



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

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

MATTER OF B- INC.

DATE: JULY 27, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a software development and consulting firm, seeks to temporarily employ the Beneficiary as a “programmer analyst” 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, concluding that the Petitioner did not establish (1) that it had secured specialty occupation work for the Beneficiary, and (2) that it would have an employer-employee relationship with the Beneficiary.

The matter is now before us on appeal. Submitting a brief and additional evidence for our review, the Petitioner asserts that the Director overlooked substantive evidence and misapplied the law to the evidence of record.

Upon *de novo* review, we will dismiss the appeal.¹

I. THE PROFFERED POSITION

On the Form I-129, Petition for a Nonimmigrant Worker, and the labor condition application (LCA), the Petitioner assigned the job title “programmer analyst” to the proffered position and identified

¹ We follow the preponderance of the evidence standard as specified in *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).

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it as a Level I wage-level position that belongs within the “Computer Programmers” occupational category.

The Petitioner’s response to the Director’s request for evidence (RFE) provided the following “Detailed Job Description”:

- Identify client needs and requirements for developing J@EE based web applications by establishing personal rapport with potential and actual clients and with other persons in a position to understand service requirements; Based on these discussions, come up with detailed specification documents that must be used by the development team during development phase; - [20%]
- Create High Level Design and participate in architecture and design review meetings and ensure that desired performance, scalability, and maintainability requirements are met; - [20%]
- Program computers by encoding project requirements in various computer languages; using J2EE technologies and web design patterns; and entering coded information into the computer; - [15%]
- Collaborate with stake holders such as business team, and QA team to create an exhaustive testing strategy and test plan. Confirm program operation by conducting tests as per the test plan; and modify program sequence and/or codes; - [15%]
- Provide reference for use of prime and personal computers by writing and maintaining user documentation; and maintain help desk; - [10%]
- Maintain computer systems and programming guidelines by writing and updating policies and procedures; - [10%]
- Develop and maintain applications and databases requirements; and develop software systems. - [20%]

The Petitioner’s employment-offer letter to the Beneficiary stated that he would be “engaging in the development of IT solutions for different projects with our clients by utilizing [his] technical skills as a programmer analyst.” On appeal, referring to proprietary programs regarding which it presented relevant documentary evidence earlier in the proceedings, the Petitioner states that the Beneficiary “would be working to deliver services and solutions to the Petitioner’s clients using its “proprietary

_____ and _____ tools.” The Petitioner also attests that the Beneficiary would work onsite at the Petitioner’s offices, as part of a team that would include, among others, programmer analysts, project leads, and project managers.

II. SPECIALTY OCCUPATION

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). 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

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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.

B. Analysis

We determine that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation. Specifically, our review of the entire array of documentary evidence did not surface any evidence that, at the time of the petition's filing, the Petitioner had secured any project for the period of intended employment that would require the Beneficiary to provide the array of services that the Petitioner has described as comprising the proffered position and as requiring at least a bachelor's degree, or its equivalent, in a specific specialty.

The Petitioner has submitted a substantial amount of documentary evidence to represent the scope of its operations, including (1) materials showcasing its line of products and range of services in project management and what it describes as [REDACTED] and [REDACTED] and (2) samples of executed contractual documents, such as consulting and service agreements, master services agreements, statements of work, and contract proposals. However, the Petitioner has not established that the Beneficiary would be assigned to any of these projects. In fact, the Petitioner appears to acknowledge that it has not identified any particular project that would require the programmer analyst services for the period specified in the petition, but does not see this as an issue. On appeal, the Petitioner states:

An H-1B employer cannot prove in advance the duties a beneficiary will be handling, before the beneficiary is authorized to start working in the authorized position. [The Petitioner] can only affirm that the position duties are what have been claimed, that the company specializes in the type of work to be performed, and that it has a past practice of hiring degree individuals for the offered position. . . . [The Petitioner] has met its burden. The reputation of [the Petitioner] and its owners, its past accomplishment and its future business plans, are evidence that it has and will exercise sound business judgments. [The Petitioner] is confident that it will be in need of the specialty occupation services of [the Beneficiary] throughout the entire time requested in the H-1B petition and the LCA.

A position may be awarded H-1B classification only on the basis of evidence of record establishing that, at the time of the filing, definite, non-speculative work would exist for the beneficiary for the period of employment specified in the Form I-129. 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, 249 (Reg'l Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). We find that the documentary evidence upon which the Petitioner depends does not meet this requirement: it does not establish definite work that would engage the Beneficiary

if the petition were approved. For instance, the Petitioner has not presented work orders or other binding contractual documents specifying, for the employment period sought in the petition, the array of services that the Petitioner identifies as those which the Beneficiary would perform as a programmer analyst. Nor does the record contain business records, such as substantive planning documents, demonstrating that actual work, comporting with the record's description of the proffered position, would be available to the Beneficiary for the period specified in the petition. "[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)).

Thus, as the evidentiary framework of the petition does not include documents showing projects that would definitely include the Beneficiary's services as described by the Petitioner for the period specified in the petition, we are not persuaded by the Petitioner's view that the evidence of past contracts and the nature of its business are sufficient to show that the Beneficiary would be employed as stated in the petition.²

Thus, too, the Petitioner has not established the substantive nature of actual project-work to be performed by the Beneficiary. This aspect of the record 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

² 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).

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.

Even if there were sufficient substantive evidence to establish the proffered position as being that of a programmer analyst, a review of the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)* does not indicate that, simply by virtue of its occupational classification, such a position qualifies as a specialty occupation in that the *Handbook* does not state a normal minimum requirement of a U.S. bachelor's or higher degree in a specific specialty, or its equivalent, for entry into the occupation of programmer analyst. See 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/print/computer-systems-analysts.htm> (last visited July 25, 2016). As such, absent evidence that the position of programmer analyst satisfies one of the alternative criteria available under 8 C.F.R. § 214.2(h)(4)(iii)(A), the instant petition could not be approved for this additional reason.

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. The appeal will be dismissed for this reason.

III. U.S. EMPLOYER ISSUE

As our determination of the specialty occupation issue is determinative of the appeal, we need not address the U.S. employer issue in detail.

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant, in pertinent part, as an individual:

[S]ubject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . , who meets the requirements for the occupation specified in section 214(i)(2) . . . , and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1)

The term "United States employer" is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;

- (2) *Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and*
- (3) Has an Internal Revenue Service Tax identification number.

(Emphasis added); *see* Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 56 Fed. Reg. 61,111, 61,121 (Dec. 2, 1991) (to be codified at 8 C.F.R. pt. 214).

The Petitioner asserts that it has presented sufficient indicia of control over the Beneficiary and his work to establish that it would have the requisite employer-employee relationship with the Beneficiary by application of the common law principle of control as outlined and discussed at USCIS Policy Memorandum, HQ 70/6.2.8/AD [-] AD 10-24, *Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Replacements* (Jan. 8, 2010), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf>. We disagree.

The evidence of record does not contain sufficient evidence to establish either definite projects to which the Beneficiary would be assigned or the specific terms and conditions of whatever client contracts would generate such projects and govern the day-to-day control over the Beneficiary's performance of project work.

Lacking as it is in substantive evidence of actual client project(s) to which the Beneficiary would be assigned, and the specific contractual terms that would govern his supervision, accountability, and performance requirements, the record of proceeding does not present a sufficient array of factors for a reasonable determination of the employer-employer issue in accordance with the policy memorandum and the legal authorities that it cites. Thus, the evidence of record does not provide an adequate foundation for us to reasonably determine the particular business entity or entities, if any, that would have sufficient control over the Beneficiary and his work to qualify as a U.S. employer under the governing common-law employer-employee analysis required for such a determination.

Thus, the appeal will be dismissed also on the ground that the Petitioner has not established the employer-employee relationship with the Beneficiary required for it to qualify as a U.S. employer as required by the definition at 8 C.F.R. § 214.2(h)(4)(ii).

IV. CONCLUSION

For the reasons discussed above, the evidence of proceeding as supplemented on appeal does not establish that the Director's grounds for dismissing the petition was incorrect.

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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 B- Inc.*, ID# 17135 (AAO July 27, 2016)