



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

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

MATTER OF ITF-, INC.

DATE: MAR. 2, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an information technology consulting company, seeks to temporarily employ the Beneficiary as a "SailPoint developer" 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 Petitioner did not establish that the proffered position is a specialty occupation.

The matter is now before us on appeal. In its 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, 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 “SailPoint developer.” In its letter of support, and throughout the record, the Petitioner described the job duties of the proffered position as follows:

- Analyzing users’ needs and then designing, testing, and developing software to meet those needs.
- Design each piece of an application or system and plan how the pieces work together.
- Creating a variety of models and diagrams that instruct programmers on how to write software code for the application or system.
- Recommend software upgrades for customer’s existing programs and systems.
- Ensure that a program continues to function normally through software maintenance and testing and create a plan for future maintenance and upgrades.
- Building new systems and applications programming and maintaining networks.
- Determining efficient coding processes and procedures.
- Diagnose bugs and software problems.

The Petitioner stated that the minimum entry requirement for the proffered position is a bachelor’s degree in computers, engineering, or a related field.

III. ANALYSIS

For the reasons set out below, we have determined that the proffered position does not qualify as a specialty occupation. Specifically, the record (1) does not describe the actual proffered position 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

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

The Petitioner's description of the job duties for the proffered position are identical to most of the duties listed in the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*. In the Director's request for evidence (RFE), the Petitioner was advised of this and asked to submit a more detailed description of the proffered position to specifically address the substantive nature of the position. In response, the Petitioner submitted the same list of duties as previously provided. In her decision, the Director again addressed this issue and found that the substantive nature of the proffered position could not be determined. On appeal, the Petitioner again submits the same list of duties without any additional information or detail as to the substantive nature of the position. The Petitioner further stated that it was unable to obtain confirmation of the job duties from the end-client. Additionally, the Petitioner has not addressed how the duties of a software developer directly correlate to the duties of a SailPoint developer, the proffered position. The Petitioner has not provided any information about SailPoint or the duties directly related to its development.

Overall, the Petitioner has not provided sufficient details regarding the nature and scope of the proffered position. Without a meaningful job description, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. The tasks as described do not sufficiently communicate (1) the actual work that the Beneficiary will perform; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. We therefore find the evidence of record insufficient to demonstrate that the proffered position qualifies as a specialty occupation.

Moreover, although the Petitioner provided a copy of its subcontractor agreement between itself and [REDACTED] its claimed mid-vendor, the Petitioner has not specifically explained the

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

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duties and role of the proffered position in the context of the work performed for the end-client. Here, the Petitioner's subcontractor agreement does not specifically list the end-client for which the Beneficiary will perform work. The Petitioner did not submit a copy of the end-client's agreement with the subcontractor. A letter from the claimed end-client, [REDACTED] does not list the mid-vendor through which the Beneficiary is employed and does not specifically state that the Beneficiary is an employee of the Petitioner. The letter specifically states that it "is utilizing [the Beneficiary] to perform services on our behalf for our customer, [REDACTED] [The Beneficiary] is scheduled to continue these services long term." It appears here that the claimed end-client is further diluting the Beneficiary's position and job duties to perform services for its client [REDACTED]

Furthermore, neither the subcontractor agreement nor the letter from the claimed end-client describes the particular duties of the Beneficiary in detail. In fact, they do not provide any position description or list of duties. The claimed end-client's letter does not further explain what each of these duties specifically entails, and how each duty specifically relates to the project.

Again, 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.

As the Petitioner has not established the substantive nature of the work to be performed by the Beneficiary, this precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

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

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 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 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 claimed 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 ITF-, Inc.*, ID# 210664 (AAO Mar. 2, 2017)