



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

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

MATTER OF C-M-, INC.

DATE: FEB. 29, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a two-person business, seeks to temporarily employ the Beneficiary as a “software engineer” 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, California Service Center, denied the petition. The matter is now before us on appeal. Upon *de novo* review, we will dismiss the appeal.

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.

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:

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.

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

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

The degree must be in the specific specialty that is directly related to the H-1B position, unless the petitioner demonstrates that an alternative, closely related specialty degree applies to the 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).

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the individual, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

B. Proffered Position

The Petitioner stated that it is a start-up company, and that the Beneficiary will work on its first project, which is called [REDACTED]. According to the Petitioner, the Beneficiary will perform the following job duties in the proffered position:

[The Beneficiary] will be responsible for developing, creating, implementing and testing software enhancements for our [REDACTED] product. He will analyze users need and develop software solutions that maximize use engagement. He will determine product vision, develop product strategy and roadmap and produce business and technical requirements. He will analyze feature of our products and

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decide what is needed to stay competitive. He will translate concept into product requirements that meet user needs. He will be responsible for the life-cycle of our products.

Using the latest web development technologies including ASP.Net, jQuery, Ajax, JavaScript and MSSQL with dynamic LINQ queries, he will develop a software solution to provide our customers with the best user experience. He will customize software for customer use with the aim of optimizing operational efficiency. He will formulate and design software that identifies key components to improve functionality. He will devise and create test data, test plans and benchmark measures of application performance.

In addition, the Petitioner stated that it “normally requires at least a bachelor’s degree in computer science, engineering, software engineering or a related field for the position of Software Engineer.”

In the letter of support, the Petitioner provided the following about its business operations (verbatim):

Our mission is to create products and services that allows users to have a healthier, more independent and connected magical experience. [The Petitioner] is re-inventing mobility aid devices by making them:

- SMART to help people to be healthier and more independent
- STYLISH & ERGONOMICALLY DESIGNED to help people feel proud, comfortable and remove the stigma of using them.
- AT YOUR SERVICE: concierge service with [REDACTED] like platform including [REDACTED] for Nurses.

The first product called [REDACTED], the cane reinvented. [REDACTED] can make users:

- Healthier: by helping them prevent falls, tracking their daily activities & biometrics, and helping them to walk more
- Independent” by letting them stay independently at their own homes while getting the needed services at a press of a button. In addition, caregivers can monitor users’ daily activities, biometrics and services remotely
- Comfortable: by using ergonomically designed devices with a rich user experience
- Proud: by walking with stylish designed devices that have a better self expression

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The Petitioner submitted documentation regarding its corporate status in Delaware and California,¹ an agreement to lease 478 square feet of office space, and several photographs. According to the Petitioner, it hopes to build devices “like ‘Apple’ with a service layer like [REDACTED]

C. Analysis

The Petitioner stated that it wishes to employ the Beneficiary for a three year period; however, the record lacks documentation regarding the Petitioner’s business activities and the work that the Beneficiary would perform to sufficiently substantiate that it has H-1B caliber work for the requested period. For instance, while the Petitioner provided a general description of its intention to create the [REDACTED] product, it did not submit documentation demonstrating that it has the capacity and resources to develop such a product. It did not provide supporting evidence such as: (1) a business plan; (2) competitive, marketing and/or cost analysis; (3) a short- or long- term budget; (4) evidence substantiating investments or revenue sources; (5) documentation regarding its sales, costs, and income projections; (6) contracts; (7) its timeline and staffing requirements for developing products; and/or (8) marketing materials, company brochures, pamphlets, or other documentation describing in detail its products and services.²

Further, it is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. *See EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v. Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position. For example, when a petitioner employs relatively few people, it may be necessary for the petitioner to establish how the beneficiary will be relieved from performing non-qualifying duties.

In the instant case, the Petitioner stated that it has two employees.³ The company appears to consist of [REDACTED] Chief Financial Officer, and [REDACTED] Chief Technology Officer/Chief Executive Officer. As the Petitioner employs relatively few people, without further evidence, it has not established how the Beneficiary will be relieved from performing non-qualifying duties.

The Petitioner has not established the substantive nature of the work to be performed by the Beneficiary, which therefore precludes a finding that the proffered position satisfies any criterion at

¹ In the petition, the Petitioner states that the Beneficiary will work in [REDACTED] California. Notably, the Petitioner did not comply with the requirements of California law to conduct business in that state until after the H-1B petition was filed. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. 8 C.F.R. § 103.2(b)(1).

² The H-1B classification is not intended for companies to engage in speculative employment and hire foreign workers to meet possible workforce needs arising from potential business expansions, customers, or contracts. The agency made clear long ago that speculative employment is not permitted in the H-1B program. *See, e.g.*, 63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998).

³ On the Form I-129, the Petitioner stated that it does not have any gross annual income and net annual income. The Petitioner has not submitted documentation establishing that it has any assets or particular agreements for its services. Consequently, it has not been established who would pay the Beneficiary for his work.

8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for entry into the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Accordingly, as the Petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies for classification as a specialty occupation.

III. 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) (citing *Matter of Brantigan*, 11 I&N Dec. 493, 495 (BIA 1966)). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of C-M-, Inc.*, ID# 15378 (AAO Feb. 29, 2016)