



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

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

MATTER OF D- INC

DATE: DEC. 15, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a computer software company, seeks to temporarily employ the Beneficiary as a “junior system engineer” 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 Form I-129, Petition for a Nonimmigrant Worker, concluding that the record did not establish that: (1) the proffered position qualifies as a specialty occupation; and (2) the Petitioner will engage the Beneficiary in an employer-employee relationship.

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. SPECIALTY OCCUPATION

We will first determine whether the record of proceedings establishes that the proffered position qualifies as a 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 offered 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 initially stated that the Beneficiary will be responsible for the following job duties as a junior system engineer:

- Analyze, design, develop, implement, integrate and maintain client server web related applications including internet, intranet and internal business applications.
- Design new systems or enhancements to existing systems.
- Analyze user requirements, procedures and problems to automate processing and to improve existing systems.
- Write code to meet user specifications.
- Design Database and develop optimization of queries, creating tables, views, stored procedures and functions.
- Convert data to SQL server.
- Develop new applications as per requirement and enhancement to existing or legacy applications.
- Use productivity tools to develop and modify applications software to meet user needs.

- Analyze data requirements, develop and document data dictionary, and develop data models.
- Assist in data transfers or sharing of files etc.

Thereafter, in response to the Director's request for evidence (RFE), the Petitioner amended the duties to the following:

Duties	Percent of time
Analyze, research, design and write specifications for the EHR [electronic health records] project.	5%
Analyze user requirements to automate processing and improve existing systems using systems using Oracle, Java, UNIX, SQL Server, Java, HTML, DHTML, Business Objects and other related technologies.	10%
Design new applications and develop application prototypes for the EHR project.	10%
Write detailed descriptions of user needs, promote efficient user utilization of system, cooperate with and provide technical support to project teams.	5%
Develop, enhance and maintain proficiency in technical and analytical tools, perform studies to aid development of new systems, plan and prepare technical reports and instruction manuals.	15%
Perform analysis, conversion coding, code walkthrough, and integration testing.	55%

Within the initial proceedings, and the appeal brief, the Petitioner stated that the Beneficiary will work on an in-house project titled [REDACTED] which is also referred to as [REDACTED]. A review of U.S. Citizenship and Immigration Services records indicates that in August 2017, immigration officers performed a site inspection and interviewed officials from the petitioning organization, in part, regarding the Beneficiary. During the interview, the Petitioner's representative informed the officers that only three chiropractor offices were using the [REDACTED] platform, the project named in the petition, and that the petitioning organization was still evaluating its viability. In addition, the Petitioner stated that the Beneficiary did not work on the [REDACTED] project and that the Beneficiary will not be assigned to the [REDACTED] project. Instead, the Beneficiary will work on two other projects [REDACTED] and [REDACTED].

Subsequent to the site inspection, we issued a combined RFE and notice of intent to dismiss (NOID), to which the Petitioner responded with additional information and evidence. In response to our combined RFE and NOID, the Petitioner asserts that the Beneficiary will be assigned to the [REDACTED] project. Specifically, the Petitioner states that the Beneficiary "will dedicate approximately 5% of his time to [REDACTED] 30% of his time to [REDACTED] and 65% of his

time to [REDACTED] The Petitioner also asserts that the Beneficiary's duties will remain unchanged.

C. 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.¹

1. Inconsistencies in the Record

First, we find that there are inconsistencies in the petition and supporting documents, which lead us to question the Petitioner's claim with regard to the services the Beneficiary will perform, as well as the actual nature and requirements of the proffered position. Inconsistent information in a petition raises concerns about the veracity of the Petitioner's assertions.²

For example, the Petitioner initially claimed that the Beneficiary would work on the [REDACTED] project. However, during a site inspection, the Petitioner stated that the Beneficiary would not be assigned to the [REDACTED] project. Thereafter, in response to the combined RFE and NOID, the Petitioner asserts that the Beneficiary will work on the [REDACTED] project, as well as on the [REDACTED] and [REDACTED] projects. The Petitioner did not provide an explanation for these inconsistencies.

In addition, on appeal, the Petitioner states "[o]nce the [REDACTED] project is completed and started selling, the duties and responsibilities of the beneficiary will change." However, in response to our NOID, the Petitioner asserts that the Beneficiary's duties in the proffered position will remain unchanged. The Petitioner did not provide an explanation for these inconsistent statements.

Moreover, the Petitioner has provided inconsistent information regarding the minimum requirements for the proffered position. The table below summarizes the variances in the educational requirements.

¹ The Petitioner submitted documentation in support of the H-1B petition, including evidence regarding the proffered position and its business operations. While we may not discuss every document submitted, we have reviewed and considered each one.

² "The Petitioner must resolve these inconsistencies 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.*

Record of Proceedings	Acceptable Fields of Study
Petitioner's initial support letter	Bachelor's degree in computer science or engineering or related field (page 2)
Appeal Brief	Bachelor's degree in computer science or a directly related field (page 11)
Petitioner's letter on appeal	Bachelor's degree in a computer-related field, or its equivalent (page 5)

The Petitioner did not provide an explanation for the variances in the requirements.

2. Job Description

Furthermore, a crucial aspect of this matter is whether the Petitioner has sufficiently described the duties of the proffered position such that we may discern the nature of the position and whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge attained through at least a baccalaureate degree in a specific discipline. Upon review, we find that the Petitioner has not done so.

For example, the Petitioner described the proposed duties in terms of generic functions that did not convey sufficient substantive information to establish the relative complexity, uniqueness or specialization of the proffered position or its duties. The abstract level of information provided about the proffered position and its constituent duties is exemplified by the Petitioner's assertion that the Beneficiary will "[a]nalyze, research, design and write specifications for [REDACTED] project." However, the statement does not provide sufficient insight into the Beneficiary's actual duties, nor does it include further details regarding the specific tasks that the Beneficiary will perform.

In addition, the Petitioner claimed in pertinent part that the Beneficiary will "[a]nalyze user requirements to automate processing and improve existing systems using systems using Oracle, Java, UNIX, SQL Server, Java, HTML, DHTML, Business Objects and other related technologies." Notably, the Petitioner did not demonstrate how the performance of this duty, as described in the record, would require the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent.

The Petitioner also claimed the Beneficiary will "[d]esign new applications and develop application prototypes for the [REDACTED] project" and "[w]rite detailed descriptions of user needs, promote efficient user utilization of system, cooperate with and provide technical support to project teams." The Petitioner's statements do not convey sufficient pertinent details as to the actual work involved in these tasks. The Petitioner did not convey how a baccalaureate level of education (or higher) in a specific specialty, or its equivalent, would be required to perform these tasks. Thus, the overall responsibilities for the proffered position contained general functions without providing sufficient information regarding the particular work and the associated educational requirements into which the duties would manifest themselves in their day-to-day performance within the Petitioner's business operations.

Moreover, we 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, we 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.

As discussed, the Petitioner states that the Beneficiary will spend 65% of his time on the [REDACTED] project, 30% of his time on the [REDACTED] project, and 5% of his time on the [REDACTED] project. Although the Petitioner provides documentation regarding the projects, there is a lack of information regarding the Beneficiary's specific role in each project. That is, the Petitioner has not specifically explained the duties and role of the proffered position in the context of any of these projects.

Furthermore, in response to our combined RFE and NOID, the Petitioner states that the Beneficiary will work on two projects it did not present in the proceedings before the Director. A petitioner must show that all eligibility requirements were satisfied as of the date it filed the petition.³ As such, eligibility for the benefit sought must be assessed and weighed based on the facts as they existed at the time the petition was filed and not based on what were merely speculative facts not then in existence. 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.

³ See 8 C.F.R. § 103.2(b)(1); *Michelin Tire Corp.*, 17 I&N Dec. at 249 (determining that a visa petition may not be approved at a future date after one of the parties becomes eligible under a new set of facts).

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). While a petitioner is permitted to petition for H-1B classification on the basis of facts not in existence at the time the instant petition was filed, it must nonetheless file a new petition to have these facts considered in any eligibility determination requested, as the agency may not consider them in this proceeding pursuant to the law and legal precedent cited, *supra*.

The record lacks evidence that the cyberhealths.com and crashreports.com projects existed on the date the Petitioner filed this petition. Consequently, it has not demonstrated its ability or intent to transfer the Beneficiary to either of these projects upon any operational changes in the [REDACTED] project. As a result, the Petitioner has not shown that the projects for the Beneficiary to perform the same duties as those in the [REDACTED] project existed when it filed this petition.

Here, the Petitioner has not provided sufficient details regarding the nature and scope of the Beneficiary's employment or 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 do not communicate: (1) the actual work that the Beneficiary would perform; (2) the complexity, uniqueness or specialization of the tasks; or (3) the correlation between that work and a need for a particular level of knowledge in a specific specialty.

As the Petitioner has not established the substantive nature of the work to be performed by the Beneficiary, this 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;⁴ (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.

Because the Petitioner has not satisfied one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it has not demonstrated that the proffered position qualifies as a specialty occupation.

⁴ In response to the RFE, the Petitioner provided an opinion letter from [REDACTED] associate professor at [REDACTED]. Within the opinion letter from [REDACTED] he repeatedly presents the position he was analyzing as a computer programmer analyst, with duties commensurate with a computer programmer. However, the Petitioner classified the position as a junior system engineer with duties that are distinct from those of a computer programmer. Consequently, this evidence is insufficient to establish the Petitioner's claim that the proffered position qualifies as a specialty occupation.

II. EMPLOYER-EMPLOYEE RELATIONSHIP

Finally, we will briefly address the issue of whether or not the Petitioner qualifies as a United States employer. As detailed above, the record of proceedings lacks sufficient documentation evidencing what exactly the Beneficiary would do for the period of time requested. Given this specific lack of evidence, the Petitioner has not established 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 an 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). As previously discussed, there is insufficient evidence detailing specific projects to be performed by the Beneficiary, or for which company the Beneficiary will ultimately perform these services. Therefore, the Director's decision is affirmed, and the appeal is dismissed for this additional reason.

III. 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 D- Inc*, ID# 586178 (AAO Dec. 15, 2017)