



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

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

MATTER OF F-S-S-, LLC

DATE: JULY 25, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an informational technology (IT) staffing and services company, seeks to temporarily employ the Beneficiary as a “computer systems analyst” under the H-1B nonimmigrant classification for specialty occupations. *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 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, Vermont Service Center, denied the petition on two independent grounds, concluding that the evidence of record established neither (1) that the Beneficiary would perform services at the location specified in the petition, nor (2) that availability of specialty occupation work for the Beneficiary as a computer systems analyst had been established by the time the petition was filed.

The matter is now before us on appeal. The appeal, which includes a brief and additional evidence, asserts that the totality of the evidence establishes (1) that “a work assignment existed at the end-client site” prior to the petition’s filing and (2) that “the evidence is sufficient to establish that a valid employer-employee relationship exists between the Petitioner and the Beneficiary.”

Upon *de novo* review, we will dismiss the appeal on the issue of the availability of specialty occupation work.

However, we withdraw the Director’s determination regarding the work location, as we have concluded that the evidence of record before us on appeal shows that both the Form I-129, the Petitioner for a Nonimmigrant Worker, and the labor condition application (LCA) had specified the address where the claimed end-client is located. We shall later comment upon the employer-employee issue, but we shall not here determine its merits, as we find that the Director’s decision did not articulate that issue as a basis for denial.

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:

- (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).

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.* 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.

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Additionally, 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* 8 C.F.R. § 103.2(b)(1); *see also Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978).

## II. THE PROFFERED POSITION

The Petitioner's letter on appeal summarizes the Beneficiary's employment situation as follows:

Specifically, the Petitioner has offered the Beneficiary the position of Computer Systems Analyst. The Beneficiary has been assigned by the Petitioner to work on a project at the office of [REDACTED] at [address provided]. The Beneficiary's assignment to this project has been arranged through the succession of contracts as follows: [The Petitioner] - [REDACTED] - [REDACTED]

As evidence of the Beneficiary's employment at [REDACTED] the Petitioner submitted a copy of the Beneficiary's identification badge, the Petitioner's job-offer letter to the Beneficiary, and copies of some recent timesheets reflecting [REDACTED] as the Beneficiary's work location. However, the Petitioner did not provide documentation from [REDACTED] regarding the Beneficiary's work. The Petitioner attested that it could not provide such documents "due to [REDACTED] policy against providing documentation of consultants' assignments" - a policy, by the way, that is not corroborated by any submission from [REDACTED]

In its letter submitted on appeal, [REDACTED] also claims inability to provide documentary evidence of the terms and conditions of the agreement governing the work that it has arranged for the Beneficiary to perform at [REDACTED]. The pertinent portion of the letter states:

A signed Master Consulting Services Agreement between [REDACTED] and [REDACTED] is in place, and due to policy and confidentiality information in the agreement with our Client, we cannot provide this document.

In any event, the record of proceedings does not contain contractual documents from [REDACTED] business records, memoranda, letters, or any other form of documentation addressing the Beneficiary or the proffered position, including such factors as the position's duties and related educational requirements, or details of any agreements with the Petitioner with regard to supervision and control of the Beneficiary's performance at [REDACTED]. Likewise, there are no [REDACTED] business records, memoranda, letters, or communications in any form indicating that it had any contact, or committed to any conditions or terms, with the Petitioner with regard to any facet of whatever services the Beneficiary would perform for it.

The Petitioner's response to the Director's request for evidence (RFE) included a two-page "Detailed Itinerary" which provides 40 bullet-point statements to describe the Beneficiary's "Roles and Responsibilities." We need not quote them here, as neither [REDACTED] nor the end-client, [REDACTED] have submitted any documents that confirm, or otherwise corroborate that the Beneficiary would

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actually perform all of those roles and responsibilities. “[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)).

PTR’s letter submitted with the appeal describes the proposed duties, verbatim as follows:

As a Senior Computer Systems Analyst [the Petitioner] will be involved in data center migration, System Admin Activities, and plays a key role in all his assignments of allocated projects. His duties include:

1. Analyze, Plan, and Migrate the systems (such as RHEL, APACHE, Websphere, JBOSS, [REDACTED] etc.), existing legacy applications from Old Data [C]enter to new Data Center.
2. Trouble shooting performance issues encountered after migrating the system to the new data center.
3. Prepare and document detailed software and system specifications.
4. Configuring, Tuning and monitoring the applications and resolving the same as per the SLA [(a document not identified)].
5. Automating various day to day tasks using shell scripts.

The Petitioner does not explain how these five sets of duties correlate to the 40 sets of duties asserted in the RFE reply’s “Detailed Itinerary,” and [REDACTED] does not refer to or confirm those 40 sets of duties.

### 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. The issue before us is whether the Petitioner had established that specialty occupation work for the Beneficiary as a computer systems analyst had been secured for him at the time of filing. Here, where the Beneficiary would be assigned to perform project work for a third-party end-client, evidence from that entity regarding the specific duties to be performed for it, the substantive nature of those duties, and the educational level of any body of highly specialized knowledge in a specific specialty needed to perform those duties is critical and essential for establishing that the Beneficiary would actually perform specialty-occupation-level computer-systems-analyst work as claimed as the basis of the petition.

In the instant case, the record of proceeding does not include substantive evidence from the end-client, [REDACTED] regarding such material matters as the scope of duties that the Beneficiary would perform; any relative level of uniqueness, complexity, and/or specialization that may characterize that position or its constituent duties as performed in the context of the [REDACTED] project to which the Beneficiary would be assigned; [REDACTED] recruiting and hiring practices for the type of position that the Beneficiary would fill; and whatever educational requirements for the proffered position that [REDACTED] may have communicated to [REDACTED] for candidate selection. As we noted, the

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record's submissions do not include contractual documents signed by the [REDACTED] or statements by [REDACTED] adopting or confirming the accuracy of the Petitioner's and [REDACTED] assertions about the nature and requirements of the proffered position. Further, the documents submitted on appeal indicate that the Beneficiary has been working at [REDACTED] on IT matters, but they do not establish any particular educational, training, or experience requirements for the work they reference.

As a result of the evidentiary deficiencies catalogued above, the record of proceeding lacks a sufficiently credible and probative factual foundation to establish the actual range of duties that the Beneficiary would perform for the end-client, [REDACTED] the substantive nature of those duties; and the educational, or education-equivalency, requirements for those duties.

While the inadequacy of the evidence as discussed above is decisive, there are discrepancies in the evidence presented that materially undermine the credibility of the petition. By submitting an LCA certified for a Level I prevailing-wage rate level - the lowest paying of the four levels that are assignable - the Petitioner attested that the proffered position comports with following description that the Department of Labor provides for that level:

**Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

The Department of Labor's descriptions of the three higher prevailing-wage rates reflect that positions meriting only a Level I prevailing-wage rate involve significantly less exercise of individual responsibility, independent judgement, and experience.<sup>1</sup>

In contrast to the lowest-level place in which the certified LCA places the proffered position in the wage- rate hierarchy, we note that:

- [REDACTED] letter submitted on appeal states that the Beneficiary will be providing the services of a "Senior Computer Systems Analyst."

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<sup>1</sup> 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.flcdcenter.com/download/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.flcdcenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf).

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- In its letter of support, the Petitioner declared that, “[f]or the position offered, it is not uncommon for the incumbent to also possess a master’s degree and/or a number of years of experience with increasing responsibility in programming analysis or engineering.

As an additional discrepancy, we note that, in contrast to the Petitioner’s and [REDACTED] descriptions of the proffered position as that of a computer systems analyst, the emails submitted on appeal as proof of the Beneficiary’s employment at [REDACTED] identify the Beneficiary as “Linux System Administrator,” a job title associated with the “Network and Computer Systems Administrators” occupational group, which is distinct from the “Computer Systems Analysts” occupational group and is characterized by different duties, responsibilities, and educational requirements. See U.S. Dep’t of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., “Network and Computer Systems Administrators,” <http://www.bls.gov/ooh/computer-and-information-technology/network-and-computer-systems-administrators.htm> (last visited July 20, 2016).

It is incumbent upon the Petitioner to resolve any inconsistencies in the record by independent objective evidence, and any attempt to explain or reconcile such inconsistencies will not suffice unless the Petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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. *Id.*

The record’s lack of evidence sufficient to establish the substantive nature of the work to be performed by the Beneficiary and its educational requirements 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 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.

As the Petitioner has not established that, by the time of the petition’s filing, it had secured work for the Beneficiary that 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. Therefore, the appeal will be dismissed.

As a corollary matter, we note, hypothetically, that even if the Petitioner had established that the particular position proffered in this petition belonged within the Computer Systems Analysts occupational group - despite the absence of evidence of endorsement by the end client - that would not be sufficient to establish the position as satisfying the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)

(I) as one for which a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry.

We recognize the Department of Labor's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>2</sup> The *Handbook* indicates that computer systems analysts do not constitute an occupational group (such as, for example, physicists or physicians) for which entry categorically requires a specialty-occupation level of education, that is, at least a U.S. bachelor's degree in a specific specialty, or the equivalent. We refer the Petitioner to the *Handbook's* "Computer Systems Analysts" chapter, and the following excerpt in particular:

A bachelor's degree in a computer or information science field is common, although not always a requirement. Some firms hire analysts with business or liberal arts degrees who have skills in information technology or computer programming.

### **Education**

Most computer systems analysts have a bachelor's degree in a computer-related field. Because these analysts also are heavily involved in the business side of a company, it may be helpful to take business courses or major in management information systems.

Some employers prefer applicants who have a master's degree in business administration (MBA) with a concentration in information systems. For more technically complex jobs, a master's degree in computer science may be more appropriate.

Although many computer systems analysts have technical degrees, such a degree is not always a requirement. Many analysts have liberal arts degrees and have gained programming or technical expertise elsewhere.

Many systems analysts continue to take classes throughout their careers so they can learn about new and innovative technologies. Technological advances come so rapidly in the computer field that continual study is necessary to remain competitive.

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<sup>2</sup> All of our references are to the 2016-2017 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/ooh/>. We do not, however, maintain that the *Handbook* is the exclusive source of relevant information. That is, the occupational category designated by the Petitioner is considered as an aspect in establishing the general tasks and responsibilities of a proffered position, and USCIS regularly reviews the *Handbook* on the duties and educational requirements of the wide variety of occupations that it addresses. To satisfy the first criterion, however, the burden of proof remains on the Petitioner to submit sufficient evidence to support a finding that its particular position would normally have a minimum, specialty degree requirement, or its equivalent, for entry.

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Systems analysts must understand the business field they are working in. For example, a hospital may want an analyst with a thorough understanding of health plans and programs such as Medicare and Medicaid, and an analyst working for a bank may need to understand finance. Having knowledge of their industry helps systems analysts communicate with managers to determine the role of the information technology (IT) systems in an organization.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., "Computer Systems Analysts," <http://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4> (last visited July 20, 2016).

Accordingly, the proffered position's inclusion within the Computer System Analysts occupational group would not be in itself be sufficient to establish that that particular position would require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a computer, IT, or closely related specialty, as would be required to qualify the position as a specialty occupation in accordance with the "specialty occupation" definitions at 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

#### IV. THE EMPLOYER-EMPLOYEE ISSUE

Since the identified basis for denial is dispositive of the Petitioner's appeal, we need not address this other ground of ineligibility. Nevertheless, we will briefly note and summarize it here with the hope and intention that, if the Petitioner seeks again to file a petition to classify the Beneficiary or another person as a temporary worker in an H-1B specialty occupation, it will submit sufficient independent objective evidence to address and overcome this additional ground in any future filing. As the record now stands, however, even if the Petitioner had prevailed on the ground upon which we are dismissing the appeal, the evidentiary deficiencies with regard to the employer-employee issue would preclude approval of the petition at this time.

The record lacks contractual and other documentary evidence from the end-client that would be relevant to determining such material factors of control over the Beneficiary and his work as, for instance, where the authority would reside to determine and assign day-to-day project tasks to the Beneficiary, and who would evaluate the quality, efficiency, and acceptability of the Beneficiary's work as it is being performed at the end-client's location.

The documentary evidence submitted by the Petitioner and [REDACTED] are relevant, but they do not convey sufficiently extensive and credible indicia of control to establish the requisite relationship between the Beneficiary and the Petitioner to qualify the Petitioner as a U.S. employer as defined at 8 C.F.R. § 214.2(h)(4)(ii).

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control the Beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the Beneficiary, who will provide the instrumentalities and tools, and

who has the right or ability to affect the projects to which the Beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the Beneficiary's employer. Without full disclosure of all of the relevant factors, we are unable to find that the requisite employer-employee relationship will exist between the Petitioner and the Beneficiary.

#### V. 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 F-S-S, LLC*, ID# 17293 (AAO July 25, 2016)