



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

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

MATTER OF I-I-, INC.

DATE: MAR. 21, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an information technology solutions and services provider, seeks to continue to employ the Beneficiary as a “systems 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 Vermont Service Center denied the petition. The Director concluded that the evidence of record does not establish that the Petitioner has specialty occupation work available for the Beneficiary, and thus, the proffered position does not qualify as a specialty occupation.

In its appeal, the Petitioner submits additional evidence and asserts that the evidence of record establishes eligibility for the benefit sought. 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” 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 systems engineer. In response to the Director’s request for evidence (RFE), the Petitioner provided the following expanded job duties for the proffered position:

- **Analyze user requirements, procedures, and problems to automate processing and improve existing computer system** – The current computer system to manage multiple projects is not centralized, beneficiary will conduct a thorough analysis of the current systems procedures to identify way to automate and centralize the service desk ticket management. In this process the beneficiary shall also sit with the [REDACTED] users to get a detailed understanding on their specific needs and how system can help improve end user experience.
- **Analyze current operational procedures, identify problems, and learn specific input and output requirements** – The current operational procedures involves manual input from several business units and users. This eventually needs to be consolidated between multi-users to resolve customer questions as well as to manage the project status. The proposed system designed by the beneficiary automates the complete lifecycle of service requests and projects online thereby giving complete visibility to different users of the system. This requires the Beneficiary to create flowcharts, system design specifications and workflows.
- **Write detailed description of user needs, program functions, and steps required to develop and modify computer programs** – Based on the analysis of the user needs and requirements for the [REDACTED] the beneficiary will put together a comprehensive description document which shall

explain what users expect from the new system, what are the expected key system functionalities and the required workflow to develop the system.

- **Conduct studies pertaining to the development of new information systems to meet current and projected needs** – Beneficiary will conduct detailed study on industry standard best practices to be followed for development of the desired system for the end users. This is to ensure that the system meets the industry standards as per the initial user requirements analysis conducted by the beneficiary.
- **Read loading and running instructions for system software** – The software requires workflow steps to be followed by users to create service requests. The service requests created has to be routed through the system algorithm to be categorized and allocated to the respective business unit. The checkpoints should be monitored within the software to ensure no tickets are kept open based on set Service level agreements. The beneficiary is responsible in ensuring the algorithm and logic behind the software meets the mandatory requirements.
- **Initiate test of system program and observe readout** – The final software output is tested by the beneficiary to ensure the original read-out, algorithm and workflows are seamlessly integrated and working as per the requirements.
- **Enters code changes into computer system to correct errors** – The beneficiary enters system logs and bugs under the Team Foundation Server for any functional changes required or bugs found during the course of full lifecycle testing.
- **Analyze performance indicators to ensure that system is operating efficiently** – The beneficiary utilizes WAPT Testing tool to run cloud-based tests and tests from multiple virtual locations, load volume up to 1M concurrent virtual users, receiving detailed information on the server performance during the test, complex processing of the web site responses, automatic analysis of the test results. The test results are then shared with the development team to enhance areas of improvement based on those results.
- **Review computer system capabilities, workflow, and scheduling limitations to determine if requested changes to operating system are possible** – The beneficiary is responsible to conduct periodic system reviews including any changes to the current workflows to improve the functions. The workflow changes or enhancements needs to be entered into the Team foundation server as a change request to accommodate the requested changes in the system.

According to the Petitioner, the position requires at a “minimum a Bachelor of Science degree in Computer Science, Computer Information Systems, Electronic Engineering or a related discipline.”

### III. ANALYSIS

For the reasons set out below, we have determined that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation.<sup>1</sup>

---

<sup>1</sup> We follow the preponderance of the evidence standard as specified in *Matter of Chawathe*, 25 I&N Dec. 369, 375-76

For H-1B approval, the Petitioner must demonstrate a legitimate need for an employee exists and to substantiate that it has H-1B caliber work for the Beneficiary for the period of employment requested in the petition. It is incumbent upon the Petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent, to perform duties at a level that requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.<sup>2</sup>

In this matter, the Petitioner indicated that the Beneficiary will be employed in-house as a systems 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. Specifically, the Petitioner did not submit a job description to adequately convey the substantive work to be performed by the Beneficiary. As reflected in the description of the position as quoted above, the proffered position has been described in terms of generalized and generic functions that do not convey sufficient substantive information to establish the relative complexity, uniqueness and/or specialization of the proffered position or its duties.

For example, the Petitioner stated that the Beneficiary will “conduct detailed study on industry standard best practices to be followed for development of the desired system for the end users”; “is responsible in ensuring the algorithm and logic behind the software meets the mandatory requirements”; “is responsible to conduct periodic system reviews including any changes to the current workflows to improve the functions”; and “based on the analysis of the user needs and requirements for the [REDACTED] the beneficiary will put together a comprehensive description document which shall explain what users expect from the new system, what are the excepted key system functionalities and the required workflow to develop the system.” The record of proceedings does not contain a more detailed description explaining what particular duties the Beneficiary will perform on a day-to-day basis (e.g., what is meant by “development of desired system” or “conduct periodic system reviews”). Nor is there a detailed explanation regarding the demands, level of responsibilities, complexity, or requirements necessary for the performance of these duties (e.g., explain what specific systems and applications are involved, and what body of knowledge is required to perform the duties). The Petitioner's description is generalized and generic and does not convey the substantive nature of the work that the Beneficiary would actually perform, or any particular body of highly specialized knowledge that would have to be theoretically and practically applied to perform it.

The record of proceedings also lacks documentation regarding the Petitioner's business activities and the actual work that the Beneficiary will perform to sufficiently substantiate the claim that the Petitioner has H-1B caliber work for the Beneficiary for the period of employment requested in the

---

(AAO 2010).

<sup>2</sup> 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.

petition. The Petitioner indicated that the Beneficiary will work on the [REDACTED] project. In response to the RFE, the Petitioner submitted a document outlining a project for the [REDACTED] re-write. The Director noted in her denial that the [REDACTED] software is the proprietary software of another company. On appeal, the Petitioner explains that the same individuals own the Petitioner and the company that owns the [REDACTED] software. Although the Petitioner and the owner of [REDACTED] software may be affiliated, they are still two separate companies and the Petitioner did not submit a contract or documentation demonstrating that the Petitioner is authorized to work on this software.

In addition, upon review of the project plan for the [REDACTED] re-write, it does not indicate a need for a systems engineer and does not state how a systems engineer would assist on this project, or specifically name the Beneficiary as personnel to assist with this project. In addition, the submitted project plan is dated July 5, 2015, and does not specifically state a timeline for this project. In addition, the plan does not clearly explain how the re-write project will take three more years to complete. Thus, the Petitioner did not provide documents to substantiate its ongoing project for the requested H-1B validity period.<sup>3</sup> As observed above, we must review the actual duties the Beneficiary will be expected to perform to ascertain whether those duties require at least a baccalaureate degree in a specific specialty, or its equivalent, as required for classification as a specialty occupation. To accomplish that task in this matter, we must analyze the actual duties in conjunction with the specific project(s) to which the Beneficiary will be assigned. To allow otherwise, results in generic descriptions of duties that, while they may appear (in some instances) to comprise the duties of a specialty occupation, are not related to any actual services the Beneficiary is expected to provide. The Petitioner has not provided sufficient details regarding the nature and

---

<sup>3</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).

scope of the Beneficiary's employment or any substantive evidence regarding the actual work that the Beneficiary would perform. 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 communicate (1) the actual work that the Beneficiary would 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.

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.

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 as a specialty occupation.

#### 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 specific 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 any documentation from the owners of the [REDACTED] software to indicate that the Beneficiary is authorized to work on this software, and information of the duration of the project. 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 I-I, Inc.*, ID# 232461 (AAO Mar. 21, 2017)