



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

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

MATTER OF F-, INC.

DATE: JULY 27, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an information technology and software development company, seeks to temporarily employ the Beneficiary as a “software engineer” 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, Vermont Service Center, initially approved the petition. Upon subsequent review, the Director revoked the approval of the petition, concluding that the Petitioner filed a duplicate H-1B petition on behalf of the Beneficiary in the same fiscal year without a legitimate business need.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred in finding that the Petitioner filed a duplicate H-1B petition.

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

I. REVOCATION

U.S. Citizenship and Immigration Services (USCIS) may revoke the approval of an H-1B petition, on notice and an opportunity to rebut, pursuant to 8 C.F.R. § 214.2(h)(11)(iii), which states the following:

- (A) Grounds for revocation. The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:
- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
 - (2) The statement of facts contained in the petition was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or

(b)(6)

Matter of F-, Inc.

- (3) The petitioner violated terms and conditions of the approved petition; or
 - (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
 - (5) The approval of the petition violated paragraph (h) of this section or involved gross error.
- (B) Notice and decision. The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

Upon review of the record, we determine that the Director properly revoked the approval of the petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(5).

II. PROCEDURAL HISTORY

In the Form I-129, Petition for a Nonimmigrant Worker, and the supporting documentation, the Petitioner indicated that the Beneficiary will work offsite at [REDACTED] New Jersey [REDACTED] an address identified as that of the Petitioner's end client, [REDACTED] (End Client). The labor condition application states that the proffered position corresponds to Standard Occupational Classification (SOC) code and occupation title "15-1132, Software Developers, Applications," from the Occupational Information Network (O*NET) at a Level II (qualified) wage level.

The Director initially approved the petition on May 2, 2014. Thereafter, the Director issued a notice of intent to revoke (NOIR), stating that the approval involved gross error. Specifically, the Director indicated that the Petitioner and another employer, [REDACTED] filed H-1B petitions for the same Beneficiary, and they appeared to be related entities that filed multiple H-1B petitions in violation of 8 C.F.R. § 214.2(h)(2)(i)(G).

After reviewing the Petitioner's response to the NOIR, the Director revoked the approval of the petition, finding that the Petitioner had not overcome the grounds for revocation. On appeal, the Petitioner asserts that the Director's decision was erroneous, and maintains that it is not affiliated with [REDACTED]

Matter of F-, Inc.

III. MULTIPLE H-1B FILING

We reviewed the record in its entirety, including the H-1B petition filed by [REDACTED] and determine that the Director's decision to revoke the petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(5) was correct.¹ Specifically, the Petitioner has not adequately established that it is not related to [REDACTED]

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(G) states, in pertinent part, the following:

An employer may not file, in the same fiscal year, more than one H-1B petition on behalf of the same alien if the alien is subject to the numerical limitations of section 214(g)(1)(A) of the Act or is exempt from those limitations under section 214(g)(5)(C) of the Act. If an H-1B petition is denied, on a basis other than fraud or misrepresentation, the employer may file a subsequent H-1B petition on behalf of the same alien in the same fiscal year, provided that the numerical limitation has not been reached or if the filing qualifies as exempt from the numerical limitation. Otherwise, filing more than one H-1B petition by an employer on behalf of the same alien in the same fiscal year will result in the denial or revocation of all such petitions. If USCIS believes that related entities (such as a parent company, subsidiary, or affiliate) may not have a legitimate business need to file more than one H-1B petition on behalf of the same alien subject to the numerical limitations of section 214(g)(1)(A) of the Act or otherwise eligible for an exemption under section 214(g)(5)(C) of the Act, USCIS may issue a request for additional evidence or notice of intent to deny, or notice of intent to revoke each petition. If any of the related entities fail to demonstrate a legitimate business need to file an H-1B petition on behalf of the same alien, all petitions filed on that alien's behalf by the related entities will be denied or revoked.

We find that the Petitioner has not provided sufficient evidence to rebut the Director's finding that the Petitioner and [REDACTED] are related entities. In response to the NOIR, the Petitioner asserted that it and [REDACTED] are "totally unrelated entities" and the fact that both petitions were filed by the same attorney is "pure coincidence." The Petitioner concluded by stating that "we are unable to provide any documents on behalf of [REDACTED] as we have no control over them nor any relationship with them, corporate or otherwise."

The Petitioner submitted the following documentation in response to the NOIR:

- Letter from Corporate Counsel;
- Articles of Incorporation of [REDACTED]²;
- Amended By-Laws of [REDACTED];
- Shareholders' Agreement;

¹ The file number for the petition filed by [REDACTED] is [REDACTED]

² The Petitioner claims to be the successor-in-interest of [REDACTED]

Matter of F-, Inc.

- Certificate of Amendment – [REDACTED]
- Director’s Consent – Petitioner;
- Share Transfer Agreement;
- Shareholders’ Resolutions; and
- Copy of the Petitioner’s 2013 IRS Form 1120S, U.S. Income Tax Return for an S Corporation.

On appeal, the Petitioner asserts that these documents confirm that the Petitioner is not in any way affiliated with [REDACTED]

While the entities may be separately incorporated and do not appear to be affiliates or to have a parent-subsidary relationship, they, nevertheless, appear to be closely connected. Again, the petitions filed by the Petitioner and [REDACTED] are virtually identical, and identify the same job duties, the same end client, and the same work location. Moreover, the petition filed by [REDACTED] contains a letter from the Petitioner, dated March 4, 2014, which states that “[the Petitioner] has been contracted with [REDACTED] for the professional services to be provided to this project which is a long term assignment. . . .” As noted by the Director, this statement directly contradicts the Petitioner’s statements in response to the NOIR, where it claimed that it has no relationship, “corporate or otherwise,” with [REDACTED] “[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.

The Petitioner acknowledges that it has been contracted with [REDACTED] to provide services on the End Client project, in contrast to its prior assertions. There is no evidence, however, that the End Client requested multiple filings for its business need. Therefore, we find that the Petitioner did not establish a legitimate business need for filing multiple H-1B petitions.

IV. SPECIALTY OCCUPATION

Even if the Petitioner were to overcome the ground for the Director’s revocation of the approval of the petition, it could not be found eligible for the benefit sought because 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.³

³ 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.

(b)(6)

Matter of F-, Inc.

A. 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). 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).

B. Analysis

We find that the record of proceedings contains insufficient evidence regarding the duties of the proffered position. In support of the petition, the Petitioner submitted a letter from the End Client which claims that it has contracted with the Petitioner for management of its ‘ [REDACTED] ’ project, pursuant to an executed Master Services Agreement (MSA). The letter briefly described the duties of the proffered position in list format. However, the Petitioner did not submit a copy of the MSA or any additional documentation, such as a statement of work, which would describe the nature

(b)(6)

Matter of F-, Inc.

of the [REDACTED] project in detail and the Beneficiary's proposed duties as related to the project. Without a copy of the MSA or similar documentation confirming that existence of this project and describing the specific duties the Beneficiary is required to perform, we cannot discern the nature of the position or whether the position requires the theoretical and practical application of a body of highly specialized knowledge attained through a baccalaureate program. Without a meaningful job description within the context of non-speculative employment, the Petitioner may not establish any of the alternate criteria under 8 C.F.R. § 214.2(h)(4)(iii)(A).⁴

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.

The record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position qualifies as a specialty occupation. Therefore, we cannot determine that description of the proffered position communicates: (1) the actual work that the Beneficiary would perform; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. As previously noted, "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

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).

reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92.

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.

V. EMPLOYER-EMPLOYEE

Finally, the petition could not be approved because the Petitioner has not demonstrated that it qualifies as a United States employer.

For H-1B classification, the Petitioner is required to submit written contracts between the Petitioner and the Beneficiary, or if there is no written agreement, a summary of the terms of the oral agreement under which the Beneficiary will be employed. *See* 8 C.F.R. § 214.2(h)(4)(iv)(A) and (B). The Petitioner did not submit such an agreement, and only briefly summarized the terms of the Beneficiary's employment in its letter of support submitted with the petition. Although the Petitioner submitted a letter from the End Client, the letter does not identify the Beneficiary by name, and does not provide any level of specificity as to the Beneficiary's duties and the requirements for the position. The letter also does not list the length of employment or any specific projects to be assigned, and states only that the project is expected to last through 2017.

Moreover, the Petitioner has not sufficiently established its relationship with the End Client. Although the End Client refers to an MSA in its March 4, 2014, letter, the record does not contain a copy of the MSA or any other documentation to corroborate the claimed contractual relationship and to substantiate work for the duration of the requested period.

As stated in the Form I-129 and the Labor Condition Application, the Petitioner has indicated that the Beneficiary would work at the offices of its End Client, as a software engineer, for the duration of the petition. The Petitioner did not list its own, or any other office location, as a worksite in the petition. Therefore, the Beneficiary's work is solely based on the existence of sufficient work to be performed for the End Client. However, for the reasons discussed above, we find insufficient evidence to establish the existence of the claimed contractual agreement and consequently, the

claimed project, upon which the Beneficiary will work, or that the Petitioner alternatively has specialty occupation work available for the Beneficiary for the duration of the requested period.

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 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.

VI. CONCLUSION

The Director properly revoked the approval of the petition. The petition will remain revoked and the appeal will be dismissed for the above stated reasons.

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.

ORDER: The appeal is dismissed.

Cite as *Matter of F-, Inc.*, ID# 17286 (AAO July 27, 2016)