



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

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

MATTER OF K-, INC.

DATE: SEPT. 18, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a software consulting firm, seeks to employ the Beneficiary in what it designates as a full-time “Quality Analyst” position. The Petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation. *See* section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 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.

The Director denied the petition, finding the evidence insufficient to establish that the proffered position qualifies for classification as a specialty occupation position. On appeal, the Petitioner asserts that the Director’s basis for denial was erroneous and contends that the Petitioner satisfied all evidentiary requirements.

The record of proceeding before us contains: (1) the Petitioner’s Form I-129 and the supporting documentation filed with it; (2) the service center’s request for additional evidence (RFE); (3) the Petitioner’s response to the RFE; (4) the Director’s denial letter; and (5) the Notice of Appeal or Motion (Form I-290B) and the Petitioner’s submissions on appeal. We reviewed the record in its entirety before issuing our decision.

For the reasons that will be discussed below, we agree with the Director that the Petitioner has not established eligibility for the benefit sought.¹ Accordingly, the Director’s decision will not be disturbed. The appeal will be dismissed.

I. THE PROFFERED POSITION

The Petitioner claims in the Labor Condition Application (LCA) submitted to support the visa petition that the proffered position corresponds to Standard Occupational Classification (SOC) code and title 15-1199, Computer Applications, All Other, from the Occupational Information Network (O*NET).

¹ We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

In a letter dated March 12, 2014, the Petitioner explained that it will assign the Beneficiary to an in-house project for the entire three-year validity period requested. The Petitioner listed the following duties of the proffered position verbatim:

- Conduct internal audits to measure adherence to established QA standards for software development, application integration, and information system performance, and corresponding documentation.
- Create and execute test plans and scripts that will determine optimal application performance.
- Verify and revise quality assurance standards as needed.
- Ensure that testing activities allow applications to meet business requirements and systems, goals, fulfill end-user requirements, and identify existing or potential issues.
- Collaborate with software/systems personnel in application testing, such as system, unit, regression, load, and acceptance testing methods.
- Make recommendations for improvement of applications to programmers and software developers or engineers.
- Communicate test progress, test results, and other relevant information to project stakeholders and management.
- Test any new software to ensure integration into company systems meets functional requirements, system compliance, and technical specifications.
- Analyze formal test results in order to discover any report any defects, bugs, errors, configuration issues, and interoperability flaws.
- Assist in the development of change control processes, practices, and guidelines for new and existing technologies.
- Participate in developing, distributing, and coordinating in-depth end-user reviews for modified and new systems or applications. Cultivate and disseminate knowledge of quality assurance best practices.
- Document software defects, using a bug tracking system, and report defects to software developers and project managers.
- Identify, analyze, and document problems with program function, output, online screen, or content.
- Review software documentation to ensure technical accuracy, compliance, or completeness, or to mitigate risks.
- Advise, mentor, train or assist quality assurance analysts and developers at other skill levels, as needed, to ensure timely releases of high quality code.
- Achieve a service-focused culture with emphasis on delivering on-time, high-quality products and services to internal and external customers.

The Petitioner further stated that the proffered position requires the “attainment of at least a Bachelor’s degree in Electrical Engineering, Computer Science, or a closely related field as the minimum requirement for entry into the occupation.”

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In other documentation submitted in support of the petition, the Petitioner identified the name of the project to which the Beneficiary would be assigned as [REDACTED]. The Petitioner explained that it is seeking to develop a new computer application, [REDACTED], a web-based interface which will allow consumers, employers, insurance companies, and the federal government to exchange information regarding health insurance plans. The Petitioner stated that the Beneficiary “will be actively involved in the design, development and production support of [REDACTED].”

II. SPECIALTY OCCUPATION

The issue is whether the evidence of record establishes that the Petitioner will employ the Beneficiary in a specialty occupation position.

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:

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

² The Petitioner also refers to [REDACTED] as [REDACTED].

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. 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 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 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 aliens 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 alien, 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

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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. Analysis

We agree with the Director and find that there are inconsistencies with respect to the asserted in-house project the Petitioner is developing and the work to be performed by the Beneficiary.

For instance, the Petitioner submitted a document entitled "[REDACTED] V1.0" dated March 27, 2014. Under the subsection "Operations Plan," this document describes the development process as consisting of six phases: (1) requirements building; (2) design; (3) development; (4) testing; (5) deployment; and (6) modification. The plan states that the Petitioner "has begun development of [REDACTED] and expects completion of the complete version by December, 2017." The plan also states: "During the development phase, [REDACTED] will only need to have developers and a project manager. These staff members will be current 'on the bench' contractors who are between assignments and who can devote time to the project." In another section describing the team members needed for the project, the plan states that "software development will be provided through contract labor, at least initially. The programming will require up to 20 developers during the startup development phase."

The proffered position here, however, is not a developer or project manager position, but rather a quality analyst tasked to perform duties related to quality assurance and testing. The Petitioner has not explained how it would utilize the Beneficiary's quality assurance and testing services during the development process, considering the Petitioner's assertions that the initial development and programming would only be performed by contractor-developers.

The [REDACTED] V1.0" also contains a "Financial Summary" table indicating that the Petitioner anticipates employing 6.4 employees on the project during 2014, and incurring Operating Expenses of \$105,800 during that year. Other entries in the table show that the Petitioner anticipates gross profits on the project of \$975,000 during 2015, \$3,331,125 in 2016, and \$7,933,643 during 2017. However, as duly noted by the Director in the RFE, it is not apparent how the Petitioner could reasonably anticipate such significant profits – including almost \$1,000,000 in 2015 – when a completed version of the software is not expected until December 2017. The Director also questioned why the Petitioner anticipated Operating Expenses of only \$105,800 during 2014, notwithstanding that it proposed to employ 6.4 employees on the project.

In response to the RFE, the Petitioner submitted an amended "[REDACTED] V1.6" dated July 17, 2014. In pertinent part, this document revised the "Operations Plan" to indicate that the development process now consists of seven phases, including two new phases of

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“initiation” and “research.”³ The document also revised the “Financial Summary” table to show that the Petitioner anticipates no gross profits through 2016, and \$622,574 in gross profits in 2017. The revised “Financial Summary” also shows that no operating expenses were expended and no workers were assigned to the project during 2014. Furthermore, the revised plan states that the Petitioner “has begun development of [REDACTED] and expects completion by October, 2016.” The plan states that “[t]here will be a significant marketing push to launch the basic version of [REDACTED] in 2017”

However, this amended commercialization plan does not fully address the concerns raised by the Director, and in fact, it raises additional, unresolved concerns. For instance, the Petitioner did not satisfactorily explain why the initial document represented that the Petitioner would derive gross receipts from the project prior to its completion, or why it initially represented that it was able to employ 6.4 workers on the project while only incurring operating expenses of \$105,800. Nor did the Petitioner satisfactorily explain why the expected completion date of the project changed from December 2017 to October 2016. The Petitioner also did not satisfactorily explain why the amended plan shows no operating expenses or workers assigned to the project in 2014, when the Petitioner expressly stated that it already “has begun development of [REDACTED]”⁴

There are also discrepancies with respect to how many total phases constitute the development process, and the duties to be performed during each phase. As stated above, the first commercialization plan lists six developmental phases, while the amended plan lists seven developmental phases. Furthermore, the Petitioner submitted a different document, entitled “Project Assigned,” indicating that the Beneficiary is needed for only three phases: Phase I, October 2014 to October 2015; Phase II, October 2015 to October 2016; and Phase III, October 2016 to October 2017. The Petitioner has not explained how these three phases correlate to the six or seven phases described in the Petitioner’s commercialization plans.

Overall, these and other unexplained, unreconciled inconsistencies in the evidence of record call into question the credibility of the Petitioner’s documentation and claims regarding its claimed [REDACTED]. Doubt cast on any aspect of the Petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). It is incumbent upon the Petitioner to resolve any inconsistencies in the record with independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* At 591-592.

While the Petitioner submitted critical reviews of its [REDACTED] product from [REDACTED] CEO of [REDACTED], and [REDACTED] Professor in the Department of Computer

³ The amended plan confusingly states that “we expect a total of 6-10 developers will be needed for this project” and that “[t]he programming will require up to 20 developers during the startup development phase.” The amended plan states, as did the previous version, that “staff members” and initial developers “will be provided through contract labor.”

⁴ Both the commercialization plan dated March 27, 2014, and the new plan dated July 17, 2014, stated that the Petitioner “has begun development of [REDACTED]”

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Science at [REDACTED] we decline to consider these reviews as probative evidence of that [REDACTED] is a *bona fide* project.

With respect to the reviews by [REDACTED] these reviews conclude that the Petitioner's "financial model is solid" and "operations plan looks sound."⁵ As discussed above, however, there are significant discrepancies and inconsistencies with respect to the Petitioner's financial analyses and operations plans as described in the commercialization plans. The reviews by [REDACTED] do not indicate whether the author considered, or was even aware of, these discrepancies and inconsistencies. We consider these to be significant omissions, in that it suggests an incomplete or inaccurate review of the evidence and a faulty factual basis for his ultimate conclusions.

[REDACTED] attests that he based his review upon "copies of documents provided by [the Petitioner] and Physical demo of the software and the prototypes conducted via Webinar." He also lists the documents he reviewed as including "Peer Review Process," "Test cases," "User Interface design," "UI Testing," and "Release testing." However, there is insufficient evidence that the Petitioner has even completed a working demo or prototype of the [REDACTED] solution for [REDACTED] to have reviewed. Nor is there sufficient evidence that the Petitioner has actually created the majority of the documents [REDACTED] claims to have reviewed, many of which would necessarily follow the development of a working demo or prototype.⁶ More specifically, the Petitioner's "Timeline" indicates that the Petitioner has not substantially begun any activities related to developing code, developer testing (primary debugging), developing a prototype, or any testing functions.⁷ As such, it is unclear what evidence, if any, [REDACTED] actually reviewed to come to his ultimate conclusions.

We may, in our discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

Finally, we note that the record of proceeding contains some evidence suggesting that the Beneficiary would be placed off-site. More specifically, the Petitioner's offer letter dated, March 3, 2014, states that the Beneficiary "may be required to work at any of the Client sites, if need be."⁸ Similarly, the Employment Agreement between the Petitioner ("Company") and the Beneficiary ("employee") states that the employee "agrees and understands that the Company has the right to

⁵ The Petitioner submitted the amended review from [REDACTED] along with the amended commercialization plan.

⁶ For example, it is not clear how there could be documents related to a peer review process or release testing if the Petitioner has not yet developed a working demo or prototype.

⁷ The Timeline specifically indicates that 0% of the activity "Develop prototype based on functional specification" has been completed. While the Timeline also indicates that 2% of the activity "Design/Prototype Development complete" has been completed, there is no explanation of the difference between these two activities. Nevertheless, a 2% completion rate does not indicate the existence of a working prototype.

⁸ The same offer letter states that the Beneficiary is "required to perform the duties enlisted in the enclosure marked annexure-I." However, no enclosure marked annexure-I was submitted with the instant petition. The lack of this particular annexure raises additional questions as to the actual duties to be performed by the Beneficiary.

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control the employee's work in situations where the employee is working offsite at a client location."⁹ In addition, the Petitioner submitted "documents pertaining to the Petitioner's direct clients, [REDACTED] and [REDACTED],] . . . as proof of the Petitioner's other ongoing engagements *and availability of specialty occupation work* (emphasis added)."¹⁰ The Petitioner also submitted several reference letters asserting that the Petitioner has been providing subcontracting services for these other companies. The Petitioner acknowledged on appeal that "the record discloses that the Petitioner's historical activities have focused on software consulting." Thus, in light of these "historical activities" and the lack of credible evidence establishing that [REDACTED] is a *bona fide* in-house project, we find that the evidence of record does not sufficiently demonstrate that the Beneficiary will be assigned to work in-house on the [REDACTED] as claimed.

Based upon a complete review of the record of proceeding, we find that the Petitioner has not established: (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. Consequently, these material omissions preclude a determination that the Petitioner's proffered position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions. There is a lack of evidence substantiating the Petitioner's claims with regard to the duties, responsibilities and requirements of the proffered position.

For these reasons, the evidence of record does not demonstrate the substantive nature of the duties the Beneficiary would perform on that project. 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.

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. The appeal will be dismissed and the petition denied for this reason.

⁹ On appeal, the Petitioner explains this provision in the Employment Agreement by stating that it uses a "standard format for its employment agreements." However, the Petitioner's explanation does not fully address why a similar provision regarding potential off-site placement is also included in the Petitioner's offer letter to the Beneficiary.

¹⁰ Although the Petitioner asserts that [REDACTED] is one of its clients, the letter from the State of [REDACTED] states that the Petitioner's bid was not successful.

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III. 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). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of K-, Inc.*, ID# 13007 (AAO Sept. 18, 2015)