



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

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

MATTER OF GSS- INC

DATE: DEC. 13, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a computer company, seeks to temporarily employ the Beneficiary as a “programmer analyst” 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. In general, the period of authorized admission for an H-1B nonimmigrant is limited to six years. Section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4). However, certain individuals are eligible for H-1B status beyond the six-year limitation.¹

The Director of the California Service Center denied the Form I-129, Petition for a Nonimmigrant Worker, concluding that: (1) the Beneficiary had been in H-1B status since September 28, 2006; (2) the request in the present petition would extend the Beneficiary’s status beyond the statutory six-year limit in H-1B status; and (3) a Form I-140, Immigrant Petition for Alien Worker, filed on the Beneficiary’s behalf, which may exempt her from the six-year limit, was denied.²

¹ For example, section 104(c) of the American Competitiveness in the Twenty-First Century Act of 2000, authorized H-1B status beyond the six-year maximum for a foreign national who is a beneficiary of an immigrant visa petition but cannot obtain immigrant status because of per country limitations. *See* Pub. L. No. 106-313, § 104(c), 114 Stat. 1251, 1253 (2000). This was codified at 8 C.F.R. § 214.2(h)(13)(iii)(E)(2017), which states in part:

Per-country limitation exemption from section 214(g)(4) of the Act. An alien who currently maintains or previously held H-1B status, who is the beneficiary of an approved immigrant visa petition for classification under section 203(b)(1), (2), or (3) of the Act, and who is eligible to be granted that immigrant status but for application of the per country limitation, is eligible for H-1B status beyond the 6-year limitation under section 214(g)(4) of the Act. The petitioner must demonstrate such visa unavailability as of the date the H-1B petition is filed with USCIS.

² A review of the record reveals the following events: (1) the petition was initially denied; (2) the petitioning entity simultaneously filed a motion on the denial with the service center director and an appeal with the Administrative Appeals Office; (3) the service center director reopened the case *sua sponte* and approved the petition; (4) based on the petition’s approval, we dismissed that appeal as moot; and (5) thereafter, the Petitioner withdrew the petition.

On appeal, the Petitioner submits another Form I-140 approved on behalf of the Beneficiary and demonstrates that an immigrant visa was not available as of the date it filed this H-1B visa petition. Therefore, we conclude that the Beneficiary is eligible for H-1B status beyond the six-year limitation, and the Petitioner has overcome the basis of the Director's denial. We will withdraw the Director's decision regarding this issue.

However, although not addressed in the Director's decision, the record as presently constituted does not establish that the proffered position qualifies as a specialty occupation or that the Petitioner will have an employer-employee relationship with the Beneficiary. Accordingly, we will remand the matter to the Director to review this issue and to request any additional evidence as necessary.

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:

- (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).

We note that, as recognized by the court in *Defensor*, 201 F.3d at 387-88, where the work is to be performed for entities other than the petitioner, evidence of the client companies’ job requirements is critical. 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.* 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.

B. Proffered Position

The Petitioner indicated the Beneficiary will be working through [REDACTED] (vendor) on a project at [REDACTED] (end-client). According to the Independent Contract Agreement (Agreement) between the Petitioner and the vendor, the Petitioner will provide consulting services to the vendor and to the vendor’s clients according to specifications the vendor and its clients determine.

Although the Petitioner did not provide the proffered position’s functions, it submitted a letter from the vendor that listed the following job duties:

- Project management support for Marketing, Digital, Social capabilities projects (not all projects will require a separate PM for Marketing).
- Successfully manage the roll out and implementation of capabilities projects across the impacted areas of Marketing.
- Leverage overall project management guidelines, standards, and templates from COO PMO
- Support the monitoring of performance and post project success.
- Liaise and coordinate with other Project managers or vendors (e.g. technology PM or other LOB, PM’s)
- Business Project Managers document the timeline, activities and milestones of the project in a project plan; ensure activities are tracked and met for marketing impacts/implementation (roll-out across marketing inclusive of training activities, pre/post performance monitoring); document risks/issues.
- Identify dependencies and integrate as needed vendor and technology milestones into overall project plan; and schedule and document outcomes from status and stakeholder review meetings.
- Document the timeline, activities and milestones of the project in the project plan,

- Ensure activities are defined, tracked and met for marketing impacts/implementation (end to end)
- Document risks/issues and identify dependencies and integrate as needed vendor and technology milestones into project plan.
- Communicate via various mediums project updates, financial forecasts, escalations and outcomes from meetings to project members, key stakeholders and sponsors.
- Ensure adherence to all required policies and procedures, program meeting schedule and contact management, and document management.

Regarding the position's education requirements, the Petitioner did not specifically state that it requires a bachelor's degree in a specific specialty. Instead, it alluded that it required a bachelor's degree through a reference to the definition of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(ii), in addition to mentioning the 2010-2011 edition of the U.S. Department of Labor's *Occupational Outlook Handbook* (*Handbook*) chapter for "Computer Systems Analysts."

C. Analysis

Upon review of the record in its totality and for the reasons set out below, we find that the Petitioner has not established that it has specialty occupation work available for the Beneficiary. That is, the Petitioner has not established that, at the time of filing, it has secured definite, non-speculative, H-1B caliber work for the Beneficiary for the entire validity period requested.

Specifically, the Petitioner has not shown that specialty occupation work will exist for the Beneficiary during the requested employment period. While the Petitioner claimed that the Beneficiary will work for the end-client for the duration of employment, there are no contracts, letters, or other documentation directly from the end-client confirming the existence of a contract for the Beneficiary's services and describing the work she will perform. As noted above, where the work is to be performed for entities other than the Petitioner, evidence of the client companies' job requirements is critical. *See Defensor*, 201 F.3d at 387-88. The record is missing this critical evidence.

Even if we presume the Beneficiary would work at the end-client's location, the record of proceedings does not establish that the end-client's project would continue through June 2019 – and it is the only project the Petitioner claimed that the Beneficiary would work on. The Agreement between the Petitioner and the vendor stated that the Agreement will begin on June 14, 2016, and will end as agreed to in Attachment B. Attachment B consisted of a Work Order in which the performance period began on July 5, 2016, and ended on July 4, 2017. Thus, without more, the record does not demonstrate that the Petitioner will have specialty occupation work available for the validity of the requested employment period.

A petition must be filed for non-speculative work for the Beneficiary, for the entire period requested, that existed as of the time of the petition's filing. Our 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 the Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978).

Therefore, the Petitioner has not sufficiently established that specialty occupation work is available for the Beneficiary at the time of filing, and thus has not established the substantive nature of the proffered position. This precludes a determination 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 one; (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 two; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion two; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion three; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion four. Accordingly, 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 for classification as a specialty occupation.

II. EMPLOYER-EMPLOYEE RELATIONSHIP

Further, the petition cannot be approved because the Petitioner has not demonstrated that it qualifies as a United States employer. As discussed, 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. Given this specific lack of evidence, the Petitioner has not corroborated who has or will have actual control over the Beneficiary's work or duties, or the condition and scope of the Beneficiary's services. In other words, the Petitioner has not established whether it has made a bona fide offer of employment to the Beneficiary based on the evidence of record or that the Petitioner, or any other company which it may represent, will have and maintain the requisite employer-employee relationship with the Beneficiary for the duration of the requested employment period. *See* 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer" and requiring the Petitioner to engage the Beneficiary to work such that it will have and maintain an employer-employee relationship with respect to the sponsored H-1B nonimmigrant worker). Again and as previously discussed, there is insufficient evidence detailing where the Beneficiary will work, the specific projects to be performed by the Beneficiary, or for which company the Beneficiary will ultimately perform these services. Therefore, the petition cannot be approved for this additional reason.

III. CONCLUSION

Based on the foregoing, although we withdraw the Director's decision, the record as presently constituted does not establish eligibility for the benefit sought. Accordingly, we will remand the matter to the Director for further consideration and entry of a new decision.

Matter of GSS- Inc

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of GSS- Inc*, ID# 607209 (AAO Dec. 13, 2017)