



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

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

MATTER OF K-G-I-S- LLC

DATE: JUNE 15, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a technology consulting and staffing services 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 that the proffered position qualifies as a specialty occupation.

On appeal, the Petitioner submits additional evidence and asserts that the Director's decision was in error.

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. Analysis

Upon review of the entire record and for the reasons set out below, we determine that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation.<sup>1</sup>

The Petitioner indicated that the Beneficiary will be employed in-house as a 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.

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

---

<sup>1</sup> While we may not discuss every document submitted, we have reviewed and considered each one.

products.”<sup>2</sup> The Petitioner, however, did not provide any information regarding its software product in its initial submission.

In response to the Director’s request for evidence (RFE), the Petitioner indicated that the Beneficiary would work on a client project. However, the Petitioner provided inconsistent information regarding what project the Beneficiary would work on. Specifically, the Petitioner stated that it will “complete the development of [client] Product named “Music Festival Application” and provided a list of skills and time that the Beneficiary would spend on each duty. However, in another document titled “Itinerary of Work to be Performed by Beneficiary,” the Petitioner described the product as “S4 Workflow.”<sup>3</sup> Then later in the same document, the Petitioner listed “Music Festival Application” under “Initial Work by Beneficiary.”

Even if we assume that the Petitioner had sufficiently established that the Beneficiary would work on “Music Festival Application,” the Petitioner has not provided reliable documents from the end-client that describe the duties and requirements for the project. 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 proposed job duties and the minimum educational requirements necessary to perform those duties.

The Petitioner submitted letters and itinerary from the end-client, but the documents contain discrepancies that undermine the authenticity of the documents. For example, the list of duties from the end-client’s unsigned letter, is verbatim from the Petitioner’s itinerary and contains the same grammatical errors. For example, the document states, in part, the following (note: errors in original have not been changed):

---

<sup>2</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.”

<sup>3</sup> In response to the RFE, the Petitioner submitted a brochure that states (errors in the original text have not been changed): “S4 Workflow is the product, using this we can create the workflows for different business requirements related to various industries. In S4 workflow we are using the Spreadsheet to create the different activities based on the requirement/s. This will give the flexibility to create and use the workflows quickly and hence this will stand as the very useful took in the current trend.” The Petitioner did not submit any evidence of contracts with clients regarding this software product.

- Being the CHANGE MANAGER of my team, my responsibility is to be present in CCB (change control board) meeting 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 Change management team.
- Being Problem Manager of my team, my responsibility is to drive all the SEV-1 calls, preparation of RCA document and presenting them in RCA meetings with customer.

Both documents use first-person pronouns for these two duties when other duties are described without any personal pronouns. Likewise, the itineraries from the end-client and the Petitioner also use identical language and both provide information about the end-client under the same section in the same format. When documents are worded the same and include identical errors, it raises questions regarding the source of the documents and its credibility. We further note that the documents from the end-client are either not signed or the signatures do not match. 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. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010); *Matter of E-M-*, 20 I&N Dec. 77, 80 (Comm'r 1989).

Further, the duties from the end-client do not sufficiently delineate the nature of the Beneficiary's position. For example, the Beneficiary's duties include (errors in the original text have not been changed) "taking care of day to day operation activities at offshore which involves trouble shooting incident requests by maintained satisfactory SLA," and "majorly involved in initial OMC infrastructure set up of Noida as well as Bangalore to the Client's Network with IPLC and IPSEC VPN set-up, coordination with IS and Telco team including network, security, desktops, phones, etc." It is not clear how these duties relate to "Music Festival Application" project. Further, the end-client did not explain its "day to day operations activities at offshore" or what "set up of Noida" involves. It is not clear what the Beneficiary would actually do on day-to-day basis and whether performance of these duties require theoretical and practical application of a body of highly specialized knowledge and at least a bachelor's degree a specific specialty, or its equivalent.

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]." However, the Petitioner did not submit a schedule of service that defines the scope of services to be provided. While the record contains letters and itinerary from the end-client, as discussed, they contain inconsistencies that undermine the credibility of the documents. The Petitioner did not provide additional evidence of in-house projects

for the Beneficiary. Thus, the Petitioner did not substantiate its ongoing project for the requested H-1B validity period.<sup>4</sup>

For the reasons discussed above, we are precluded from finding that the proffered position satisfies any of the 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.

However, even if we assume that the documents are from the end-client and the documents sufficiently establish the substantive nature of the proffered position, the end-client does not indicate that the position requires a minimum of a bachelor's degree in a specific specialty. While we acknowledge that the itinerary from the end-client and the Petitioner both state that (note: errors in original have not been changed) "[a]ll employees of the company are minimum bachelor's degree," neither document indicates that the end-client requires a minimum of a bachelor's degree in a

---

<sup>4</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).

specific specialty. Without more, these statements alone indicate that the proffered position is not in fact a specialty occupation.

A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. There must be a close correlation between the required specialized studies and the position; thus, the mere requirement of a degree, 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) ("The mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility."). Thus, while a general-purpose bachelor's degree 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.

In light of the above, we cannot find that the proffered position qualifies for classification 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.”

In response to the Director’s RFE, the Petitioner asserts that it “has direct control of the employee.” On appeal, the Petitioner submits a letter from the end-client which also states that the Petitioner “will have ultimate right to control and supervise [the Beneficiary]’s overall work.” These claims, however, are contradicted by the submitted evidence. According to the “Employer Agreement” (agreement) between the Petitioner and the Beneficiary, the Beneficiary is “[a]n independent contractor” who “is solely responsible for the services” he “provides to the Client.” The agreement further states that the Beneficiary “acknowledges that [the Petitioner] has no right to control any aspect of the project.” The Petitioner must resolve these inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). 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 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# 415959 (AAO June 15, 2017)