



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

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

MATTER OF A- INC.

DATE: AUG. 18, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an information technology solutions company, seeks to temporarily employ the Beneficiary as a “software quality assurance tester” under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director, California Service Center, denied the petition. The Director concluded that the Petitioner had not demonstrated that the Beneficiary is qualified to perform services in a specialty occupation.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Director erred in concluding that the Beneficiary is not qualified to perform the duties of the proffered position, and submits additional evidence in support of this assertion.

Upon *de novo* review, the matter will be remanded to the Director for action consistent with this decision.

I. BENEFICIARY’S QUALIFICATIONS

The Director denied the petition, concluding that the Petitioner did not establish that the Beneficiary is qualified to perform services in a specialty occupation. A beneficiary’s credentials to perform a particular job, however, are relevant only when the job is found to qualify as a specialty occupation. U.S. Citizenship and Immigration Services (USCIS) is required to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether a beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf. Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm’r 1988) (“The facts of a beneficiary’s background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].”).

In the instant case, the record of proceedings does not establish that the proffered position qualifies as a specialty occupation. The record of proceedings also does not establish another fundamental

issue: that the Petitioner will have and maintain an employer-employee relationship with the Beneficiary. We will discuss each of these issues in turn.

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) largely restates this statutory definition, but adds a non-exhaustive list of fields of endeavor. In addition, the regulations provide that the proffered position must meet one of the following criteria to qualify as a specialty occupation:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. § 214.2(h)(4)(iii)(A). 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).

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B. Proffered Position

The Petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B, indicating that the proffered position is that of a “software quality assurance tester” corresponding to the occupational category “Computer Occupations, All Other,” SOC (ONET/OES) code 15-1199, at a Level I (entry level) wage.¹ In its initial letter of support, the Petitioner claimed that the Beneficiary would be employed offsite at the offices of its client, [REDACTED] (Company S), and would be responsible for the following duties:

- Create detailed test plans
- Create test scenarios and test conditions
- Identify data requirement for testing
- Setup repository and test management tool for test execution
- Execution of test conditions for system integration testing and user acceptance testing
- Responsible for defects retests and regression tests during execution
- Perform post implementation validation testing.

The Petitioner stated that the proffered position requires a candidate with a minimum of a bachelor’s degree in computer science, computer information systems, information systems engineering, mechanical engineering, computer science and engineering, computer engineering, or a related field, or its equivalent.

In support of the petition, the Petitioner submitted, *inter alia*, an “itinerary of services,” a letter from Company S, a statement of work, and a master services agreement.

C. Analysis

Upon review of the record in its totality, the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation. The Petitioner has not demonstrated that it has definite, non-speculative work available for the Beneficiary for the entire validity period requested (from October 1, 2015, to September 13, 2018).

In this matter, the Petitioner claims that the Beneficiary would be employed off-site as a “software quality assurance tester” for Company S. The Petitioner’s “itinerary of services” states that the Beneficiary, “as a Software Quality Assurance Tester [would be] a part of the team responsible to support [Company S] migration project,” identified as [REDACTED]. The itinerary further states that the Beneficiary’s period of service would be from October 1, 2015, to September 30, 2018.

¹ The Director incorrectly classified the proffered position as that of a computer programmer, and erroneously stated that the Petitioner had submitted an LCA certified for that position.

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However, the record does not contain objective documentation directly from Company S confirming the Beneficiary's claimed assignment. For instance, the submitted statement of work and master services agreement are between [REDACTED] (Company R) and the Petitioner's sister company in India. The record does not demonstrate the exact relationship between Company S and Company R so as to establish these documents' relevance to the Beneficiary's claimed assignment at Company S' worksite.² More importantly, the statement of work, master services agreement, and letter from Company S do not specifically reference the Beneficiary.

Nor does the statement of work, master services agreement, or letter from Company S specifically reference the need for an onsite "software quality assurance tester" position. Notably, the statement of work lists the project's "Core Team" as consisting of, *inter alia*, 1 "quality analyst" position and 19 "test analyst" positions. But all of these positions are expressly "offshore" (i.e., located in India) positions. The statement of work does not state a need for any "onsite" (i.e., located at Company S' worksite in [REDACTED] Ohio) quality analyst or test analyst positions.³ The Petitioner has thus not credibly demonstrated that the Beneficiary would, in fact, be assigned to Company S as a "software quality assurance tester," as claimed. "[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)).

Even if the statement of work were to demonstrate the Beneficiary's assignment to Company S (which it does not), this agreement "shall expire upon the later of (i) Company's Final Acceptance of all work under this SOW, or (ii) February 28, 2016." On the other hand, the Petitioner has requested a validity date ending on September 13, 2018.⁴ The Petitioner has not adequately explained and documented what the Beneficiary would be doing from February 28, 2016, through September 13,

² The record contains a letter on the letterhead of Company S confirming the contractual relationship between Company R and the Petitioner's sister company. However, this letter does not explain the nature of the relationship between Company R and Company S. And despite this letter's reference to both companies as one entity (through the use of the words "we" and "our" in describing the contractual relationship), the submitted statement of work indicates that Company S and Company R have separate operations. In particular, in Section II.G listing the contacts "for each Company and Service Provider," several representatives of Company S are listed in addition to an "Onsite Program Manager" for Company R.

³ The statement of work does list onsite positions as including a program manager and multiple stream leads. However, it is not plausible that any of these onsite positions refer to the proffered position, as the Petitioner classified the proffered position as a Level I, entry-level, position. According to the Department of Labor's "Prevailing Wage Determination Policy Guidance," a Level I wage rate indicates that the Beneficiary is only required to have a basic understanding of the occupation and carries expectations that the Beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results. 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. Thus, in accordance with the relevant DOL explanatory information on wage levels, a Level I wage rate would not be appropriate for any "program manager" or "lead" position.

⁴ Although on the Form I-129 the Petitioner requested a validity date ending on September 13, 2018, the Petitioner's itinerary states that the Beneficiary's project would end on September 30, 2018.

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2018. The record does not demonstrate that the Beneficiary would be assigned to Company S as a “software quality assurance tester” for the entire validity period requested, if at all.

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).⁵

Moreover, the Petitioner has not sufficiently demonstrated the substantive nature of the work the Beneficiary would perform for Company S. Without reliable objective evidence from Company S confirming the Beneficiary’s assignment and the specific duties he would perform for them, the Petitioner has not sufficiently demonstrated the substantive nature of the proffered position. As recognized in *Defensor*, 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. Here, the record is similarly devoid of information from Company S regarding the specific job duties to be performed by the Beneficiary. We note that 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 (or its equivalent) as the minimum for entry into the occupation, as gleaned from the particular job duties to be performed.

While the Petitioner did provide a brief list of job duties for the Beneficiary, such as “[c]reate detailed test plans” and “[c]reate test scenarios and test conditions,” these duties are not sufficiently described and documented within the context of the Company S’ particular operations and its

For instance, the Petitioner has not demonstrated how the proffered job duties

⁵ 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).

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correlate to the job duties, roles, deliverables, or project phases listed in the submitted statement of work. Again, “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. at 165.

Overall, the evidence of record is insufficient to demonstrate the substantive nature of the work to be performed by the Beneficiary. The record therefore precludes the 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.

Additionally, the Petitioner has not articulated which of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) it believes the proffered position satisfies. That is, while the Petitioner states that the proffered position requires a minimum of a bachelor’s degree in computer science, computer information systems, information systems engineering, mechanical engineering, computer science and engineering, computer engineering, or a related field, or its equivalent, the Petitioner has not specifically pointed to which criterion or criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1)-(4) it believes the proffered position satisfies.

As the record does not satisfy 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.

III. EMPLOYER-EMPLOYEE RELATIONSHIP

As detailed above, the record of proceedings 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 services. Given this specific lack of evidence, the record also does not establish 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 an 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).

IV. CONCLUSION

The evidence of record does not demonstrate that the proffered position is a specialty occupation, or that the Petitioner will have and maintain an employer-employee relationship with the Beneficiary. Consequently, the matter will be remanded to the Director for further review and issuance of a new decision to address these and any other issues she may observe. The Director may request additional evidence considered pertinent to the new determination.

ORDER: The decision of the Director, California Service Center, is withdrawn. The matter is remanded to the Director, California Service Center, for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of A- Inc.*, ID# 17726 (AAO Aug. 18, 2016)