



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

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

MATTER OF K-G-I-S- LLC

DATE: JULY 28, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an engineering company, seeks to temporarily employ the Beneficiary as a “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 of the California Service Center denied the petition, concluding that the Petitioner did not establish, as required, that the proffered position is a specialty occupation.

On appeal, the Petitioner submits additional evidence and contends that the petition should be approved.

Upon *de novo* review, we will dismiss the appeal.

**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).

#### B. Proffered Position

According to the Petitioner, the Beneficiary will work in-house as a “software engineer” and, on the labor condition application (LCA)<sup>1</sup> submitted in support of the H-1B petition, designated the proffered position under the occupational category “Software Developers, Applications” corresponding to the Standard Occupational Classification code 15-1132.<sup>2</sup>

The Petitioner initially stated in its support letter that “[t]he major assignments for this individual [are] to develop our company software products and assist our marketing departments to promote

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<sup>1</sup> The Petitioner is required to submit a certified LCA to U.S. Citizenship and Immigration Services 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>2</sup> The Petitioner classified the proffered position at a Level I wage (the lowest of four assignable wage levels). We will consider this selection in our analysis of the position. The “Prevailing Wage Determination Policy Guidance” issued by the DOL provides a description of the wage levels. 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://flcdatacenter.com/download/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://flcdatacenter.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.*

our products.”<sup>3</sup> The Petitioner, however, did not provide any information regarding its software products in its initial submission.

In its response to the Director’s request for additional evidence (RFE), the Petitioner explained that the Beneficiary would work on an in-house project entitled “ [REDACTED] ” for W-G- (end-client), and it submitted the following listing of duties that the Beneficiary would perform (note: errors in the original text have not been changed):

- Performing weekly plan and assigning daily activities. Preparing the monthly metrics and workload.
- Preparing timelines & action plan for ensuring timely completion of Design & Development activities.
- Ensure layouts complies to standard to standard global drawing & stack templates and document deviations
- Train new team members on project & product, providing training in UG routing and GM UG
- tool, Packaging. Design tools
- Providing design proposals for various components such as Automatic Transmission Case,
- Housing, motor supports for different programs . . . by analyzing the internal and External
- Packaging of the Transmission and considering the Vehicle environment.
- Execute Engineering Work Orders in case of more workload.

The record also contains a list of duties prepared by the end-client. The end-client set forth the same bullet-pointed duties described by the Petitioner above, and then also stated that the Beneficiary would perform the following duties (note: errors in the original text have not been changed):

- Taking care of day to day operation activities which involves troubleshooting incident requests by maintaining satisfactory SLA, taking bridge calls with clients, preparing required documentation and coordination with other teams.
- Taking care of new joiners which includes logistics, cab arrangements, attendance, roster of service desk team, introduction with other teams, taking basic network troubleshooting sessions of service desk, taking project DL ownership, published and maintained SharePoint knowledge base for all tracks.

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<sup>3</sup> The Petitioner indicated on the Form I-129, Petition for a Nonimmigrant Worker, that it has three employees. It is reasonable to assume that the size of an employer’s business has or could have an impact on the claimed duties of a particular position. See *EG Enters., Inc. v. Dep’t of Homeland Sec.*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). The size of a petitioner may be considered as a component of the nature of the petitioner’s business, as the size impacts upon the actual duties of a particular position. Here, the Petitioner has not established that it has the necessary personnel to develop its own software, or that it has a “marketing department.”

- Actively involved in initial OMC infrastructure set-up, coordination with IS and Telco team including network, security, desktops, phone, etc.
- Day to day incidents handling and preparing required documentation to make the operation delivery better with my efforts.
- Act as CHANGE MANAGER for the team. Responsible to be present in CCB (change control board) meetings and address all Network's scheduled changes to the clients and also responsible to manage all the change requests generated by both Data and Voice team and coordination with the Change management team.
- Track and lead Networks, involved in preparation of Project & Operation growth plan, prepare daily report with Tickets Auditing, CSAT tracking, etc.
- Manage time to time KT's to team, On-call roaster design, SLA management, etc.

According to an evaluation submitted by the Petitioner, the proffered position requires a bachelor's degree in engineering, science, computer science, computer applications, information technology, or a closely related field. The end-client did not state a minimum educational requirement.

### C. Analysis

Upon review of the record in its totality and for the reasons set out below, we determine that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation. Specifically, the record does not establish that the proffered position requires an educational background, or its equivalent, commensurate with a specialty occupation.<sup>4</sup>

As noted above, the end-client did not state a minimum educational requirement for the position. The court in *Defensor*, 201 F.3d at 387-88, held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring a petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of *the requirements imposed by the entities using a beneficiary's services* (emphasis added). Therefore, in order for us to determine whether the proffered position qualifies as a specialty occupation, the end-client must provide sufficiently detailed information regarding the minimum educational requirements necessary to perform those duties. As the end-client does not address the issue, we cannot determine whether it requires a bachelor's degree in a specific specialty, or the equivalent to perform the duties of the position. For this reason alone, the position is not a specialty occupation.

Setting this deficiency aside, we find that the Petitioner has not provided consistent information regarding the proffered position's duties and nature. For example, the Petitioner did not reference the existence of the ' [REDACTED] ' project or the end-client when it filed the petition. Instead, the language of the support letter indicated that the Beneficiary would design and develop "systems," work on "projects," and develop "products." The Petitioner did not identify a single

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<sup>4</sup> 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.

system, project, or product or indicate that the Beneficiary would be limited to a single system, project, or product. It was only in response to the RFE that the Petitioner amended the proposed duties and narrowed the scope of the Beneficiary's employment to a single project.

We find further that some of the Petitioner's statements regarding the proposed duties are overly generalized. For example, the Petitioner claims that the Beneficiary would assign daily activities and train new team members. However, it is not apparent who these team members are. In this regard, we acknowledge the itinerary's statement that the Beneficiary would work with the Petitioner's staff. Though the record contains numerous references to various "teams," including teams of business analysts, teams of clients, teams of developers, a production deployment team, etc., it is not clear whether these teams consist of employees of the Petitioner, the end-client, or another entity. The Petitioner has only three employees, some of whom appear to be working on other projects. Further, the employment contract's statements that the Petitioner "has no right to control any aspect of the project" raises additional questions as to whose personnel would comprise these "teams."

The Petitioner's Level I wage designation raises additional questions regarding the overall reliability of the job descriptions submitted by the Petitioner and the end-client. As noted, in designating a Level I wage the Petitioner indicated that the proffered position is an entry-level position. As instructed in the DOL wage-level guidance cited above, statements that a job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered. However, several of the proposed duties appear to conflict with the Petitioner's Level I designation. For example, the Petitioner stated that the Beneficiary would assign other workers' daily activities and train new team members. The end-client stated that the Beneficiary would work as a "change manager," that he would "take care of new joiners," and discussed the fact that he would take ownership of various aspects of the project. In a position evaluation submitted by the Petitioner, [REDACTED] used the word "lead" several times to discuss the Beneficiary's role, and then also described how the Beneficiary would manage and lead other software professionals. These and similar statements of record suggest that the Beneficiary would exercise a higher level of judgement, discretion, and independence than that indicated by the Level I wage designation.<sup>5</sup> In any event, it calls into question the reliability of the Petitioner's job description.

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.*

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<sup>5</sup> In any event, they call into question whether the LCA corresponds to and supports the H-1B petition, which would appear to constitute another ground for denial. However, because the proffered position is not a specialty occupation we will not discuss this matter further except to note that the Petitioner should be prepared to address it in any future proceedings.

Moreover, the record does not establish that this project with the end-client would be valid for the requested employment period. The record contains a software services agreement (agreement) with the end-client, which states that "the services to be performed under this agreement will be defined through Schedule of Service that are signed by an Authorized Representative of [the Petitioner] and an Authorized Representative of [end-client]." While the record contains the letters and itinerary from the end-client discussed above, the record does not contain a copy of the schedule of service document described in the agreement that defines the scope of services to be provided. Thus, the Petitioner did not substantiate its ongoing project for the requested H-1B validity period.<sup>6</sup>

For the reasons discussed above, we are precluded from 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.

Because we have found that the Petitioner did not establish the substantive nature of the proffered position and its constituent duties, [REDACTED] evaluation of the position is of limited use. That said, we reviewed his letter nonetheless, and find that the letter does not sufficiently establish that the proffered position qualifies as a specialty occupation even if the Petitioner had established the position's substantive nature.

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<sup>6</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.

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).

For example, [REDACTED] did not discuss the duties of this position in any detail beyond listing them in the same bullet-pointed fashion as the Petitioner's RFE response. When he did describe duties beyond those bullet-points, he made the statements discussed above that conflicted with the Petitioner's Level I wage designation. [REDACTED] did not discuss or otherwise reference the Level I wage designation, the project upon which the Beneficiary would work, or the fact the Beneficiary would be working for the end-client. Considered collectively, we find that these shortcomings indicate an incomplete review of the position by [REDACTED].

In addition, we observe that [REDACTED] does not state that the proffered position requires a bachelor's degree in a specific specialty. According to [REDACTED] the proffered position requires a bachelor's degree in engineering, science, computer science, computer applications, information technology, or a closely related field. However, a requirement for a bachelor's degree in "science" is not a requirement for a bachelor's degree in a specific specialty, and it is inadequate to establish that a position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as science, 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). To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As explained above, we interpret the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. We have consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, 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.

We may, in our discretion, use opinion statements submitted by the Petitioner as advisory. *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Id.* Consistent with *Caron Int'l*, we find that even if [REDACTED] had been able to glean from the record the substantive nature of this position, [REDACTED] evaluation would not satisfy any of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

As the evidence does not satisfy 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.

## II. EMPLOYER-EMPLOYEE RELATIONSHIP

We also find an additional basis for denial because the evidence of record does not establish that the Petitioner would be a "United States employer" having "an employer-employee relationship with



respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee.” 8 C.F.R. § 214.2(h)(4)(ii).

A. Legal Framework

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant, in pertinent part, as an individual:

[S]ubject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . , who meets the requirements for the occupation specified in section 214(i)(2) . . . , and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1) . . . .

The term “United States employer” is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

*United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) *Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and*
- (3) Has an Internal Revenue Service Tax identification number.

(Emphasis added); *see* Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 56 Fed. Reg. 61,111, 61,121 (Dec. 2, 1991) (to be codified at 8 C.F.R. pt. 214).

Although “United States employer” is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), the terms “employee” and “employer-employee relationship” are not defined for purposes of the H-1B visa classification. Therefore, in considering whether or not one will be an “employee” in an “employer-employee relationship” with a “United States employer” for purposes of H-1B nonimmigrant petitions, we will look to common-law agency doctrine and focus on the common-law touchstone of “control.” *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992); *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440 (2003).

The factors indicating that a worker is or will be an “employee” of an “employer” are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-24; *Clackamas*, 538 U.S. at 445; *see also* *Restatement (Second) of Agency* § 220(2) (1958) (defining “servant”).



Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. See *Clackamas*, 538 U.S. at 445; see also EEOC Compl. Man. at § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *Defensor*, 201 F.3d at 388 (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant to control may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. See *Clackamas*, 538 U.S. at 448-49; EEOC Compl. Man. at § 2-III(A)(1).

#### B. Analysis

Applying the *Darden* and *Clackamas* tests to this matter, we find that the evidence of record does not establish that the Petitioner will be a "United States employer" having an "employer-employee relationship" with the Beneficiary as an H-1B temporary "employee."

The Petitioner states throughout the petition that it would act as the Beneficiary's employer, and that it would engage him in an employer-employee relationship. To that end, the Petitioner emphasizes that it would exercise control over the Beneficiary's work. However, the employment agreement states that the Beneficiary will be an independent contractor, that the Petitioner has no right to control any aspect of the projects upon which he would work, that neither the Petitioner nor any end-client would assume any financial liability incurred by the Beneficiary while he worked for the Petitioner, that the Petitioner would assume no responsibility for working conditions at a client site, and that the Petitioner would have no right to control any aspect of the Beneficiary's work while at a client site, and assigns to the Beneficiary the responsibility to "discuss directly with the [end-client] the task requirements prior to acceptance of the work." Such lack of control over the project by the Petitioner, and delegation of responsibility to the Beneficiary as to whether to even accept the project on behalf of the Petitioner,<sup>7</sup> conflicts directly with the Petitioner's claim of an employer-employee relationship with the Beneficiary.

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<sup>7</sup> This delegation of responsibility would also appear to conflict with the Level I designation in that it would empower the Beneficiary to make a decision with significant financial impact to the Petitioner.

Further, the agreement does not provide any level of specificity as to the Beneficiary's duties, the requirements for the position, number of hours to be worked per week, annual leave allotment, salary, etc. While an employment agreement may provide some insights into the relationship of a petitioner and a beneficiary, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450.

In light of the above, we are unable to find that the Petitioner has not sufficiently established the requisite employer-employee relationship with the Beneficiary.

### III. CONCLUSION

The Petitioner has not established that: (1) the proffered position qualifies as a specialty occupation; and (2) the requisite employer-employee relationship would exist between the Petitioner and the Beneficiary.

**ORDER:** The appeal is dismissed.

Cite as *Matter of K-G-I-S- LLC*, ID# 441782 (AAO July 28, 2017)