



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

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

MATTER OF S-I-T- INC.

DATE: OCT. 27, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a software development company, seeks to temporarily employ the Beneficiary as a “programmer analyst” under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director of the Vermont Service Center denied the petition, concluding that the Petitioner has not demonstrated the availability of specialty occupation work for the Beneficiary.

On appeal, the Petitioner submits additional evidence and asserts that the Director’s decision was erroneous.

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

I. LEGAL FRAMEWORK

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term “specialty occupation” as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) largely restates this statutory definition, but adds a non-exhaustive list of fields of endeavor. In addition, the regulations provide that the proffered position must meet one of the following criteria to qualify as a specialty occupation:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. § 214.2(h)(4)(iii)(A). We have consistently interpreted the term “degree” 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 requested to employ the Beneficiary in-house as a programmer analyst for an approximate three-year period beginning in October 2016 and ending in July 2019. In its letter of support, the Petitioner explained that it seeks the Beneficiary’s services “in order to design and develop and implement various modules of [its] in house project, [REDACTED] application,” which it described as “a new product design” geared towards small and mid-size financial companies. The Petitioner provided the following job description:

[The Beneficiary] is responsible for designing and developing and customizing the relational database management systems as backend database of applications utilizing Oracle 10G with PL/SQ, SQL, XML, XSD, WSDL, Java, Oracle Developer, JDeveloper, SQL Developer; design and develop GUI utilizing SQL Developer; data modeling using ERWIN, logical and physical design of databases and partitioning the database tables utilizing Range, Hash, and Composite Methods; coding of Triggers and stored procedures using PL/SQ, loading database utilizing SQL* Plus; monitor databases using SQL Lab, I/WATCH, Space Manager; responsible for backup and recovery of systems; designing and implementing the Hot and Cold backups for the Oracle Instances; writing Shell and Perl Scripts; design and develop applications to generate customized reports; performance tuning of databases and applications by optimizing the code; design and develop applications to generate customized reports utilizing Oracle Reports;

[The Beneficiary] is responsible to analyze, review, and alter programs from time to time to optimize the performance of the applications; formulate plan-outlining steps required to develop the applications; prepare flowcharts and diagram to illustrate sequence of steps program must follow and to describe logical operations involved utilizing MS Visio & MS Project;

[The Beneficiary] is also responsible to direct and participate in various aspects of life cycle of a system, SDLC including analysis, design, programming, testing, maintenance, and support utilizing Waterfall methodologies; and establish system requirements, client operating systems, software, network operating systems, system security, back-up schedules and recovery plans.

[The Beneficiary], further, is responsible to test the developed applications for software quality assurance utilizing various manual and automated tools on different operating systems, utilizing testing tools, Junit, Ant; implement version controls for the developed applications and modifications utilizing SVN, CSV; and develop user manual to describe steps to be followed for installation and system requirements, trouble-shooting techniques.

In response to the Director's request for evidence (RFE), the Petitioner explained that, since February 2016, it has "received a lot of kudos and encouraging feedback, and palpable interest in [its] product [REDACTED]". The Petitioner stated that it is "expecting to [launch the] first phase of the product by the end of June 2017 and [it] expect[s] to sign contract with [its] prospective clients by the beginning of July 2017 and continued thereafter." The Petitioner further stated that it "can't assure the success of this application unless we perform quality assurance of this application," and therefore, "now require[s] the beneficiary to perform the quality assurance of this application."

According to the Petitioner, the position requires a bachelor's degree in computers, or its equivalent.

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. Specifically, the record does not sufficiently describe the proffered position such that we can determine that the associated job duties require an educational background, or its equivalent, commensurate with a specialty occupation.¹

Here, the Petitioner claims that the Beneficiary will exclusively work on its in-house project, [REDACTED]. However, we find the record insufficient to demonstrate the viability of [REDACTED] as a bona fide internal project. For instance, the submitted [REDACTED]

¹ 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.

_____ gives only broad, high-level information about the project. According to this document, the Petitioner began development on _____ several years ago. The first project phase was expected to be “available in product” in March 2014. The second and third project phases were expected to be “available in product” in December and November 2015, respectively. The fourth and final project phase, culminating in _____ was expected to begin in October 2016. Despite these dates, the Petitioner has not submitted sufficient evidence demonstrating substantial progress or the actual completion of prior project phases and prior editions of _____ (e.g., _____ and _____).

The project overview contains information that appears inconsistent with the Petitioner’s other statements. According to this document, and as indicated above, the first three versions of _____ were completed in 2015, and version 3.0 is expected to be available in October 2018. However, in response to the Director’s RFE, the Petitioner stated that it is “expecting to [launch the] first phase of the product by the end of June 2017 and [it] expect[s] to sign contract with [its] prospective clients by the beginning of July 2017.” The Petitioner has not explained what it meant by the expected launch of the “first phase” of the product in June 2017, or how it could sign contracts with prospective clients in July 2017 when the final _____ which started in October 2016, is not scheduled to be complete until October 2018.

Furthermore, the project overview indicates that the Petitioner budgeted total implementation costs (including “project team” costs) of approximately \$164,000, \$178,000, and \$157,000, for 2014, 2015, and 2016, respectively. In comparison, the Petitioner claimed no or minimal internal software development costs on those years’ tax returns. More specifically, on its 2014 tax return, the Petitioner claimed zero “cost of goods sold.” On its 2015 tax return, the Petitioner claimed only \$53,640 in “cost of goods sold,” and specifically identified those costs as “inhouse = software development labor cost.” On its 2016 tax return, the Petitioner claimed approximately \$103,000 in “cost of goods sold,” which still falls short of the \$157,000 budgeted for that year. Based on the Petitioner’s cost of in-house software development services as reported on its tax returns,² it appears that the Petitioner did not perform substantial in-house development work on its _____ product in accordance with the information provided in the product overview.

² We do not assert that the *only* method of determining a petitioner’s in-house software development costs is through its declared “cost of goods sold” income on its tax return. Nevertheless, the “cost of goods sold” income can still be a relevant source of information, especially where a petitioner has previously declared “cost of goods sold” income or does not otherwise document its claimed software development costs.

On appeal, the Petitioner states that it “did not classify the cost of the goods sold as separate item until the beginning of the year 2016 . . . [based on] the advice of the Certified Public Accountant,” but does not further explain the reason behind this change. We note that the Petitioner’s tax returns from 2014-2016 were prepared by the same paid preparer. Moreover, the Petitioner’s explanation on appeal is contradicted by its 2015 tax return, in which it specifically identified the \$53,640 in “cost of goods sold” as “inhouse = software development labor cost.” Accordingly, the Petitioner’s explanation on appeal is insufficient to overcome the Director’s concerns about the lack of evidence of the Petitioner’s in-house software development activities.

As mentioned above, the Petitioner asserted that it is “currently in the process of negotiations with some of [its] clients.” The Petitioner specifically named three companies as “prospective clients.” However, the Petitioner did not submit documentation from any of these prospective clients or other companies to which the Petitioner has marketed its product. Instead, the Petitioner simply submitted a blank sample product license agreement. Without more, we find the record insufficient to corroborate the Petitioner’s statements about the claimed “negotiations” and “palpable interest in [its] product [REDACTED]” and more generally, about the availability of in-house development work on this particular project.

Even if we were to assume that [REDACTED] is a viable internal project as claimed, the Petitioner has not adequately documented the nature of the work the Beneficiary will perform on this project. The submitted project overview does not mention the Beneficiary specifically. While the project overview lists the “project team” as consisting of a project manager, project leader, systems analysts/budget analysts, programmers, systems testers, and additional team resources, it does not list any team member with the specific job title of “programmer analyst.” Nor does the project overview provide additional information about these team members, such as the number of total members, their names, or job duties. Based on the project’s budget (including the hourly and yearly pay rates for team members), it appears that there has not been, and will not be, any full-time team members. These aspects of the record further lead us to question whether the Petitioner can, and will, assign the Beneficiary to the [REDACTED] project on a full-time basis for the entire three-year validity period.

Finally, the Petitioner indicated that its [REDACTED] product will launch in June 2017 (according to the RFE response) or October 2018 (according to the project overview). However, the Petitioner requested to employ the Beneficiary until July 2019. The Petitioner has not explained what the Beneficiary’s duties and responsibilities for the [REDACTED] project will be after the product has been developed and launched.

In sum, the Petitioner has not adequately explained and documented what the Beneficiary will do for the entire validity period requested. We therefore find that the Petitioner has not demonstrated the availability of work for the Beneficiary, or the substantive nature of the work that he will perform.

As the Petitioner has not established the substantive nature of the proffered position, we are precluded from finding that the proffered position satisfies any of the 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, the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation.

IV. CONCLUSION

The Petitioner has not demonstrated the availability of specialty occupation work for the entire requested H-1B validity period for the Beneficiary.

ORDER: The appeal is dismissed.

Cite as *Matter of S-I-T- Inc.*, ID# 698505 (AAO Oct. 27, 2017)