



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

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

MATTER OF V-T-, INC.

DATE: MAR. 9, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a computer consulting and software development business, seeks to temporarily employ the Beneficiary as a "software QA tester" 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 had not established an employer-employee relationship with the Beneficiary.

The matter is now before us on appeal. In its appeal, the Petitioner submits a brief and additional evidence and asserts that the Director erred in her decision.

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

I. PROFFERED POSITION

The Petitioner listed the duties of the proffered position as follows (paraphrased and bullet points added):

- Analyze business requirements and develop test plans, test scenarios, test cases, test data, and test scripts;
- Query databases, read and compile code, and deploy and maintain test environments;
- Execute test case and test scripts, and capture test results and test metrics;
- Reproduce, diagnose, and document software defects using TFS/Microsoft Test Manager;
- Verify that new feature requirements are met in each release;
- Perform and coordinate system verification and validation test activities utilizing SQL Server and SSIS;
- Perform integration, and functional, system and regression testing;
- Collaborate with software developers to identify defects and offer solutions;

- Report software quality metrics;
- Communicate the Quality Assurance team's needs/objectives to development, operations, and business analysis teams; and
- Create reports and maintain technical documentation.

According to the Petitioner the minimum requirement for performance of the job duties is a bachelor's degree in computer science, information systems, or a related field.¹

II. EMPLOYER-EMPLOYEE RELATIONSHIP

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).

¹ On appeal, the Petitioner submits a letter signed by a representative of the end client providing the same job description and educational requirements.

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)).

B. Analysis

On the Form I-129, and in its letter in support of the petition, the Petitioner indicated that the Beneficiary would work offsite, providing services to [REDACTED] for its client [REDACTED]. The Petitioner stated that “[w]hile [REDACTED] will provide the day[-]to[-]day work requirements that [the Beneficiary] must complete, at all times, [the Petitioner], as her employer, will have ultimate control and authority over her work assignments.” The Petitioner also noted that the work for [REDACTED] was through its subcontract with [REDACTED] which had a contract to provide services to [REDACTED] and its client [REDACTED]. The Petitioner provided a copy of its employment agreement with the Beneficiary, wherein she acknowledged [REDACTED] as providing her with the day-to-day work requirements and the Petitioner with the ability to re-assign her to other projects. In a separate statement, also signed by the Petitioner’s president and the Beneficiary, the Beneficiary acknowledged that she may be called upon to assist the employees of companies other than the Petitioner, but that again the Petitioner will have the “ultimate right to control her work,” and that only the Petitioner would provide her “with the tools and instrumentalities required to perform her job, if not readily available at her work location.”

² 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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The initial record also included the master services agreement (MSA) between the Petitioner and [REDACTED] a purchase order for the Beneficiary's services, and a letter signed by an [REDACTED] representative acknowledging that [REDACTED] will provide the Beneficiary's day-to-day work requirements but that the Beneficiary would report to the Petitioner's president who would be ultimately responsible for her services on the [REDACTED] project.

In response to the Director's request for evidence (RFE), the Petitioner submitted its president's declaration confirming the above information. The Petitioner also submitted a letter signed by [REDACTED] representative and a letter signed by [REDACTED] associate vice president and lead. In the [REDACTED] letter the associate vice president and lead identified himself as the individual responsible for identifying and providing the Beneficiary with the day-to-day tasks that she must complete. Both representatives acknowledged that the Petitioner would have the ability to hire, fire, supervise, and conduct performance reviews of the Beneficiary. The record also included the Beneficiary's weekly status reports from June 1, 2016, through September 2, 2016, which outlined her completed tasks, her priorities for the next week, and noted planned team meetings to discuss work assignments on the upcoming release and status of the project.³ The Petitioner's organizational chart showed 24 of the Petitioner's 26 employees reporting directly to the Petitioner's president.

We do not find that the Petitioner has established an employer-employee relationship with the Beneficiary as interpreted by the common law definitions cited in the legal framework section above. While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are 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 the work will 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 actual employer.

Here, we do not have the MSA between the end client and the mid-vendor. Thus, we are unable to review any binding contractual restrictions on the Petitioner's ability to control the Beneficiary's employment contained within that document. Although the end client, through a letter signed by its associate vice president, claims that it does not have the right to fire, supervise, and conduct performance reviews of the Beneficiary, the record does not include the MSA between the mid-vendor and end client confirming this claim. We are unable to ascertain, for example, whether the end client may question the Beneficiary's performance or even terminate the Beneficiary's assignment at its facility. Although the Petitioner asserts on appeal that its statements and the statements of the mid-vendor and end client are uncontroverted, we do not have all the relevant contracts to review to confirm the Petitioner's unfettered ability to control the Beneficiary in the exercise of her work. Without full disclosure of all of the relevant factors, including all contracts,

³ The record includes information that the Beneficiary began working for the Petitioner in an approved [REDACTED] status on August 12, 2015, with an end date of August 11, 2016.

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we are unable to properly assess whether the requisite employer-employee relationship will exist between the Petitioner and the Beneficiary.

Moreover, the Petitioner, the mid-vendor, and the end client, all acknowledge that the end client's representative will provide the Beneficiary her day-to-day work requirements. Thus, the type of work that may be required may vary, and that variance appears to be outside the Petitioner's control. Although the Beneficiary submits weekly reports to the Petitioner, this appears to be an administrative function not an instructional function. The weekly reports are insufficient to conclude that the Petitioner is involved in the technical and logistical elements of the Beneficiary's work or in her day-to-day work assignments. The end client's ability to control the manner and means by which the Beneficiary's work is accomplished undermines the Petitioner's claim that it controls the Beneficiary's work.⁴ The Petitioner has not established that it controls the Beneficiary's work so that her services while at the end client will fall within the parameters of a specialty occupation. The record includes ambiguous information regarding who will supervise the Beneficiary's employment, and consequently, who exercises substantive control over the Beneficiary and the work that she is to perform.

The Petitioner in this matter has not submitted probative evidence demonstrating that it will oversee and direct the Beneficiary's actual work, and that it provides the tools and instrumentalities for her work.⁵ The record does not include the MSA between the mid-vendor and the end client and thus we are unable to determine any contractual restrictions further limiting the Petitioner's ability to exercise control of the Beneficiary's work. The Petitioner must support its assertions with relevant, probative, and credible evidence. *Matter of Chawathe*, 25 I&N 369, 376 (AAO 2010).

Based on the tests outlined above, the Petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the Beneficiary as an H-1 B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii). Thus, the Petitioner has not demonstrated that it will have an employer-employee relationship with the Beneficiary. Therefore, the Director's decision is affirmed, and the appeal is dismissed for this reason.

III. SPECIALTY OCCUPATION

As the Petitioner did not demonstrate an employer-employee relationship with the Beneficiary, we need not fully address another issue evident in the record. However, we wish to identify an additional issue to inform the Petitioner that this matter should be addressed in any future proceedings.⁶

⁴ For example, on appeal the end client provided an overview of the [REDACTED] project, the project to which the Beneficiary would be assigned. However, the Petitioner reported that the Beneficiary would be assigned to the [REDACTED] Project. It is not clear if these are the same projects, and if not, who determined the change in assignment.

⁵ Although the Petitioner states that it supplies the tools and instrumentalities for the Beneficiary's work, it qualifies this statement with the condition that this occurs only if the tools and instrumentalities are not available at her work location.

⁶ In reviewing a matter *de novo*, we may identify additional issues not addressed below in the Director's decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir.

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” 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, 387-88 (5th Cir. 2000).

We note that, as recognized by the court in *Defensor*, where the work is to be performed for entities other than the petitioner, evidence of the client companies’ job requirements is critical. *Defensor*, 201 F.3d at 387-88. 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

2003) (“The AAO may deny an application or petition on a ground not identified by the Service Center.”).

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.

B. Analysis

For the reasons set out below, we have determined that the proffered position does not qualify as a specialty occupation. Specifically, the record does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.

Here the Petitioner states on the Form I-129, that the Beneficiary will perform work as a software QA tester. On the labor condition application (LCA)⁷ submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category "Computer Occupations, All Other" corresponding to the Standard Occupational Classification code 15-1199.⁸ We recognize that the Occupational Information network (O*NET) lists the titles of various occupations under the 15-1199 category, and provides a summary report for the occupation of software quality assurance engineers and testers at 15-1199.01. *See* O*NET OnLine Summary Report for "15-1199.01 – Software Quality Assurance Engineers and Testers," <http://www.onetonline.org/link/summary/15-1199.01> (last visited Feb. 22, 2017). However, even if the proffered position falls within this category, O*NET OnLine does not state a requirement for a bachelor's degree for this occupation. Rather, it assigns this occupation a Job Zone "Four" rating, which groups it among occupations for which "most . . . require a four-year bachelor's degree, but some do not." Further, O*NET OnLine does not indicate that four-year bachelor's degrees required by Job Zone Four occupations must be in a specific specialty directly related to the occupation. Therefore, O*NET OnLine information is not probative of the proffered position being a specialty occupation.

⁷ The Petitioner is required to submit a certified LCA 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, 545-46 (AAO 2015).

⁸ 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 she will be closely supervised and her work closely monitored and reviewed for accuracy; and (3) that she 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. 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.*

We have also accessed the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* for information on "Computer Occupations, All Other."⁹ We recognize the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹⁰ However, there are some occupations for which occupational profiles have not been developed, such as for the occupational category "Computer Occupations, All Other." U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Employment Statistics*, Occupational Employment and Wages, May 2015, 15-1199, "Computer Occupations, All Other," <http://www.bls.gov/oes/current/oes151199.htm> (last visited Feb. 22, 2017).

Accordingly, in certain instances, the *Handbook* is not determinative. When the *Handbook* does not support the proposition that a proffered position is one that meets the statutory and regulatory provisions of a specialty occupation, it is incumbent upon the Petitioner to provide persuasive evidence that the proffered position more likely than not satisfies at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), notwithstanding the absence of the *Handbook's* support on the issue. In such case, it is the Petitioner's responsibility to provide probative evidence (e.g., documentation from other objective, authoritative sources) that supports a finding that the particular position in question qualifies as a specialty occupation. Whenever more than one authoritative source exists, an adjudicator will consider and weigh all of the evidence presented to determine whether the particular position qualifies as a specialty occupation.

In that regard, we have reviewed the duties listed for the proffered position to determine if the duties demonstrate the Beneficiary's actual day-to-day tasks or what bodies of knowledge are required to perform these duties. It appears from the description that the Beneficiary will be testing and debugging software and that she will check computer code, use TFS/Microsoft Test Manager, and will utilize SQL Server and SSIS. The Petitioner, however, does not allocate the amount of time she will spend on any of the described duties, which further limits our ability to ascertain the primary duties of the position and what the Petitioner or the end client expects the Beneficiary to do. Upon review of all the duties, the Petitioner has not demonstrated that the duties described require a bachelor's degree in computer science, information systems, or a related degree. That is, the duties

⁹ All of our references are to the 2016-2017 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/ooh/>.

¹⁰ The *Handbook*, in a sub-category of the chapter on the occupation of "Computer Systems Analysts," reports that "*Software quality assurance (QA) analysts* do in-depth testing and diagnose problems of the systems they design in order to make sure that critical requirements are met. They also write reports to management recommending ways to improve the systems." See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., Computer Systems Analysts, <https://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-2> (last visited Feb. 22, 2017). While this brief description appears to include the essence of the proffered position, the educational requirements for a computer systems analyst as reported in the *Handbook* indicates at most that a bachelor's or higher degree in a computer or information science field may be a common preference, but not a standard occupational, entry requirement. See <https://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited Feb. 22, 2017). In fact, this chapter notes that many computer systems analysts only have liberal arts degrees and programming or technical experience. See *id.* Thus, the *Handbook's* report is insufficient to conclude that simply by virtue of its occupational classification a software quality assurance position qualifies as a specialty occupation.

as generally described appear to be duties that could be performed with technical certifications and would not require a bachelor's degree in any specific specialty.

The wage-level designated by the Petitioner on the LCA raises further questions regarding the duties of the proffered position. As noted, in designating the proffered position at a Level I wage rate, the Petitioner indicated that the proffered position is a comparatively low, entry-level position related to others within the occupation.¹¹ As the record does not include more detail regarding the nature of the proffered position, we are unable to ascertain whether the proffered position requires duties which will incorporate the theoretical and practical application of a body of highly specialized knowledge, associated with the attainment of a baccalaureate or higher degree in the specific specialty, or its equivalent, as the minimum for entry into the occupation as required by section 214(i)(1) of the Act. Without additional information and documentation establishing the specific duties the Beneficiary would perform, we are unable to discern the substantive nature of the position and whether the proffered position indeed qualifies as a specialty occupation.

Consequently, 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.

The current record does not establish that the Petitioner has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A); therefore, it cannot be found that the proffered position qualifies as a specialty occupation.

¹¹ The Petitioner's designation of this position as a Level I, entry-level position undermines any claim that the position is particularly complex, specialized, or unique compared to other positions *within the same occupation*. Nevertheless, a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation, just as a Level IV wage-designation does not definitively establish such a classification. In certain occupations (e.g., doctors or lawyers), a Level I, entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty, or its equivalent. That is, a position's wage level designation may be a relevant factor but is not itself conclusive evidence that a proffered position meets the requirements of section 214(i)(1) of the Act.

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IV. CONCLUSION

The appeal must be dismissed because the Petitioner did not establish that it will have an employer employee relationship with the Beneficiary.

ORDER: The appeal is dismissed.

Cite as *Matter of V-T-, Inc.*, ID# 225325 (AAO Mar. 9, 2017)