



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

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

MATTER OF S-S-, LLC

DATE: FEB. 8, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a custom software development company, seeks to temporarily employ the Beneficiary as a "senior software 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, California Service Center, denied the petition. The Director concluded that the evidence of record does not establish that the proffered position qualifies as a specialty occupation.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the evidence of record establishes eligibility for the benefit sought.

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” 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 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 senior software engineer. In response to the Director’s request for evidence (RFE), the Petitioner provided the following job duties, with the percentage of time spent on each duty, for the proffered position:

- Analyzing, designing, developing, and testing custom software applications for retirement administration systems using [the Petitioner’s] proprietary [REDACTED] (10%).
- Reviewing, analyzing, and evaluating existing applications and end user needs to develop software requirements and modifications (10%).
- Interacting with software engineers and quality assurance engineers to analyze, evaluate, and modify software application changes (10%).
- Leading, designing, and developing functional and technical software applications and solutions for retirement administration systems that can interface with third party software and operating environment using Microsoft.Net and J2EE to support the company’s proprietary technologies (25%).

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- Performing scope verification and change control, managing configuration and changes per requirements specifications (10%).
- Performing application coding, testing, debugging, and implementing system applications and solutions (10%).
- Maintaining and monitoring operations of retirement administration system and online peripheral equipment to detect defects, delays, disruptions, and related problems (10%).
- Developing back up, recovery, and security procedures and performing periodic tests to ensure proper software system functionality and design concept adherence (5%).
- Deploying software applications using [the Petitioner's] proprietary [REDACTED] (5%).
- Resolving and documenting technical issues (5%).

According to the Petitioner, the position requires "a minimum of a Bachelor's degree or its equivalent in Computer Science, Engineering or another closely related discipline."

The Petitioner indicated that the Beneficiary will work in-house at the branch office in [REDACTED] Kansas, with periodic visits to another branch office in [REDACTED] Missouri.

III. ANALYSIS

On appeal, the Petitioner indicates that the "preponderance of the evidence" standard is relevant to this matter, and that it established through credible evidence that the proffered position is a specialty occupation and sufficient H-1B caliber work exists for the Beneficiary for the entire requested period.

The "preponderance of the evidence" standard requires that the evidence demonstrate that the Petitioner's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* Thus, in adjudicating the petition pursuant to the preponderance of the evidence standard, the Director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Applying the preponderance of the evidence standard, we determine 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.¹

For H-1B approval, the Petitioner must demonstrate a legitimate need for an employee exists and substantiate that it has H-1B caliber work for the Beneficiary for the period of employment requested in the petition. It is incumbent upon the Petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent, to perform duties at a level that requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.

In this matter, the Petitioner indicated that the Beneficiary will be employed in-house as a senior software engineer. However, we find that the Petitioner did not provide sufficient, credible evidence to establish in-house employment for the Beneficiary for the validity of the requested H-1B employment period. Specifically, the Petitioner did not submit a job description to adequately convey the substantive work to be performed by the Beneficiary. As reflected in the description of the position as quoted above, the proffered position has been described in terms of generalized and generic functions that do not convey sufficient substantive information to establish the relative complexity, uniqueness and/or specialization of the proffered position or its duties.

For example, the Petitioner stated that the Beneficiary will be "analyzing, designing, developing, and testing custom software applications for retirement administration systems using [the Petitioner's] proprietary [REDACTED]; "reviewing, analyzing, and evaluating existing applications and end user needs to develop software requirements and modifications"; and "leading, designing, and developing functional and technical software applications and solutions for retirement administration systems that can interface with third party software and operating environment using Microsoft.Net and J2EE to support the company's proprietary technologies." The record of proceedings does not contain a more detailed description explaining what particular duties the Beneficiary will perform on a day-to-day basis (e.g., what is meant by "design and develop software applications"). Nor is there a detailed explanation regarding the demands, level of responsibilities, complexity, or requirements necessary for the performance of these duties (e.g., explain what specific systems and applications are involved, and what body of knowledge is required to perform the duties). The Petitioner's description is generalized and generic and does not convey the substantive nature of the work that the Beneficiary would actually perform, or any particular body of highly specialized knowledge that would have to be theoretically and practically applied to perform it.

On appeal, the Petitioner provided a brief description of some software products offered by the Petitioner, but it does not provide a detailed understanding of the Beneficiary's responsibilities with working on these products. The Petitioner also stated that it is working on the trademarked [REDACTED]

¹ The Petitioner submitted documentation to support 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.

pension administration software and systems, but the Petitioner's job description does not specifically discuss in detail any of these software products and only mentions [REDACTED]. The responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance.

Furthermore, in the RFE, the Director requested a more detailed job description and the product to be developed or the service to be provided; however, in response, the Petitioner provided the same general duties and added the percentage breakdown for each duty. "Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the [petition]." 8 C.F.R. § 103.2(b)(14).

The record of proceedings also lacks documentation regarding the Petitioner's business activities and the actual work that the Beneficiary will perform to sufficiently substantiate the claim that the Petitioner has H-1B caliber work for the Beneficiary for the period of employment requested in the petition. In response to the RFE, the Petitioner stated that the Beneficiary will primarily be working on a project with the [REDACTED] from the Petitioner's offices. The Petitioner submitted a letter from the executive secretary of [REDACTED] to confirm that it has an "ongoing agreement with [the Petitioner] to upgrade, develop, and administer its retirement benefits management system that will continue after the current contract term ends on July 31, 2016." The letter also states that [REDACTED] expects to "continue the agreement for additional phases of this project after the current phase to continue through September 30, 2019." Upon review, the letter does not indicate a need for a senior software engineer and does not state how a senior software engineer would assist on this project, or specifically name the Beneficiary as personnel to assist with this project. In addition, the project summary is very brief and vague and does not clearly explain how the additional phase will take 3 more years to complete.

The Petitioner also did not submit any contracts or corroborating evidence that this project will continue until September 2019, and that there are sufficient funds to continue for the entire duration of the project. In response to the RFE, the Petitioner also stated that it has two other clients in the area and it expects the Beneficiary to work on "multiple project as needed." However, the Petitioner did not provide any information regarding the projects for the additional clients, or evidence that the work provided by the Beneficiary will be utilized on these projects. Thus, the Petitioner did not provide documents to substantiate its ongoing project for the requested H-1B validity period.²

² 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

Furthermore, upon review of the "maintenance and support service level agreement" between the Petitioner and [REDACTED] section 2.4. states that "[a]s the parties develop projects to be governed by the Agreement, they shall enter in Statements of Work which shall contain the detailed terms of each project." In the current petition, the Petitioner did not submit any statements of work that list the project details or the need for the Beneficiary's services. Without additional information and documentation establishing what projects have been secured, the specific duties the Beneficiary will perform on these projects, and the required knowledge perform these duties, we are unable to discern the substantive nature of the position and whether the position indeed qualifies as a specialty occupation. 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. The record of proceedings does not contain such evidence here.

As observed above, U.S. Citizenship and Immigration Services (USCIS) in this matter 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, USCIS 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. The Petitioner has not provided sufficient details regarding the nature and scope of the Beneficiary's employment or any 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.

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). 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. § 214.2(h)(2)(i)(E).

The Petitioner has not established the substantive nature of the work to be performed by the Beneficiary, which therefore 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 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.

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. The Director's decision is affirmed, and the appeal is dismissed for this reason.³

IV. EMPLOYER-EMPLOYEE RELATIONSHIP

Finally, we will briefly address the issue of whether or not the Petitioner qualifies as an H-1B employer. 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 *Cnty. 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

³ The Director's decision also noted that the Petitioner did not submit sufficient evidence to establish that it has valid office space to house the Beneficiary. The Petitioner submitted the lease agreement and photographs of the office. According to the lease agreement, the Petitioner leased an office space of 1470 square feet. In reviewing the organizational chart of the branch office location where the Beneficiary will work, it has 15 employees. Thus, it is still not clear if 1470 square feet is sufficient office space to house 15 employees.

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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. As discussed above, the record of proceedings lacks sufficient documentation evidencing exactly what 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. We also note that the record does not include a statement of work for the client or contractual evidence of work for other clients if the [REDACTED] project ends. Without full disclosure of all of the relevant factors, we cannot conclude that the requisite employer-employee relationship will exist between the Petitioner and the Beneficiary. For this additional reason, the petition is not approvable.

V. CONCLUSION

The burden is on the Petitioner to show eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of S-S-, LLC*, ID# 321072 (AAO Feb. 8, 2017)