



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

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

MATTER OF T- LLC

DATE: SEPT. 29, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a software consulting company, seeks to temporarily employ the Beneficiary as a “computer systems 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 did not establish that the proffered position qualifies as a specialty occupation.

On appeal, the Petitioner asserts that the Director’s decision was in error.

Upon *de novo* review, we will dismiss the appeal.¹

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.

¹ We follow the preponderance of the evidence standard as specified in *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).

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. Analysis

For the reasons discussed below, the Petitioner has not established the substantive nature of the work to be performed by the Beneficiary and therefore, has not established that the proffered position qualifies as a specialty occupation.²

The Petitioner indicates that it will assign the Beneficiary to work at a third party location. The court in *Defensor*, 201 F.3d at 387-88, held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring a petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of *the requirements imposed by the entities using a beneficiary’s services*. In other words, as the beneficiaries in that case would provide services to the end-client hospitals, and not to the petitioning staffing company, the job duties and alleged requirements to perform those duties provided by the petitioning company were insufficient for a specialty occupation determination. *See id.* Therefore, in order for us to determine whether the proffered position qualifies as a specialty occupation, the end-client must provide sufficiently detailed information regarding the proposed job duties and the minimum educational requirements necessary to perform those duties.

² While we may not discuss every document submitted, we have reviewed and considered each one.

According to the end-client, the Beneficiary will be “responsible for the following specific project objectives” (note: errors in original have not been changed):

- Provide hardware installation and support including but not limited to IBM Power Systems, Intel Based Dell, Sun & HP Servers, F5 Load balancer, IBM DS5300 SAN, Dell Equologic SAN, Fiber Channel and iScsi Switches.
- Provide Software installation and support including but not limited to Cups based enterprise printing, Appworx enterprise scheduler, Weblogic 12c for ADF based systems, and JD Edwards 9.1 ERP system.
- Install, manage and support VMware 5.5 and Oracle VM 3 based virtualization infrastructure, Windows server 2008 and 2012 R2, Oracle linux 5 and 6, and AIX based unix legacy systems.

The letter does not, however, provide any additional project details.

As evident from the job description above, the end-client described the duties of the proffered position in relatively general terms. The job description lacks sufficient detail to establish the substantive nature of the work within the context of any project(s) the Beneficiary will work on, the end-client’s business operations, and the associated applications of specialized knowledge that their actual performance would require. While a generalized description may be appropriate when defining the range of duties that are performed within an occupation, such generic descriptions generally cannot be relied upon when discussing the duties attached to specific employment for H-1B approval. In establishing such a position as a specialty occupation, the description of the proffered position must include sufficient details to substantiate that the end-client has H-1B caliber work for the Beneficiary for the entire requested validity period. Without a meaningful job description, the record lacks sufficiently informative evidence to demonstrate that the proffered position requires a specialty occupation’s level of knowledge in a specific specialty. The tasks as described provide only a general overview of the actual work that the Beneficiary will perform, but do not establish the complexity, uniqueness, and/or specialization of the tasks, or the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty.

According to the above end-client letter, not only does the proffered position require “extensive computer systems analysis and development experience,” but the Beneficiary will also “manage . . . the virtualization infrastructure . . . and the AIX based unix legacy systems.” The Petitioner expanded upon these project-management job duties, stating that the Beneficiary will perform such duties as “identifying project milestones, phases, and elements,” “forming project team,” and “establishing project budget.” Likewise, the Petitioner submitted an opinion letter by [REDACTED] which characterizes these job duties as “high-level project and personnel management duties . . . characteristic of a more senior-level position.” The problem with these

claimed high-level, project management and personnel management duties is that they are inconsistent with the certified labor condition application (LCA).³

Here, the Petitioner classified the proffered position under the “Computer Systems Analysts” occupational category at a Level I wage (the lowest of four assignable wage levels) on the certified LCA. The “Prevailing Wage Determination Policy Guidance” issued by the Department of Labor (DOL) provides a description of the wage levels. A Level I wage rate is generally appropriate for entry-level positions for which the Petitioner expects the Beneficiary to have a basic understanding of the occupation, and indicates: (1) that the Beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; (2) that he will be closely supervised and his work closely monitored and reviewed for accuracy; and (3) that he will receive specific instructions on required tasks and expected results.⁴ Again, the claimed high-level project management duties are not consistent with a Level I “Computer Systems Analysts” position pursuant to the certified LCA.⁵ This significant inconsistency further prevents us from understanding the substantive nature of the proffered position.⁶

In light of the above, the Petitioner has not established the substantive nature of the work to be performed by the Beneficiary. This 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.

³ The Petitioner is required to submit a certified labor condition application (LCA) in order 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).

⁴ 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.*

⁵ Either the proffered position is not as described, or the LCA does not support and correspond with the H-1B petition, which would constitute an independent ground for denying the petition. While the DOL is the agency that certifies LCA applications before they are submitted to U.S. Citizenship and Immigration Services (USCIS), DOL regulations note that the Department of Homeland Security (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular H-1B petition actually supports that petition. *See* 20 C.F.R. § 655.705(b).

⁶ Based on this inconsistency, we also find that [REDACTED] opinion letter lends little probative value to the matter here, and does not demonstrate the proffered position’s qualification as a specialty occupation. *Matter of Caron Int’l*, 19 I&N Dec. 791, 795 (Comm’r 1988) (“The service is not required to accept or may give less weight to an advisory opinion when it is “not in accord with other information or is in any way questionable.”).

Finally, as previously mentioned here, and as discussed in the Director's decision, the record does not contain sufficient information regarding the specific project the Beneficiary is assigned to. While we acknowledge that Exhibit A of the "Consulting Services Agreement" (CSA) lists the Beneficiary by name, his rate of pay, and indicates his "Start Date" as "02/08/2016 to Indefinite," the CSA does not provide any additional information regarding the client project, or the Beneficiary's duties. We note the Petitioner's statement that the Beneficiary "is not working on any specific project which can be put into a project report or a purchase agreement." Moreover, the Petitioner's employment agreement with the Beneficiary contains vague, non-committal language about the Beneficiary's "duties," such as that "[the Petitioner] agrees to hire [the Beneficiary] as a Computer Systems Analyst [sic] or in such other capacity as Employer shall, in its sole discretion, hereafter assign to the Employee" (emphasis added). Accordingly, the record does not contain sufficient documentation demonstrating that there is definite, non-speculative specialty occupation work available to the Beneficiary for the entire period requested. The agency made clear long ago that speculative employment is not permitted in the H-1B program. *See, e.g.*, 63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998).

In light of the above, we cannot find that the proffered position qualifies for classification as a specialty occupation.

II. EMPLOYER-EMPLOYEE RELATIONSHIP

Although we need not fully address other issues evident in the record, we wish to identify an additional issue which the Petitioner should address in any future proceedings.

The Petitioner must establish that it will be a "United States employer" having "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." 8 C.F.R. § 214.2(h)(4)(ii). 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.

In this case, the Petitioner asserts that the Beneficiary is supervised by [REDACTED] the Petitioner’s chief executive officer, who will also supervise seven additional employees at various client sites. Such supervision will involve “regular contact (via email, telephone, and/or videoconferencing) . . . to provide periodic status updates to allow [the Petitioner] to review and evaluate his performance on an ongoing basis.” According to the “Performance Review Process,” the Beneficiary will submit timesheets to allow the Petitioner “to know about the regularity of the employee and the number of hours the employee worked in that particular period.” It further states that the Beneficiary will also submit “status reports periodically” to allow the Petitioner to determine whether or not the “job duets [*sic*] performed by the employee are within the accepted job duties.” On appeal, the Petitioner indicates that the Beneficiary, who is already working at the end-client in the proffered position, “is not working on any specific project,” but rather he is part of the “internal IT department” and “reports to [the] IT Support Manager at the Head Office who is responsible for developing, managing and supporting Cloud based, co-lo and on premise IT infrastructure for [the] entire company.” It, therefore, appears that the day-to-day work of the Beneficiary may actually be supervised and overseen by the end-client.

The Beneficiary does not work at the Petitioner’s location. Moreover, the day-to-day work of the Beneficiary appears to be supervised and overseen by the end-client, with the Petitioner’s role likely limited to invoicing and proper payment for the hours worked by the Beneficiary and providing similar benefits. With the Petitioner’s role limited to essentially the functions of a payroll administrator, the Beneficiary is even paid, in the end, by the client or end client. See *Defensor*, 201 F.3d at 388.

Merely claiming that the Petitioner exercises complete control over the Beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. The Petitioner must support its assertions with relevant, probative, and credible evidence. See *Chawathe*, 25 I&N Dec. at 376. In this case, the Petitioner has not sufficiently explained or documented how it supervises and otherwise controls the Beneficiary’s day-to-day activities at the end-client location.

III. CONCLUSION

The Petitioner has not established that the proffered position qualifies as a specialty occupation.

ORDER: The appeal is dismissed.

Cite as *Matter of T- LLC*, ID# 620904 (AAO Sept. 29, 2017)