



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

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

MATTER OF E-, INC.

DATE: APR. 19, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a consulting and data processing services company, seeks to temporarily employ the Beneficiary as an “epitec developer” under the H-1B nonimmigrant classification for specialty occupations. See Immigration and Nationality Act (the Act) § 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, California Service Center, denied the petition. The Director concluded that the evidence of record does not establish that the Petitioner has specialty occupation work available for the Beneficiary, and thus, that the proffered position qualifies as a specialty occupation.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the proffered position is a specialty occupation.

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

I. LAW

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:

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- (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). U.S. Citizenship and Immigration Services (USCIS) has consistently interpreted 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 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

The labor condition application (LCA) submitted to support the H-1B petition states that the proffered position is an epitec developer position, and that it corresponds to standard occupational classification (SOC) code and title 15-1132, “Software Developers, Applications.”

In its support letter, the Petitioner stated that the Beneficiary will be assigned in-house and his job duties will include the following:

- Design, modify, develop, write and implement leading-edge applications and components using [REDACTED] C#, SQL, HTML, CSS, and Java, and JavaScript.
- Provide support for software applications and components.
- Create and work from stories (tasks), within the Scrum framework, and maintain documentation.

The Petitioner also stated that the Beneficiary is an “excellent candidate to fulfill the requirements of this temporary professional position,” as he has obtained a master of science degree in computer science and a bachelor’s degree in computer science from the [REDACTED]

In response to the request for additional evidence (RFE), the Petitioner stated that the Beneficiary “will be working within [the Petitioner’s] suite of applications as well as performing services for the [REDACTED] The Petitioner also stated that it has an “ongoing contract with

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vendor, [REDACTED] supplying personnel to [REDACTED] and provided the following position description for the [REDACTED]

Java Developer needed to drive enterprise-class design and development of Java applications and services for [REDACTED] using standards and guidelines that support high volumes, are fast, simple, reliable, distributed, and easy to extend and maintain.¹

Skills Required:

- Develop the system specifications by interpreting the business, user, functional, and non-functional requirements as documented in Business Requirements
- Develop design documentation using UML and Logical design from the Conceptual mode
- Responsible for understanding the capabilities and limitations of new systems, integration of the new and the old including limitations placed on the integration and performance of the combined and interfacing systems
- Enlist Architects and SMEs to ensure the system and/or application design meets corporate and/or architecture requirements, standards, and optimizes assets
- Requires a broad and comprehensive knowledge of technology and systems development lifecycles, including traditional waterfall and agile methodologies
- Work with the Business Analyst and Business Customers to ensure all business and user requirements are met through design, build, and implement phases
- Collaborate with program architecture leadership
- Participate in integration testing

On appeal, the Petitioner states that its propriety system, [REDACTED] requires “a full-time team to perform enhancements, updates, and on-going maintenance of the systems.” The Petitioner further states that the Beneficiary is expected to be a member of this team responsible for upgrading the system and providing ongoing maintenance as required. The Petitioner also indicates that the current backlog of development requests from users will “support an additional developer for the next 18 months” and that the backlog includes these major programs, in part:

1. CRM, Enhancements (1206 hours)
2. CRM, Maintenance (456 hours)
3. Employee Portal, New Development (1551 hours)

¹ On the Form I-129, the proffered position is listed as epitec developer; however, this position description used the position title of java developer. The Petitioner did not explain the discrepancy in position titles.

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III. ANALYSIS

Upon review of the record in its totality and for the reasons set out below, we determine that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation. Specifically, the record (1) does not describe the position's duties with sufficient detail; and (2) does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.²

For H-1B approval, the Petitioner must demonstrate a legitimate need for a position to exist 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 an epitec developer. However, upon review of the record of proceedings, 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.

As reflected in the description of the position as quoted above, the proffered position has been described in terms of generalized and generic functions that do not convey sufficient substantive information to establish the relative complexity, uniqueness and/or specialization of the proffered position or its duties. For example, the Petitioner indicated that the Beneficiary will "provide support for software applications and components," "design, modify, develop, write and implement leading-edge applications," and "create and work stories (tasks)." The Petitioner does not convey the substantive nature of the work that the Beneficiary would actually perform, or any particular body of highly specialized knowledge that would have to be theoretically and practically applied to perform it. The responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance.

Similarly, the Petitioner also described the Beneficiary's duties for the "java developer" for the [REDACTED] application in general and vague terms. For example, the duties included "work with Business Analyst and Business Customers to ensure all business and user requirements are met through design, build, and implement phases," "collaborate with program architecture leadership," and "participate in integration testing." There is no further explanation of what specific tasks the

² 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.

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Beneficiary will perform in furtherance of these overarching duties, who the “users” are or what bodies of knowledge are required to perform these duties. Moreover, the Petitioner has not specifically explained the duties and role of the proffered position in the context of the [REDACTED]

We further note that the record of proceedings lacks sufficient documentation regarding the actual work that the Beneficiary will perform to substantiate the claim that the Petitioner has H-1B caliber work for the Beneficiary for the period of employment requested in the petition. For example, on appeal, the Petitioner states that the current “workload will support an additional developer for the next 18 months.” However, the requested employment dates are for 3 years rather than 18 months. Further, while we note that the Petitioner provided a description of its backlog on appeal to support its workload needs, it is described in general and broad terms that it does not illuminate what specific tasks will be performed, which team member(s) will perform them, and the manner and means through which they will be achieved. For example, the backlog description includes “CRM, Enhancements (1206 hours)” and “CRM, Maintenance (456) hours,” but there is no additional information provided to explain what these “enhancements” and “maintenance” entail.

Moreover, while the Petitioner asserts that the Beneficiary will also work on [REDACTED] application project, the record of proceeding does not include sufficient evidence to establish the nature of the project and its existence. For example, the Petitioner submitted a contract between the Petitioner and [REDACTED]. The document submitted is entitled, “Terms of Business for Supplying Contract Personnel,” signed in August 2005. The document stated that [REDACTED] has entered into agreements with customers for the “provision of on-site contract personnel and related services,” and that they look for “suppliers to help us perform this important function.”³ The agreement also states that these “terms should be read in conjunction with the Protocol Attachments which are affixed to this document and the relevant Project Schedule(s) or Purchase Order(s) which we will issue to you.”

However, the Petitioner did not provide any protocol attachments or project schedules indicating that the Beneficiary will assist [REDACTED] with a customer (in this case [REDACTED]). In addition, the documentation does not provide any contracts or agreements between [REDACTED] and [REDACTED] to indicate that [REDACTED] will work with [REDACTED]. The documentation also did not include evidence of the type of work the Beneficiary would perform for [REDACTED]. As recognized in [REDACTED] 201 F.3d at 387-88, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location(s) in order to properly ascertain the minimum educational requirements necessary to perform those duties. In other words, as the nurses in that case would provide services to the end-client hospitals and not to the petitioning staffing company, the Petitioner-provided job duties and alleged requirements to perform those duties were irrelevant

³ An accompanying letter dated October 2015 from [REDACTED] indicates that it works with the Petitioner as a supplier to [REDACTED]

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to a specialty occupation determination. *See id.* Here, the record of proceeding in this case is similarly devoid of sufficient information from the end-client, [REDACTED] regarding the specific job duties to be performed by the Beneficiary for that company.

Furthermore, the agreement submitted between the Petitioner and [REDACTED] was signed in August 2005 and the Petitioner did not provide any additional documentation evidencing that this agreement is still valid. Therefore, the record lacks documentation substantiating that the Petitioner has sufficient work for the Beneficiary to perform covering the duration of the petition. “[G]oing 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 Cal.*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

We find that the Petitioner has not established that the petition was filed for non-speculative work for the Beneficiary, for the entire period requested, that existed as of the time of the petition’s filing. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or 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).⁴

As observed above, we must review the actual duties the Beneficiary will be expected to perform to ascertain whether those duties require at least a baccalaureate degree in a specific specialty, or its equivalent, as required for classification as a specialty occupation. To accomplish that task, we must analyze the actual duties in conjunction with the specific project(s) to which the Beneficiary will be assigned. The Petitioner has not provided sufficient information regarding the nature and scope of

⁴ The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor’s degree. *See* section 214(i) of the Immigration and Nationality Act (the “Act”). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30,419, 30,419-20 (proposed June 4, 1998) (to be codified at 8 C.F.R. pt. 214). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

the Beneficiary's employment or substantive evidence regarding the specialty occupation work that the Beneficiary would perform.⁵ Without a meaningful job description, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in the specific specialty, or its equivalent, as a minimum for entry into the occupation. The tasks as described do not consistently communicate: (1) the substantive nature and scope of the Beneficiary's employment within the Petitioner's business operations; (2) the actual work that the Beneficiary would perform; (3) the complexity, uniqueness and/or specialization of the tasks; and/or (4) the correlation between that work and a need for a particular educational level of highly specialized knowledge in a specific specialty.

Therefore, we are precluded from 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 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. Thus, the Petitioner has not satisfied any of the criteria under the applicable provisions at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 as a specialty occupation.

IV. ADDITIONAL ISSUES

As the Petitioner did not demonstrate that the proffered position is a specialty occupation, we need not fully address other issues evident in the record. That said, we wish to identify additional issues to inform the Petitioner that these issues should be addressed in any future proceedings.⁶

⁵ While the Petitioner provided a list of job duties, it is noted that petitioner-provided duties are often outside the scope of consideration for establishing whether the position qualifies as a specialty occupation. See *Defensor v. Meissner*, 201 F.3d at 387-388 (stating that the petitioner-provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination where the nurses in that case would provide services to the end-client hospitals and not to the petitioning staffing company).

⁶ In reviewing a matter *de novo*, we may identify additional issues not addressed below in the Director's decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003) ("The AAO may deny an application or petition on a ground not identified by the Service Center.").

A. Employer-Employee Relationship

As an additional basis, we note that the petition cannot be approved because the evidence does not demonstrate that the Petitioner qualifies as a United States employer having an employer-employee relationship with the Beneficiary. As detailed above, the record of proceeding lacks sufficient documentation evidencing what exactly the Beneficiary would do for the period of time requested or where exactly and for whom the Beneficiary would be providing his services. Given this specific lack of evidence, the Petitioner has not corroborated who has or will have actual control over the Beneficiary's work or duties, or the condition and scope of the Beneficiary's services. In other words, the Petitioner has not established whether it has made a *bona fide* offer of employment to the Beneficiary based on the evidence of record or that the Petitioner, or any other company which it may represent, will have and maintain the requisite employer-employee relationship with the Beneficiary for the duration of the requested employment period. See 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer" and requiring the Petitioner to engage the Beneficiary to work such that it will have and maintain an employer-employee relationship with respect to the sponsored H-1B nonimmigrant worker). Again and as previously discussed, there is insufficient evidence detailing where the Beneficiary will work, the specific projects to be performed by the Beneficiary, or for which company the Beneficiary will ultimately perform these services.

B. Beneficiary's Qualifications

We do not need to examine the issue of the Beneficiary's qualifications, because the Petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation. In other words, the Beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

The Petitioner did not submit sufficient evidence regarding the proffered position to determine whether it will require a baccalaureate or higher degree in a specific specialty or its equivalent. Absent this determination that a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position, it also cannot be determined whether the Beneficiary possesses that degree or its equivalent. Therefore, we need not and will not address the Beneficiary's qualifications further, except to note that, in any event, the Petitioner did not submit an evaluation of the Beneficiary's foreign degrees or sufficient evidence to establish that his degree is equivalent to a U.S. bachelor's degree in a specific specialty. As such, since evidence was not presented that the Beneficiary has at least a U.S. bachelor's degree in a specific specialty, or its equivalent, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

V. CONCLUSION

The burden is on the Petitioner to show 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.

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ORDER: The appeal is dismissed.

Cite as *Matter of E-, Inc.*, ID# 16313 (AAO Apr. 19, 2016)