



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

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

MATTER OF M-S-, LLC

DATE: JUNE 26, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a computer company, seeks to temporarily employ the Beneficiary as a “software programmer” 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 Vermont Service Center denied the petition, concluding that the evidence of record does not establish that the proffered position qualifies as a specialty occupation.

On appeal, the Petitioner submits additional evidence and asserts that the Director erred in denying the petition.

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

## I. LEGAL FRAMEWORK

Section 214(i)(1) of the Act, 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).

## II. PROFFERED POSITION

In the H-1B petition, the Petitioner stated that the Beneficiary will serve as an in-house “software programmer.”<sup>1</sup> Although the Petitioner provided several different job descriptions for the proffered position, the following job duties were provided with the initial petition:

- Design, customize and implement appropriate solutions for planning, analytics and reporting systems.
- Code, test and analyze software programs and applications using various tools and technologies identified by the project manager/architect.
- Identify, evaluate, test, support and troubleshoot new and existing software applications.
- Migrate applications from one environment to another environment.
- Manage Release & change management & version control for migration.
- Maintain the master data in a centralized repository.
- Provide user training, and training for team members.
- Prepare and maintain user documentation on business process and applications.
- Use various tools and technologies that include but not limited Java/J2EE, Documentum, Oracle, Windows, Unix etc.
- Configure, test and deliver the solution as per the requirement.
- Perform the continuous system support throughout the project[.]
- Design and develop programs and reports with suggestions to necessary software components required for the system setup[.]

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<sup>1</sup> As discussed below, the Petitioner provided several different job descriptions, job titles, and educational requirements for the position.

- Turn the application to improve the performance[.]
- Provide support the software and application solutions[.]
- Respond to production incidents and take appropriate actions such as filing bugs and suggestions.

### III. ANALYSIS

We determine that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation.<sup>2</sup> Specifically, the record provides significant variances in the description of the position, thereby precluding us from determining its substantive nature.<sup>3</sup>

#### A. Variances in the Petitioner's Description

The Petitioner has provided inconsistent information regarding the Beneficiary's job title, duties, and the minimum requirements for the proffered position. The table below summarizes the variances in the Petitioner's job titles and educational requirements.

<b>Record of Proceedings</b>	<b>Job Title</b>	<b>Job Requirements</b>
Appeal Brief	Computer Programmer	(1) Bachelor's degree in engineering or a related analytic or scientific discipline  (2) Bachelor's degree in business, IT or the equivalent
Form I-129	Software Programmer	
Labor Condition Application	Software Developer	
Letter of support (March 24, 2016)	Programmer Analyst	Bachelor's degree in science, computer science, computer engineering, electronics, engineering, physical sciences or equivalent
Application Document	Computer Analyst	

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<sup>2</sup> We hereby withdraw the Director's statement that the position of software developer is traditionally considered a specialty occupation. The Director does not cite to any authoritative or objective source to support this statement.

<sup>3</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.

“Specialty Occupation Work and Petitioner Right to Control” Document	(1) Software Programmer (2) Programmer Analyst	Bachelor’s degree in science, computer science, computer engineering, electronics, engineering, physical sciences or equivalent
Employment Offer Letter (March 11, 2016)	Software Developer	
Response to Request for Evidence	(1) Programmer (2) Computer Programmer	(1) Bachelor’s degree in engineering, computer science, statistics, mathematics, economics, commerce or business (pg. 4)  (2) Bachelor’s degree in engineering or a related analytics of scientific discipline (pg. 5)  (3) Bachelor’s degree in business, information technology or the equivalent (pg. 5)
Letter of support (September 2, 2016)	(1) Business Analyst (2) Programmer	Bachelor’s degree or its equivalent in the field of business, computer science, application, IT, engineering

The Petitioner also provided multiple job descriptions for the proffered position. The descriptions vary from just 4 tasks to over 15 tasks, and they are distinct. For example, in the initial submission, the Petitioner claims the Beneficiary will “provide user training, and training for team members” and “design, customize and implement appropriate solutions for planning, analytics and reporting systems.” However, these tasks do not appear in subsequent descriptions. Further, the Petitioner has not provided a sufficient explanation of the demands, level of responsibilities, complexity, or requirements necessary for the performance of these duties.

The record does not establish 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.

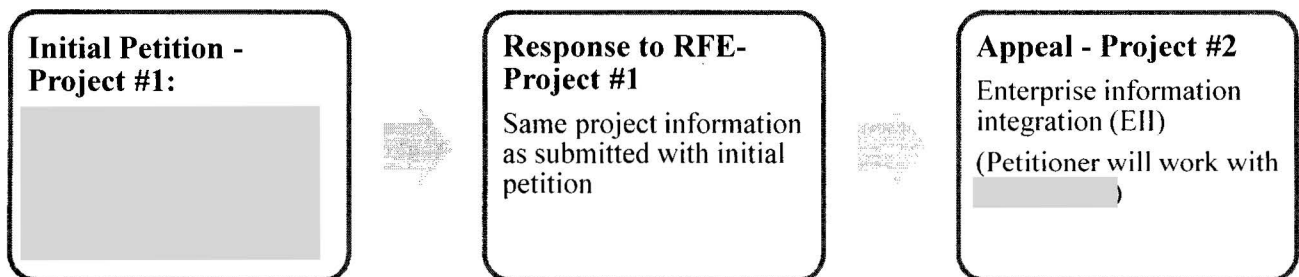
In sum, the Petitioner has provided inconsistent information on material aspects of the proffered position (i.e., job title, academic requirements, and the duties of the position). The record lacks an explanation for these variances. Thus, we must question the accuracy of the documents and whether the information provided is correctly attributed to this particular Beneficiary and position.

#### B. Bachelor's Degree in Business

In addition, the Petitioner repeatedly stated that a bachelor's degree in business is acceptable. However, the requirement of a bachelor's degree in business 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 business, 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). U.S. Citizenship and Immigration Services (USCIS) has 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.

#### C. Inconsistent Job Projects

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. The Petitioner indicated that the Beneficiary will be working on certain projects and outlined the projects as follows:



As noted above, the Petitioner initially stated that it will work on a project for [Redacted], but on appeal the Petitioner submits an entirely new project. It is not clear why the Petitioner provided information on appeal regarding a completely new project. On appeal, the Petitioner makes no mention of the project documentation submitted with the initial petition and in response to the Director's request for evidence (RFE).

The Petitioner must establish that the position offered to the Beneficiary when the petition was filed merits classification for the benefit sought. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Moreover, the Petitioner did not provide sufficient evidence to establish that it has a current contract with [REDACTED] or [REDACTED] to perform either of these projects. For instance, the Petitioner submitted a presentation for [REDACTED], and a document outlining the scope of the project for the [REDACTED] e-commerce application. In reviewing the project presentation, it states that "this investor presentation has been prepared to secure investment for [REDACTED]." The Petitioner did not provide evidence to establish a connection with the company, [REDACTED], who appears to be the owner of this application, or evidence to establish that the Petitioner has a contract with that company to work and utilize this application.

The Director also noted that public records indicated that [REDACTED] completed the swipestreet application approximately two years earlier. Thus, it is not clear as to the Beneficiary's duties on this project since the application is already developed. Although the Director indicated in the RFE several of these inconsistencies in the documentation, the Petitioner did not discuss these issues in response to the RFE or on appeal, or submit additional documentation to overcome these concerns.

Further, on appeal, the Petitioner submits a contract for the new project, between itself and [REDACTED], executed in August 2006, nearly 10 years prior to filing the instant petition. The purpose of the contract is indicated as an agreement to "establish a general framework for engaging in certain business, sales marketing or other activities that will utilize or draw upon their respective products, services, skills, expertise and experience." Under the section, "scope of relationship," it states that the "intent of this agreement is to set forth the general legal terms and conditions which are expected to govern each Schedule. . . ." The contract explains that the parties will prepare a schedule to include information such as the scope and fees for a particular project. The Petitioner did not submit a schedule to indicate a current specific project between itself and [REDACTED], and a project that indicates the need of the Beneficiary as a software programmer. Without additional documentation establishing the specific duties the Beneficiary will perform on this project, and the required knowledge to perform these duties, we are unable to discern the substantive nature of the position and whether the position indeed qualifies as a specialty occupation.

The Petitioner referenced two separate projects but did not submit sufficient evidence such as contracts or corroborating evidence that these projects will continue until September 2019, and will require the services of a software programmer for that entire period. The Petitioner provided insufficient evidence to substantiate its ongoing project for the requested H-1B validity period.<sup>4</sup>

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<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:

#### D. Job Location

While the Petitioner repeatedly claims in the record (including its letters and the labor condition application) that the Beneficiary will be employed on-site, we observe that the employment agreement provides evidence that the Beneficiary may work off-site. The Petitioner submitted an employment agreement between itself and the Beneficiary, dated March 22, 2016. Under section 1(b), geographical preference, the agreement states that the “employee working as a consultant should be flexible & open to relocate to any client location within Continental United States at Company’s decision and request.” Also, under section 1(e) of the agreement, under in-between assignment period, it states “the employee acknowledges that he or she understands that as part of Employee’s employment he or she may not be assigned to client project at all times.” The Petitioner did not provide an explanation as the reason the employment agreement is not consistent with the information provided to USCIS as to the Beneficiary’s work site location.

Moreover, in response to the RFE, the Petitioner submitted a strategic business plan for the [REDACTED] project. This business plan stated under the “management team” section that the “company executive staff and operations will be in [REDACTED], California.” This information is inconsistent with the Petitioner’s statement that the Beneficiary will work on this project in-house in New Jersey.

#### IV. CONCLUSION

For the reasons discussed above, the Petitioner has not established that it the proffered position qualifies as a specialty occupation.<sup>5</sup>

**ORDER:** The appeal is dismissed.

Cite as *Matter of M-S-, LLC*, ID# 442282 (AAO June 26, 2017)

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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. . . . In the case of speculative employment, the Service 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).

<sup>5</sup> As the petition cannot be approved for the reasons discussed above, we will not address the additional deficiencies that we observe in the record.