



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

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

MATTER OF G-I- INC

DATE: JAN. 29, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an information technology services company, seeks to temporarily employ the Beneficiary as a “computer programmer analyst” 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. The appeal will be dismissed.

**I. ISSUES**

The Director denied the petition, finding that the evidence of record did not establish that the proffered position qualifies as a specialty occupation. As an additional basis, we will also address whether the Petitioner has an employer-employee relationship with the Beneficiary.<sup>1</sup>

**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.

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<sup>1</sup> 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).

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 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. Fed. 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 individuals 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 individual, 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 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 as the minimum for entry into the occupation, as required by the Act.

We note that, as recognized by the court in *Defensor*, 201 F.3d at 387-88, where the work is to be performed for entities other than the Petitioner, evidence of the client companies’ job requirements is critical. See *Defensor v. Meissner*, 201 F.3d at 387-88. The court held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary’s services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

## B. Analysis

We find that the record of proceeding does not contain sufficient information regarding the substantive nature of the proffered position. Specifically, the proffered duties and minimum requirements for the position are not consistent throughout the record. For example, in its support letter dated March 12, 2015, the Petitioner describes the Beneficiary’s day-to-day responsibilities as follows:

- Involved in full life cycle of project including planning sessions with project managers and business analysts to analyze business requirements in Java. [15%]

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- Performed analysis and development of implementation tasks using Java, Struts, Oracle and UNIX scripting language on Web Logic servers. [20%]
- Developed the HTTP based Web Service Client which calls up the existing web service to get the application related data which comes in XML format. [20%]
- Designed various tables required for the project in Oracle 9i database and used stored procedures and Triggers in the application. [20% ]
- Involved in maintenance and documentation of the application installed and configured Weblogic in development and testing environment. [15%]
- Building, testing and deploying the application on Web logic server. [10%]

However, according to a statement of work (SOW) from [REDACTED] (purported end client), the Beneficiary is responsible for:

- Development of web application for manage creating and modifying pricing group module using Spring MVC, J2EE, JSF, CSS
- Develop[ing] the UI layout and front-end programming for web application that matched requirements using hand written **HTML, CSS and JavaScript**.
- Implement[ing] various Validation Controls for form validation and implemented custom validation controls with **JavaScript and jQuery**

Then, in response to the Director's request for additional evidence (RFE), the Petitioner changed the proffered day-to-day responsibilities to:

- Implement Data Model Extensions for various Entities as per requirement. And implemented the integration points in the custom configuration and development. [15%]
- Work on different Java Server pages, Use different techniques and skills related to Java, J2ee, XML, PL/SQL technologies [20%]
- Create Integration DB and populated different entries of Disbursements going to legacy systems and coming back to web as part of reports generation [20%]
- Work on various Integration requirements between systems for Reports and Document Managements. [20%]
- Worked on Defects the development of the application [15%]
- Worked on Enhancements, project deliverables, production support issues. [10%]

This, again, differs from the responsibilities provided in the addendum to employment contract, which breaks down the Beneficiary's duties into the following: (1) requirement gathering and leading workshops (10%); (2) system configuration (10%); (3) documentation (15%); (4) source code writing (30%); (5) development (20%); and (6) end user support, knowledge transfer (15%).

In short, the Petitioner has submitted several different descriptions of day-to-day responsibilities for the proffered position. Consequently, we are unable to determine what the Beneficiary will actually be doing on a day-to-day basis.

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There are additional other discrepancies throughout the petition. Specifically, the Petitioner has provided inconsistent information regarding the minimum educational requirement for the proffered position.

For example, on appeal, the Petitioner states that the position requires a minimum of a “Master’s or Bachelor’s of Science in any discipline in Engineering, or computer science or information systems or a related analytic or scientific discipline or its equivalent in education or work-related experience.” However, in another letter submitted on appeal, the Petitioner states: “[i]n order to work on this position a Baccalaureate or higher degree is the requirement for this position. The position demands the solid educational background with couple of years industry experience in the market. . . .” The Petitioner provided yet another description of minimum requirements in the letter from the purported end client, which states that the position “typically requires a person with a Bachelor’s Degree in Science, Engineering, Information Technology, Mathematics, or Science, or other related field in addition to relevant work experience.” No explanation for the variances was provided by the Petitioner. “[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. With the conflicting information regarding the minimum requirements, we cannot determine whether the proffered position requires at least a bachelor’s degree in a specific specialty.

Moreover, the Petitioner provided inconsistent information regarding the place of employment for the Beneficiary. Specifically, the Petitioner indicated that the Beneficiary would work either at its offices in [REDACTED] IL or the purported end client site in [REDACTED] IL. However, the subcontractor services agreement implies that the purported end client is a vendor and not the ultimate end client. Specifically, the agreement states in pertinent part, “[the purported end client] wishes to have [the Petitioner] supply temporary workers to perform labor for [the purported end client]’s clients, and [the Petitioner] wishes to provide these temporary services.” It also states “at [the purported end client]’[s] request from time to time, [the Petitioner] agrees to supply temporary workers for services to be performed for [the purported end client]’s client(s) at client sites.”

Further, while the Petitioner stated that the Beneficiary would be employed in Illinois, the records reflect that the Beneficiary lives in another state. For example, the Petitioner stated in its support letter that the Beneficiary was “presently working with [the Petitioner].” The SOW stated that the project for the Beneficiary is located in [REDACTED] Illinois, to begin on July 1, 2015.<sup>2</sup> However, the pay stub dated July 15, 2015, indicates that the Beneficiary lived in [REDACTED] VA on that date. An additional pay stub dated August 15, 2015, indicates the Beneficiary’s home address was in [REDACTED] AZ. The Petitioner has not explained how the Beneficiary could be working in Illinois while living in either Virginia or Arizona.

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<sup>2</sup> USCIS records indicate that the Beneficiary has an optional training authorization valid from June 25, 2015 to November 24, 2016.

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Moreover, the Petitioner submitted a subcontract between the purported end client and another company. While this document references another consultant who is not the Beneficiary and appears to have been submitted in error, the document lists the same project as the Beneficiary's SOW, but identifies a different location, [REDACTED] PA, and a different end client.

These inconsistencies undermine the Petitioner's claim regarding the Beneficiary's place of employment. Again, "it is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence." *Matter of Ho*, 19 I&N Dec. at 591. 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.

While the Petitioner indicated that the Beneficiary will be employed either in-house or at the purported end client's site in [REDACTED] IL, the Petitioner did not submit evidence that it develops its own software, and its work appears to be dependent on contracts with clients. Moreover, the Petitioner submitted a few existing contracts; however, the SOW is from July 1, 2015, for 24 months, and is not valid for the duration of the Beneficiary's requested employment period. Further, the Petitioner did not demonstrate that it submitted contracts with the ultimate end client. Without further information regarding specific projects to which the Beneficiary would be assigned that covers the duration of the period of employment requested, we are not able to ascertain what the Beneficiary would do, where the Beneficiary would work, as well as how this would impact circumstances of her relationship with the Petitioner. A petition must be filed for non-speculative work for the Beneficiary, for the entire period requested, that existed as of the time of the petition's filing. The Petitioner must establish eligibility at the time of filing the 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, 249 (Reg'l Comm'r 1978).<sup>3</sup>

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<sup>3</sup> 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).

Based on all of the above reasons, including the lack of reliable, detailed information and documentation regarding the client projects and the specific duties the Beneficiary will perform, as well as the conflicting information regarding the minimum requirements for the position, we find that the evidence of record is insufficient to establish the substantive nature of the work to be performed by the Beneficiary.

The inability to establish the substantive nature of the work to be performed by the Beneficiary consequently 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. 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 as a specialty occupation.

### III. EMPLOYER-EMPLOYEE RELATIONSHIP

As an additional basis, we note that the petition cannot be approved because the Petitioner has not demonstrated that it qualifies as a United States employer. 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 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. Therefore, the petition cannot be approved for this additional reason.

### IV. CONCLUSION

As discussed, the evidence of record does not demonstrate: (1) that the proffered position is a specialty occupation; and (2) that the Petitioner has a valid employer-employee relationship with the Beneficiary. Consequently, the appeal will be dismissed.

We may deny an application or petition that does not comply with the technical requirements of the law even if the Director does not identify all of the grounds for denial in the initial decision. *See Spencer Enters., Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001); *see also Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542.

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of the enumerated grounds. *See Spencer Enters., Inc. v. United States*, 229 F. Supp. 2d at 1037; *see also BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1183 (D.C. Cir. 2003) (“When an agency offers multiple grounds for a decision, we will affirm the agency so long as any one of the grounds is valid, unless it is demonstrated that the agency would not have acted on that basis if the alternative grounds were unavailable.”).

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 G-I- Inc*, ID# 15776 (AAO Jan. 29, 2016)