



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

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

MATTER OF M-, INC.

DATE: NOV. 16, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a software developer, seeks to employ the Beneficiary as a software application developer 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). We follow the preponderance of the evidence standard as specified in *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).

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 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. Federal 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 387. 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 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 foreign nationals 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 foreign national, 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 nor 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.

B. The Proffered Position

In its support letter, the Petitioner provided the following information regarding the duties of the proffered position (verbatim):

Specifically, the position requires that the incumbent: work the entire Software development life cycle. Work with a team of developers to create a system user interface using html5 spec, J Query mobile, JQuery, C sharp, Dev Express, i.e. whatever cutting edge technology is out there, and the middleware with efficiently communicates with the database. Build and create think client based interfaces to incorporate business logics for specialized software application relating to cash management and cash movement for the ATM, bank and transport industries. These interfaces communicate with other systems and integrate with our primary software application system. Carry out technical and business testing and create technical documentation to roll it out. Keep central l repository of software codes to share with others. Create database views, stored procedures and tables to communicate with the think client and to pass data back and forth using SQL server dbms.

The Petitioner also stated that it requires a minimum of a “Bachelor’s Degree (or its equivalent) in Computer Science, or Computer Engineering, or Computer Information Systems.”

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The Director found the duties as stated by the Petitioner vague and requested a more detailed description of the duties. In response to the Director's RFE, the Petitioner submitted a document entitled "Position Description,"² which listed the following duties (verbatim):

Duties and Responsibilities:

- a) Analysis b) design c) development d) testing e) implementation activities f) debugging and other technical issues
- Ensure corporate and IT processes are supported at all times
- Maintain expertise in the core business and integration points to the business systems
- Assist with the management of defects, issues, design changes, reporting and resolution of vendor defects
- Participate in code reviews
- Demonstrate a commitment to [REDACTED] core values of safety , integrity, process improvement, and customer satisfaction
- Create, design and architect database based upon business and user requirements
- Perform both logical and physical modeling of database objects for optimal performance
- Design persistent data storage to be used by the system
- Assist with implementation of [REDACTED] software at customer location:
 - Travel to assigned customers as needed
- Customer relationship management: Assist customers on how to better use [REDACTED] software. In the process come up with new development ideas to communicate to the Development team
- Develop queries to provide user view of data
- Development of functional and technical requirement documentation
- Development of functional and technical design documentation
- Develop testing scenarios and required testing environment of procedures
- Translate end-user requirements and specifications into efficient executable programs
- Analyze customer's business process flow and needs; assist with creating a better process
- Assist with project management of new implementations, as well as other internal projects
- Work with other members of the development team to continue positive evolution of [REDACTED] software
- Take direction from upper management, keeping management personnel advised on pertinent items or details

² This document indicates a requisition date of April 2006.

- Develop project plans and timelines when requested to meet critical deliver dates Accountable for meeting delivery dates on assigned projects and tasks
- Work in a fast paced, sometimes stressful, time critical environment, prioritizing workflow and meeting deadlines as directed
- Communicate effectively and courteously during daily interaction with customers and coworkers, offering exemplary customer service and handling situations promptly
- Must work as a team player, presenting a polished, professional image
- Maintain a clean, safe workplace

In this document, the Petitioner indicated a “Bachelor’s degree in Computer Information Systems or equivalent related experience and 1-2 years [of] experience in Software development” as one of the qualifications for the position. Other qualification requirements involved experience with various computer programming and software.

The Labor Condition Application (LCA) submitted by the Petitioner in support of the petition was certified for use with a job prospect within the “Software Developers, Application” occupational classification, SOC (O*NET/OES) Code 15-1132, and a Level I (entry-level) prevailing wage rate, the lowest of the four assignable wage-levels.

C. Analysis

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.

In this matter, the Petitioner indicated that the Beneficiary will be employed in-house as a “Software Application Developer.” However, upon review of the record of proceeding, 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.

Considering the totality of all of the Petitioner’s duty descriptions, we find that the evidence of record does not establish the depth, complexity, or level of specialization, or substantive aspects of the matters upon which the Petitioner claims that the Beneficiary will engage. Rather, the duties of the proffered position, and the position itself, are described in relatively generalized and abstract terms that do not relate substantial details about either the position or its constituent duties. For example, the Petitioner states that the Beneficiary will “[e]nsure corporate and IT processes are supported at all

times” without providing details regarding the Beneficiary’s specific duties. Nor does the Petitioner provide details as to the tasks involved in “[p]articipat[ing] in code reviews.” The abstract nature of the proposed duties is further illustrated by the Petitioner’s statement that the Beneficiary will “[a]ssist with implementation” of software at customer locations. The Petitioner, however, does not explain the Beneficiary’s actual tasks in the implementation process. Similarly, the Petitioner states that the Beneficiary will “[m]aintain a clean, safe workplace,” but provides no details as to how the Beneficiary would accomplish such duty. Furthermore, the Petitioner states that the Beneficiary will “[t]ake direction from upper management,” but provides no insight into the type of duties such management direction may involve. The Petitioner repeatedly uses words and phrases such as “ensure,” “develop,” “assist,” “work with,” and “maintain,” which do not provide insight into the actual tasks the Beneficiary would perform on a day-to-day basis.

Such generalized information does not in itself establish a correlation between any dimension of the proffered position and a need for a particular level of education, or educational equivalency, in a body of highly specialized knowledge in a specific specialty. Therefore, it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. Thus, as so generally described, we find that the descriptions do not illuminate the substantive application of knowledge involved or any particular educational attainment associated with such application. The duties as described give very little insight to actual tasks that the Beneficiary would perform on a day-to-day basis. Furthermore, we find that the Petitioner has not supplemented the job and duty descriptions with documentary evidence establishing the substantive nature of the work that the Beneficiary would perform, whatever practical and theoretical applications of highly specialized knowledge in a specific specialty would be required to perform such substantive work, and whatever correlation may exist between such work and associated performance-required knowledge and attainment of a particular level of education, or educational equivalency, in a specific specialty.

In this case, the Petitioner has not described the proffered position with sufficient detail to determine that the minimum requirements are a bachelor’s degree in a specialized field of study. It is incumbent on the Petitioner to provide sufficient evidence to establish that the particular position that it proffers would necessitate services at a level requiring both the theoretical and practical application of a body of highly specialized knowledge and the attainment of at least a bachelor’s degree in a specific specialty, or its equivalent. When “any person makes an application for a visa or any other document required for entry, or makes an application for admission, [. . .] the burden of proof shall be upon such person to establish that he is eligible” for such benefit. Section 291 of the Act; *see also Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972).

Moreover, the Petitioner did not provide any information with regard to the order of importance and/or frequency of occurrence with which the Beneficiary will perform these functions and tasks. Thus, the Petitioner did not specify which tasks were major functions of the proffered position, and it did not establish the frequency with which each of the duties would be performed

(e.g., regularly, periodically or at irregular intervals). As a result, the Petitioner did not establish the primary and essential functions of the proffered position.

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's assertion with regard to the educational requirement for the position is conclusory and unpersuasive, as it is not supported by the job description or probative evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Further, we note that there are inconsistencies in the record of proceeding that undermine that Petitioner's credibility with regard to the services the Beneficiary will perform, as well as the actual nature and requirements of the proffered position. For example, in response to the RFE, the Petitioner indicated that the proffered position "will be a one person development shop." However, the Petitioner also stated that the position "requires technical leadership skills as well as the ability to lead other developers on projects." The Petitioner did not submit an organization chart to demonstrate the organizational structure of the company.

The Petitioner further indicated that the Beneficiary "will lead development of [the Petitioner's] systems and services." The Petitioner also stated that in addition to a Bachelor's degree in Computer Information Systems or equivalent related experience, the proffered position also requires "1-2 years experience in software development," "minimum 4 years programming using PL/SQL, Oracle 9i, with a total of 5-7 years in database programming," and "1-3 years experience in Application Integration development."

However, we note that the Petitioner did not sufficiently develop relative complexity or uniqueness as an aspect of the proffered position. This is further evidenced by the LCA submitted by the Petitioner in support of the instant petition. The LCA indicates a wage level at a Level I (entry) wage, which is the lowest of four assignable wage levels.³ Without further evidence, the evidence does not demonstrate that the proffered position is complex or unique as such a position falling under this occupational category would likely be classified at a higher-level, such as a Level III (experienced) or Level IV (fully competent) position, requiring a significantly higher

³ The wage-level of the proffered position indicates that (relative to other positions falling under this occupational category) the Beneficiary is only required to have a basic understanding of the occupation. That designation indicates further that the Beneficiary will only be expected to "perform routine tasks that require limited, if any, exercise of judgment." See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

prevailing wage.⁴ For example, a Level IV (fully competent) position is designated by DOL for employees who “use advanced skills and diversified knowledge to solve unusual and complex problems.”⁵ “[I]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence.” *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92.

The record does not establish 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 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.

The record of proceeding does not demonstrate that the Petitioner will employ the Beneficiary in a specialty occupation.

III. ADDITIONAL BASIS

Next, we will briefly discuss whether the Petitioner complied with the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B). The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) provides as follows:

Service or training in more than one location. A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions. The address that the Petitioner specifies as its location on the I-129 shall be where the Petitioner is located for purposes of this paragraph.

⁴ The issue here is that the Petitioner’s designation of this position as a Level I, entry-level position undermines its claim that the position is particularly complex, specialized, or unique compared to other positions *within the same occupation*. Nevertheless, it is important to note that a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation. In certain occupations (doctors or lawyers, for example), an entry-level position would still require a minimum of a bachelor’s degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor’s degree in a specific specialty or its equivalent. That is, a position’s wage level designation may be a consideration but is not a substitute for a determination of whether a proffered position meets the requirements of section 214(i)(1) of the Act.

⁵ For additional information regarding wage levels as defined by DOL, see U.S. Dep’t of Labor, Emp’t & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

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As noted above, the Petitioner indicated on the Form I-129 that the Beneficiary would be working only at the Petitioner's office in [REDACTED] Texas, for the duration of the H-1B employment period. However, in response to the director's RFE, the Petitioner submitted a position description stating that the Beneficiary would travel to assigned customers' locations and assist with the implementation of software. The Petitioner, however, did not specify a customer and the length of time the Beneficiary would spend at a particular customer's location.⁶ Furthermore, in this position description, the Petitioner stated under "Special Requirements" that the Beneficiary "must provide personal transportation," which suggests that the Beneficiary's duties would include travel.

The petition must list the locations where the Beneficiary would be employed and be accompanied by an itinerary with the dates the Beneficiary will provide services at each location. Both conditions were not satisfied in this proceeding. Again, a petitioner must establish eligibility at the time of filing a nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the Petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978).

In view of the foregoing, the record of proceeding has not overcome the Director's basis for denying the petition, and it has also not met the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B). For these reasons, the petition may not be approved.⁷

IV. CONCLUSION AND ORDER

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). Here, that burden has not been met.

⁶ Documents the Petitioner submitted on appeal indicate that its customers may be located in states other than where the Petitioner is located. For example, [REDACTED] is located in [REDACTED] Wisconsin; [REDACTED] is located in [REDACTED] California; and [REDACTED] is located in [REDACTED], Ohio.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an H-1B petition is filed with a "DOL-certified LCA attached" that actually supports and corresponds with the petition on the petition's filing, this regulation inherently necessitates the filing of an amended H-1B petition to permit USCIS to perform its regulatory duty to ensure that a certified LCA actually supports and corresponds with an H-1B petition as of the date of that petition's filing. In addition, as 8 C.F.R. § 103.2(b)(1) requires eligibility to be established at the time of filing, it is factually impossible for an LCA certified by DOL after the filing of an initial H-1B petition to establish eligibility at the time the initial petition was filed. Therefore, in order for a petitioner to comply with 8 C.F.R. § 103.2(b)(1) and USCIS to perform its regulatory duties under 20 C.F.R. § 655.705(b), a petitioner must file an amended or new petition, with fee, whenever a beneficiary's job location changes such that a new LCA is required to be filed with DOL.

⁷ As the grounds discussed above are dispositive of the Petitioner's eligibility for the benefit sought in this matter, we will not address and will instead reserve our determination on the additional issues and deficiencies that we observe in the record of proceeding with regard to the approval of the H-1B petition.

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ORDER: The appeal is dismissed.

Cite as *Matter of M-, Inc.*, ID# 14416 (AAO Nov. 16, 2015)