



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

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

MATTER OF S-I-, INC.

DATE: DEC. 1, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a software development and solutions firm, seeks to temporarily employ the Beneficiary as an “SAP Functional Analyst” under the H-1B nonimmigrant classification. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Director, Vermont Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

I. ISSUE

The issue before us is whether the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.¹

II. 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) states, in pertinent part, the following:

¹ We conduct appellate review on a *de novo* basis. *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015); *see also* 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989).

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must meet one of the following criteria:

- (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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Fed. Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or

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higher degree, but one in a specific specialty that is directly related to the proffered 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”). Applying this standard, USCIS regularly approves H-1B petitions for qualified individuals who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. USCIS must examine the ultimate employment of the individual, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position or an employer’s self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

III. PROCEDURAL AND FACTUAL BACKGROUND

The visa petition states that the period of intended employment is from May 7, 2014, to September 9, 2016, and that it seeks to amend a previously approved H-1B visa petition. The Petitioner claims in the Labor Condition Application submitted to support the visa petition that the proffered position corresponds to Standard Occupational Classification (SOC) code and title 15-1121, Computer Systems Analysts, from the Occupational Information Network (O*NET) at a Level I (entry) wage.

In a letter dated May 5, 2014, the Petitioner stated that the Beneficiary would work on a “Mobile Solutions project” for its client, [REDACTED]. That letter does not list the duties that the Beneficiary will perform or state any educational requirement for those duties.

In a letter dated March 20, 2014, a representative of [REDACTED] stated that [REDACTED] has entered into a long-term agreement with the Petitioner and that the Beneficiary would be assigned to provide “mobile product development, testing, maintenance and installation services.” That letter does not otherwise describe the duties the Beneficiary would perform if the visa petition were approved.

The Petitioner provided a Vendor Master Services Agreement (MSA), dated September 26, 2011, showing general terms pursuant to which [REDACTED] might utilize the services of the Petitioner’s workers. That document indicates that the Petitioner and [REDACTED] have the same address.

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The Petitioner submitted a letter, dated September 3, 2013, from the president of [REDACTED] stating that [REDACTED] has entered into a long-term agreement with [REDACTED] “to jointly market our combined mobile software development services capabilities.” The Petitioner also submitted a Statement of Work executed by [REDACTED]

In an RFE issued June 23, 2014, the Director questioned the legitimacy of the claim of work to be performed for [REDACTED] and asked for additional evidence in support of that claim. In a letter dated September 16, 2014, the Petitioner stated that it and [REDACTED] share an address but that they are two separate legal entities with common ownership. That letter does not provide any additional detail pertinent to the work the Beneficiary would perform or the educational requirements of that work.

In the decision of denial, the Director found that the evidence submitted is insufficient to show that the Petitioner has specialty occupation work available at which it could employ the Beneficiary throughout the period of requested employment.

On appeal, the Petitioner provided checks showing that [REDACTED] and [REDACTED] paid [REDACTED] for services provided. It also provided checks showing that [REDACTED] paid the Petitioner \$19,120 on June 24, 2014, and \$20,240 on September 15, 2014. The Petitioner further provided invoices showing that the Petitioner charged [REDACTED] for work performed by [REDACTED] and [REDACTED]

In its appeal brief the Petitioner contends that the evidence shows that the Petitioner would have sufficient specialty occupation work at which to employ the Beneficiary throughout the period of intended employment.

B. Analysis

Initially, we observe that the Petitioner has never asserted that the duties of the proffered position require a minimum of a bachelor’s degree in a specific specialty or its equivalent, or, if they do, identified the specific specialty in which the position would require a degree.

Further, the Petitioner has not described the duties of the proffered position with sufficient detail to allow us to determine precisely what the Beneficiary would do in the proffered position and whether those duties would require a specialized degree. Mobile product development, testing, maintenance, and installation are so abstractly described that they may or may not require a specific bachelor’s degree. Mobile product development, of instance, may be a specialized duty, requiring a minimum of a bachelor’s degree in some specific specialty or its equivalent, or it may be a duty of a very low-level programmer position, which positions do not, as a category, require a specialized bachelor’s or higher degree.²

² *C.f.* U.S. Dep’t of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., “Computer Programmer,” <http://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4> (last

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Testing, maintenance, and installation services are similarly vague and may not be duties that require a specialized bachelor's or higher degree. That the Beneficiary would provide "mobile product development, testing, maintenance and installation services" is insufficient to establish that the proffered position qualifies as a specialty occupation position, because that description lacks the detail necessary to establish the substantive nature of the work to be performed and the educational requirements of that work.

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 and the petition denied for this reason.

As a final matter, we recognize that the instant petition was filed to amend a previously approved petition; however, we are not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988). The Petitioner claims here that the Beneficiary will now work on a project for [REDACTED] but the terms and conditions of the prior approval "remain unchanged." The record of proceeding, however, does not contain sufficient evidence of the terms and conditions of the prior approval. "[G]oing on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings." *In re Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Further, if the previous petition was approved based on the same vague assertions that are contained in the current record, they would constitute material and gross error on the part of the Director. It would be "absurd to suggest that [USCIS] or any agency must treat acknowledged errors as binding precedent." *Sussex Eng'g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987). A prior approval does not compel the approval of a subsequent petition or relieve the Petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. *Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act*, 55 Fed. Reg.

visited Nov. 24, 2015) (stating that a low-level computer programmer job may not require any bachelor's degree at all).

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2,606, 2,612 (Jan. 26, 1990) (to be codified at 8 C.F.R. pt. 214). A prior approval also does not preclude USCIS from denying an extension or amendment of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Tex. A&M Univ. v. Upchurch*, 99 F. App'x 556 (5th Cir. 2004). Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, we would not be bound to follow the contradictory decision of a service center. *See La. Philharmonic Orchestra v. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 1999).

IV. CONCLUSION

In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013) (citing *Matter of Brantigan*, 11 I&N Dec. 493, 495 (BIA 1966)). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of S-I, Inc.*, ID# 14521 (AAO Dec: 1, 2015)