues regarding the "technical" aspects of the project.

However, in denying the petition, the Director found that the newly-submitted "technical" document, which the Petitioner claimed was submitted to show the current status of the project and its progress to date, contained numerous discrepancies. Specifically, a review of the document demonstrates that portions of the project overview are created by [REDACTED] with the web address of [REDACTED] at the bottom of the pages of this document. Further review of this document indicates a revision date of "03/14," which seems to contradict the Petitioner's claim that this document represents the current status of the [REDACTED] project. The connection between [REDACTED] and [REDACTED] has not been clarified or thoroughly explained.

On appeal, the Petitioner again asserts that the Director inappropriately used plagiarism-checking software, and asserts that the only aspects of the project the Director found to be plagiarized relates to a social phenomenon pertaining to the "digital divide experience experienced by Native Americans," a factor not relative to the credibility of the proffered position. The Petitioner concludes by asserting that the minimal similarities between the project document and the paper relating to the "digital divide" do not warrant denial of the petition, and that the petition should be approved under the preponderance of the evidence standard.

Upon review, we concur with the Director's ultimate conclusions. The discrepancies in these aspects of the Petitioner's documentation greatly undermine the validity of the Petitioner's claims regarding the true nature of the intended work for the Beneficiary, and preclude us from determining that *bona fide* H-1B caliber work exists for the Beneficiary at the offices of the end-client for the requested validity period, or that such work constitutes specialty occupation employment. The Petitioner must resolve these discrepancies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

We acknowledge the Petitioner's assertion that the elements of the project document in question do not relate to the technical aspects of the project, and thus the effect of the similarities is minimal when viewing the project as a whole. However, the Petitioner's submission of a plagiarized document, without properly providing credit to the original writer, as a document created by the end-client undermines its credibility. Notably, the Petitioner did not acknowledge that the noted sections were not the original work product until the Director raised the issue in the NOID.

Regardless, if we were to disregard these discrepancies, the documentation contained in the record does not sufficiently establish that specialty occupation work is available for the duration of the Beneficiary's requested employment period. Specifically, the Petitioner did not submit credible, objective documentation corroborating its claims regarding the Beneficiary's assignment to the [REDACTED] project.

In particular, the project document contains no references to the Beneficiary or to the proffered position. In fact, this 51-page document merely provides an overview of the research conducted regarding the digital divide, and the proposed solutions to be implemented by was of a technology infrastructure created by the end-client. The project document, which addresses [REDACTED] of the proposed project, contains no schedule for completion, no timeline for deliverables, and contains no list of the required positions and employees needed to complete the project. Although the record contains a vague reference in the Petitioner's letter, submitted in response to the NOID, that the end-client needs between "50 to 70" persons to complete this project, no independent evidence to corroborate this claim was submitted.

Moreover, even if it were established that the Beneficiary will be assigned to the [REDACTED] project, the evidence still does not sufficiently describe the duties to be performed by the Beneficiary. That is, while the Petitioner submitted a lengthy list of job duties in its initial support letter, the SOW submitted in support of the petition states simply that the Beneficiary will be responsible for "implementation of modules using Dot Net and C#" in accordance with the ICSA. Even if sufficient documentation existed to demonstrate the legitimate need for the Beneficiary's services on a *bona-fide* project, this vague, abbreviated statement of duties is insufficient to establish that the proffered position would qualify as a specialty occupation.

As recognized by the court in *Defensor*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. 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 Petitioner asserts that the Beneficiary will be employed offsite at the offices of the end-client. The record of proceedings, however, is devoid of sufficient information from the

end-client regarding the nature of the Beneficiary's proposed position and requirements for the project. While the record contains a list of duties provided by the Petitioner in its letter of support, the only statement of duties provided by the end-client is the brief statement above in the SOW, which does little to shed light on the actual requirements of the proposed position. Simply stating that the Beneficiary will work on the "implementation of modules using Dot Net and C#," which are generic IT duties that are not project specific, does little to support the Petitioner's claim that the proffered position is a specialty occupation. These job duties, as presently stated, do not adequately convey the actual tasks the Beneficiary will perform within the context of the [REDACTED] project, the complexity of such tasks, and the knowledge necessary to perform them. Although the Petitioner asserts that the proffered position requires the services of an individual who holds at least a bachelor's degree or higher in computer science, information technology, management information systems, engineering, electronics/electrical, mathematics, or a closely related field, this claim has not been substantiated by the end-client.

Without additional, reliable information regarding the specific project to which the Beneficiary will be assigned that covers the duration of the period of employment requested, we are not able to ascertain what the Beneficiary will do, where the Beneficiary will work, as well as how this will impact circumstances of his relationship with the Petitioner.<sup>4</sup> "[G]oing 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 Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972).

Consequently, we find that the evidence of record does not demonstrate the substantive nature of the proffered position and its constituent duties.<sup>5</sup> The Petitioner has not established the substantive nature of the work to be performed by the Beneficiary, which therefore precludes a finding that the

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<sup>4</sup> 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.

Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30,419, 30,419-20 (proposed June 4, 1998) (to be codified at 8 C.F.R. pt. 214).

<sup>5</sup> Further, without full disclosure, we are unable to determine whether the requisite employer-employee relationship with exist between the Petitioner and Beneficiary.



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 entry into 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.

## II. LCA

We also find that the Petitioner did not demonstrate that the certified LCA corresponded to the petition.

While the Department of Labor (DOL) is the agency that certifies LCA applications before they are submitted to U.S. Citizenship and Immigration Services (USCIS), DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL-certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements for H-1B visa classification.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the Beneficiary. Here, the Petitioner has not established that specialty occupation work exists for the Beneficiary in the position and work location identified on the LCA. Therefore, the Petitioner has not submitted a valid LCA that corresponds to the petition.

## III. CONCLUSION

Here, the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation or that it has submitted a valid LCA that corresponds to the petition.

**ORDER:** The appeal is dismissed.

Cite as *Matter of T-S-ITG- LLC*, ID# 457566 (AAO Aug. 4, 2017)