



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

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

MATTER OF E-S-, INC.

DATE: MAR. 15, 2017

APPEAL OF CALIFORNIA 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, offsite, as a "software 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 California Service Center denied the petition concluding that the Petitioner did not establish that: (1) the proffered position is a specialty occupation; and (2) it will have an employer-employee relationship with the Beneficiary.

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

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 regulations largely restate this statutory definition, but add a non-exhaustive list of fields of endeavor. 8 C.F.R. § 214.2(h)(4)(ii). 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).

As recognized by the court in *Defensor*, 201 F.3d at 387-88, where the work is to be performed for entities other than the petitioner, evidence of the client companies’ job requirements is critical. *See id.* 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 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. The Proffered Position

In the letter submitted in support of the petition, the Petitioner provided an overview of a software developer occupation and asserted that the “usual minimum requirement for performance of the job duties is a Bachelor’s degree in Computer Science/Computer Information Systems/Management Information Systems/Electrical Engineering or a related field.” On the Form I-129, the Petitioner indicated that the Beneficiary would work offsite. The initial record included a letter signed by a representative of the mid-vendor, [REDACTED] stating that the Beneficiary “will be employed at the end-client as a Software Developer, assigned to the [REDACTED] project. The

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representative repeated the Petitioner's lengthy overview of a software developer occupation and added that the "minimum education requirements to perform these job duties are [a] bachelor's degree in Computer Science & Engineering or a related field."

In response to the Director's request for evidence (RFE), the Petitioner confirmed that the Beneficiary would be assigned to work on the project at the end-client and that the Beneficiary's "assignment is pursuant to agreements entered into between [the] Petitioner and Vendor, and between End-Client." The Petitioner described the Beneficiary's role in this project as follows (verbatim):

[The Beneficiary], as a part of the team, is responsible for obtaining the webpages developed based on the business requirement encompassed from the E-Commerce Experience team. He will be involved in the project discussion, design phase, development, testing, and maintenance in different levels of involvement, having input from the initial stages of the project in order to ensure the required output.

Beneficiary is responsible for analyzing the requirement, adding inputs to the design in terms of what can and cannot go on the page in order to keep the webpage up to standards, developing the page with a quick turn-around time, unit testing as a [sic] well as integration testing when there is a need for the page to interact with the other pages on the websites, and using the web services to get the data that is going to be on the page. He also maintains the pages already existing on the website. Marketing pages on the E-Commerce website sometimes not only have a very short lifetime on the website, but also have a very quick turnaround time in terms of development.

It is the responsibility of the software developer on the team to be the expert in the day-to-day development work on our work stream. Beneficiary must reach out to his Lead frequently to discuss the work stream and learn about other changes that may impact the team. It is the responsibility of the software developer to access the design and develop a page which is WGAC 2.0 AA standard compliant for accessibility. In addition, maintaining a page, which is live, is also one of the responsibilities of the software developer; it is of paramount importance to keep the page up and running on the website, as well as keeping the page updated. The team uses tools such as (Version Control), (Proxy Tool) and some internal content management systems in order to achieve the required results.

The Petitioner listed a number of technologies the team will use "to enable them to not only develop a webpage, faster, but to also be efficient in terms of page load time and performance."

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C. Analysis

For the reasons set out below, we determine that the Petitioner has not demonstrated that it would employ the Beneficiary in a specialty occupation. Specifically, the record (1) does not describe the position's duties 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

The Petitioner, on appeal, asserts that [REDACTED] has contracted with an additional vendor, [REDACTED] as its centralized supplier management services provider. Although the Petitioner submits a staffing supplier agreement between [REDACTED] and [REDACTED] the agreement does not refer to any specific project or job that is the subject of the contract. Moreover, the [REDACTED] agreement indicates that [REDACTED] "shall, at [REDACTED] option and sole discretion, contact [REDACTED] to request Contract Workers to perform Contract Services based upon open Job Postings [REDACTED] receives from [REDACTED]. The agreement further refers to the job postings as electronic requisitions, entered into [REDACTED] electronic system, which set forth a position for which [REDACTED] desires a contract worker. The record, however, does not include a copy of [REDACTED] job posting, or other information depicting [REDACTED] or [REDACTED] requirements to perform the duties for [REDACTED].

Accordingly, the record does not include sufficient information from [REDACTED] or its centralized supplier services provider to ascertain the nature of the proffered job. The Petitioner designated the proffered position on the labor condition application (LCA)² under the occupational category "Software Developers, Applications" corresponding to the Standard Occupational Classification code 15-1132.³ However, without evidence of the end client's actual job posting or other evidence of the end-client's proposed work, we do not have sufficient insight into the Beneficiary's actual duties while at the end-client location. Accordingly, we cannot conclude he will perform the duties of a software developer, applications or that the proffered position is a specialty occupation.

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.

² 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).

³ The Petitioner designated the proffered position under the occupational category "Software Developer, Applications" corresponding to the Standard Occupational Classification code 15-1132, at a Level II wage (the second-lowest of the four assignable wage levels). The "Prevailing Wage Determination Policy Guidance" issued by the Department of Labor (DOL) provides a description of the wage levels. A Level II wage rate is generally appropriate for positions for which the Petitioner expects the Beneficiary to have a good understanding of the occupation but who will only perform moderately complex tasks that require limited judgment. See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/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.*

Nevertheless, for thoroughness we reviewed the Petitioner's description of duties and allocation of the Beneficiary's time to duties it initially claimed are the duties of its software developers. This description is a generic overview of an occupation and does not reflect the specific duties as they relate to a particular project. For example, when comparing the Petitioner and the mid-vendor's description of duties for the [REDACTED] project and the Petitioner's overview of the duties of a software developer occupation, it is not possible to correlate specific duties with any degree of certainty. Again, we are unable to analyze even the general parameters of the actual tasks and the Beneficiary's actual level of responsibility as those tasks relate to specific work the Beneficiary will perform for [REDACTED]. The Petitioner must support its assertions with relevant, probative, and credible evidence. See *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The Petitioner does not submit sufficient consistent, probative evidence to establish that the Beneficiary will primarily perform the duties of a specialty occupation-level software developer, applications. The Petitioner's inconsistent description of the Beneficiary's proposed duties does not convey the substantive matters that would engage the Beneficiary on a day-to-day basis on a specific project. Without a meaningful job description, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a bachelor's degree, or higher, in a specific specialty, or its equivalent.⁴

We also reviewed the opinion letter prepared by [REDACTED] M.S.E.E., Professor at [REDACTED] of Professional and Continuing Studies, submitted on appeal. [REDACTED] bases his opinion on the Petitioner's initial description of duties for its software developers. He notes that the opinion "makes the assumption that the duties for the Software Developer, as described in the support letter, will characterize the duties that the position performs at any end-client site to which the position would be assigned." However, the Petitioner and the mid-vendor provide a different description of duties for the position at the end-client's location. Thus, [REDACTED] opinion is not based on the actual duties the Beneficiary will perform for the end-client. Additionally, he identifies the Petitioner's described duties as "advanced duties" indicating that he is unaware that the Petitioner assigned a Level II wage to the proffered position, a wage-level which is appropriate for an individual with a good understanding of the occupation but who will only perform moderately complex tasks that require limited judgement, relative to others within the same occupation.

⁴ We also reviewed the description of duties listed by the Petitioner and the mid-vendor in response to the Director's RFE, even though the end-client did not specify these would be the duties the Beneficiary would perform. The Beneficiary's duties on the [REDACTED] project, however, correspond most closely with the duties of a front-end web developer, a position that the DOL's *Occupational Outlook Handbook* (*Handbook*) identifies as a subcategory of a web developer occupation. See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., "Web Developers," <https://www.bls.gov/ooh/computer-and-information-technology/web-developers.htm#tab-2> (last visited Mar. 3, 2017). According to the *Handbook*'s subchapter on "How to Become a Web Developer," the "[e]ducational requirements for web developers vary with the setting they work in and the type of work they do. *Id.* at <http://www.bls.gov/ooh/computer-and-information-technology/web-developers.htm#tab-4> (last visited Mar. 3, 2017). Requirements range from a high school diploma to a bachelor's degree and an "associate's degree in web design or related field is the most common requirement." *Id.* Thus, a front-end web develop position is not, as a category, a specialty occupation.

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Moreover, it appears that [REDACTED] has not reviewed the Petitioner's advertisement for software developers which states that the Petitioner requires one to five years of full stack Java or Javascript experience and experience with other technological languages/programs/platforms and prefers, but does not require, a bachelor's degree from a computer science program. Based on his lack of information regarding the proffered position, we question the foundation of his opinion. For these reasons, we do not find the opinion probative in establishing that a bachelor's degree in a specific specialty, or its equivalent, is required for the proffered position. 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.*

The record of proceedings does not contain sufficient information from the end-client, [REDACTED] regarding the specific job duties to be performed by the Beneficiary for that company. Thus, the Petitioner has not established 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.

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

II. 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)).

On appeal, the Petitioner lists the documents that it believes demonstrate the Beneficiary's actual employer, including: (1) the [redacted] staffing supplier agreement entered into between [redacted] and [redacted] (2) the sub-contractor agreement between [redacted] and the Petitioner; (3) copies of purchase orders between the Petitioner and [redacted] (4) a letter from [redacted] (5) the employment offer and agreement between the Petitioner and the Beneficiary; (6) the Petitioner's organizational chart; (7) a copy of the Beneficiary's performance review; (8) copies of invoices; (9) the Beneficiary's past weekly time and expense reports; (10) email correspondence between the Petitioner and [redacted] (11) the Petitioner's employee handbook; (12) the Beneficiary's insurance card; (13) a memorandum of understanding signed by the Beneficiary; and (14) the Beneficiary's [redacted] corporate security badge.

However, we do not find that the record includes any contract, agreement, statement of work, or other reliable document outlining in detail the duties the Beneficiary will perform and the manner in which his work will be supervised. First, we have reviewed the [redacted] staffing supplier agreement submitted on appeal and find that [redacted] placed significant restrictions on [redacted] ability to control the Beneficiary and the Beneficiary's right to work. For example, [redacted] states that [redacted] is not obligated to select [redacted] contract worker and that contract workers shall be subject to [redacted] continuing approval. Additionally, [redacted] agrees that it will not reassign a contract worker to a [redacted] project or facility without the prior written approval of [redacted] and [redacted] if such contract worker is currently assigned to a [redacted] project or facility. Accordingly, the Petitioner's right to assign the Beneficiary to other positions is restricted by [redacted] agreement with [redacted] also may end any assignment at any time by providing notice to [redacted]. We have reviewed the [redacted] documents in the record, however, these documents are insufficient to overcome [redacted] contractual restrictions on [redacted]

Additionally, the supplier purchase orders between [redacted] and the Petitioner do not identify to whom the Beneficiary will report at [redacted] premises. We note that in the description of the Beneficiary's responsibilities, the Beneficiary will report to a "Lead," however, this individual is not identified on the Petitioner's organizational chart. The record does not include information regarding how the Beneficiary will receive his daily instructions for work, and the reporting relationship, if any, between [redacted] and the Petitioner. We have considered the Petitioner's claim that the Beneficiary will report to the Petitioner's president and we note that the

Petitioner's president signed the Beneficiary's past performance evaluation. However, the Petitioner has not explained how and why the president of a 188-employee company would supervise the Beneficiary, and the Petitioner has not provided additional details showing where the Petitioner's president works and evidence of the nature and frequency of his interaction with Beneficiary. Notably, the Petitioner's organizational chart depicts the Beneficiary's placement on Team 1, and shows that he will report directly to [REDACTED] not the Petitioner's president. The record does not include definitive information on who will supervise and direct the Beneficiary's work while at the [REDACTED] worksite. The omission of critical details, coupled with the discrepancies above, render the submitted documents of limited evidentiary value.

We acknowledge the evidence indicating that the Petitioner will be responsible for administrative matters such as dispensing pay to the Beneficiary, compliance with immigration-related requirements, and making contributions to taxes, social security, and workers compensation insurance for the Beneficiary. However, while payment of salary, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control a 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. There is insufficient information regarding who will supervise the Beneficiary's employment, who will instruct the Beneficiary on the performance of his daily tasks, and, consequently, who exercises substantive control over the Beneficiary and the work that he is to perform. Without full disclosure of all of the relevant factors, we are unable to find that the requisite employer-employee relationship will exist between the Petitioner and the Beneficiary.

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). Accordingly, the appeal will be dismissed for this additional reason.⁵

III. CONCLUSION

The record does not establish that, more likely than not, the proffered position is a specialty occupation, and that the Petitioner will have an employer-employee relationship with the Beneficiary.

⁵ We note the Petitioner's references to several unpublished, non-precedent decisions issued by this office. However, the Petitioner has not furnished probative evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions and has not furnished evidence that the reasoning in that matter is reasoning that we currently follow. Further, while 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on all U.S. Citizenship and Immigration Services employees in the administration of the Act, unpublished decisions are not similarly binding.

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ORDER: The appeal is dismissed.

Cite as *Matter of E-S-, Inc.*, ID# 225313 (AAO Mar. 15, 2017)