



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

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

MATTER OF V- LLC

DATE: MAY. 1, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a software services and development company, seeks to temporarily employ the Beneficiary as a “DevOps 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 California Service Center denied the petition, concluding that: (1) the evidence does not establish the availability of specialty occupation work for the Beneficiary at the time the petition was filed; (2) the Petitioner did not establish the requisite employer-employee relationship with the Beneficiary; and (3) the certified Labor Condition Application (LCA) did not correspond to the petition.

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. 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 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).

#### B. Proffered Position

The Petitioner stated in its letter of support that the proffered position is a computer programmer analyst with an internal title of “DevOps Engineer.” On the LCA<sup>1</sup> submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category “Computer Systems Analysts,” corresponding to the Standard Occupational Classification code 15-1121.

In a statement submitted in response to the Director’s request for evidence (RFE), the Petitioner submitted the following list of the duties of the proffered position along with the percentage of time that would be devoted to each duty:

- Expand or modify [the Petitioner’s] products to improve performance and efficiency
  - Estimated effort – 40% of time

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<sup>1</sup> The Petitioner is required to submit a certified LCA to U.S. Citizenship and Immigration Services 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, 545-546 (AAO 2015).

- Develop, document and revise system design procedures, test procedures, and quality standards – Estimated effort – 30% of time
- Understand and document system requirements and technical solutions – Estimated effort – 10%
- Review and analyze codebase and or monitor indicators to locate code problems, and correct errors by correcting code – Estimated effort – 5% of the time
- Consult with management to ensure agreement on system principles, bug fixes and support resolutions – Estimated effort – 5% of the time
- Confer with clients regarding the nature of the information processing or computation needs a computer program is to address – Estimated effort – 5% of the time
- Configuration Management – Design, implement and maintain system specific environments. – 2% of the time
- Develop scripts, code for automation and or operations management. – 2% of the time
- Attend internal trainings to gain knowledge on best practices and latest technologies – Estimated effort – 1% of the time

The Petitioner stated that the minimum entry requirement for the proffered position is a bachelor's degree in "Computer Science, Information technology, Electrical, Math or related field."

### C. Analysis

Upon review of the record in its totality and for the reasons set out below, we determine that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation. Specifically, the record does not establish that (1) at the time of filing, the Petitioner had secured definite, non-speculative, H-1B caliber work for the Beneficiary for the entire validity period requested; and (2) the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.<sup>2</sup>

The Petitioner stated that the Beneficiary will work onsite, on in-house projects, at its office. The Petitioner initially submitted a copy of a master vendor agreement it had executed with [REDACTED] to demonstrate the availability of work for the Beneficiary. The Director, however, noted that the term of the agreement extended only through February 2016, thus expiring prior to the Beneficiary's requested start date in October 2016.

The Petitioner addressed this deficiency in response to the Director's RFE by submitting two master agreements and accompanying work statements it executed with [REDACTED] (Company K) and [REDACTED] (Company C) in August 2016 as evidence of available work for the Beneficiary. The

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<sup>2</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.

Director noted that these documents were executed subsequent to the filing of the petition, and found that they therefore could not be considered evidence of the existence of specialty occupation work at the time the petition was filed. We agree.

The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). The Petitioner has not established that it had definite, non-speculative work for the Beneficiary at the time of filing.

However, even if we were to consider the master agreements from Company K and Company C, we would still find them insufficient to establish availability of work for the Beneficiary. Both master agreements indicate that they will "engage [the Petitioner] from time to time pursuant to one or more Work Statements . . . ." Upon review, we note that the work statement accompanying Company K's master agreement does not comply with the provisions of Section 2.3 of the master agreement, which governs the issuance of work statements. Specifically, this section states that each work statement must provide "a description of the services to be performed and any Deliverables to be delivered to the Client." In addition, it requires that each work statement set forth the terms of compensation as well as the time schedule for performance, delivery, and acceptance of Deliverables. The work statement appended to Company K's master agreement, however, only outlines the applicable managed services to be provided and provides an applicable billing scale. It does not, therefore, comply with the specific requirements for work orders set out in Section 2.3 of the master agreement. Moreover, we note that the billing percentages and scale are estimated only through 2018, thereby contradicting the contention that the Petitioner has secured specialty occupation work for the Beneficiary through September 2019.

The work statement appended to Company C's master agreement would likewise be deficient. As the provisions in both master agreements and work statements are virtually identical, we note that this work order likewise contains only an outline of the applicable managed services to be provided and an applicable billing scale. The billing percentages in that work order also extend only through 2018, thus further negating the claim that the Petitioner had secured specialty occupation work for the Beneficiary for the entire requested validity period.

A petition must be filed for non-speculative work for the Beneficiary, for the entire period requested, that existed as of the time of the petition's filing.<sup>3</sup>

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<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 individual 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

The Petitioner also has not demonstrated that the proffered position qualifies as a specialty occupation, because the evidence of record does not establish the substantive nature of the proffered position and its constituent duties. The Petitioner claims that the Beneficiary will “review, analyze, code, deploy and test computer programs and systems per business needs and customer requirements.” Specifically, the Beneficiary will “expand or modify [redacted] products to improve performance and efficiency” (40%), “develop, document and revise system design procedures, test procedures, and quality standards” (30%), and “confer with clients regarding the nature of the information processing or computational needs a computer program is to address” (5%). However, as discussed, the record of proceedings lacks sufficient information from the Petitioner’s clients to establish that specialty occupation work existed for the Beneficiary at the time the petition was filed.

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. See *Defensor*, 201 F.3d at 387-388. 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.* at 384. 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.

Without documentary evidence of projects that cover the duration of the period of employment requested, we are not able to ascertain what the Beneficiary would do, where the Beneficiary would work, as well as how this would impact circumstances of his relationship with the Petitioner. 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.<sup>4</sup> To accomplish that task in this matter, we must analyze the

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expectation of potential new customers or contracts. To determine whether an individual 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 individual 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 individual 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).

<sup>4</sup> We acknowledge the Petitioner’s repeated assertions that the proffered position requires at least a degree in “Computer Science, Information technology, Electrical, Math or related field.” While a petitioner may believe or otherwise assert that a proffered position requires a degree in a specific specialty, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were we limited solely to reviewing a petitioner’s claimed self-imposed requirements, then any individual with a bachelor’s degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. See *Defensor*,

actual duties in conjunction with the specific project(s) to which the Beneficiary will be assigned. To allow otherwise would result 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. We find that the Petitioner's letters describing the duties and requirements of the proffered position are entitled to little probative weight. These documents do not describe in detail the specific duties, demands, level of responsibilities and requirements necessary for the proffered position. Instead, they provide vague job descriptions that do not convey the specific tasks to be performed, the complexity of such tasks, and the substantive application of knowledge involved.

The Petitioner has not provided sufficient details regarding the nature and 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, or specialization of the tasks, 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 therefore has not demonstrated the substantive nature of the duties the Beneficiary would perform.

That the Petitioner did not establish the substantive nature of the work to be performed by the Beneficiary precludes a finding that the proffered position is a specialty occupation under 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.<sup>5</sup>

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201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. See section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

<sup>5</sup> Because the Petitioner has not demonstrated the nature of the duties the Beneficiary would perform, it has not demonstrated that the Beneficiary would work as a computer systems analyst, as claimed. Therefore, we will not further address evidence submitted to show that computer systems analyst positions qualify as specialty occupation positions. However, we note that even if the proffered position were established as being that of a computer systems analyst, a review of the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)* does not indicate that, simply by virtue of its occupational classification, such a position qualifies as a specialty occupation. Specifically, the *Handbook* does not state a normal minimum requirement of a U.S. bachelor's or higher degree in a specific specialty, or its equivalent, for entry into the occupation of computer systems analyst. See Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook*, Computer Systems Analysts (2016-17 ed.). As such, absent evidence that the position of computer systems analyst satisfies one of the alternative criteria available under 8 C.F.R.

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

## II. EMPLOYER-EMPLOYEE RELATIONSHIP

Next, we will briefly address the issue of whether the Petitioner has demonstrated that it qualifies as a United States employer.

We find that the Petitioner has not established whether it has made a bona fide offer of employment to the Beneficiary based on the evidence of record or that the Petitioner will have and maintain the requisite employer-employee relationship with the Beneficiary for the duration of the requested employment period. *See* 8 C.F.R. § 214.2(h)(4)(ii) (defining the term “United States employer” and requiring the Petitioner to engage the Beneficiary to work such that it will have and maintain an employer-employee relationship with respect to the sponsored H-1B nonimmigrant worker).

In the instant case, the record indicates that the Beneficiary will be providing cloud management services in accordance with the needs and requirements of the Petitioner’s clients. However, absent documentation demonstrating the existence of client projects and the nature of the Beneficiary’s duties in accordance with the client’s requirements on such projects, we cannot conclude that the requisite employer-employee relationship would exist between the Petitioner and the Beneficiary, as the extent of client control and supervision of the Beneficiary cannot be determined absent such evidence. The evidence, is insufficient to establish that the Petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Therefore, the H-1B petition must be denied for this additional reason.

## III. LCA

The Director also found that the Petitioner did not submit an LCA that corresponds to and supports the H-1B petition. However, because the Petitioner has not established that (1) it has secured definite, non-speculative work for the Beneficiary for the entire validity period requested; and (2) that it will engage the Beneficiary in an employer-employee relationship, we are unable to conclude that the LCA corresponds to and supports the H-1B petition.

## IV. CONCLUSION

The Petitioner has not established eligibility for the immigration benefit sought.

**ORDER:** The appeal is dismissed.

Cite as *Matter of V- LLC*, ID# 326147 (AAO May. 1, 2017)

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§ 214.2(h)(4)(iii)(A), this petition could not be approved for this additional reason.