



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

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

MATTER OF E-S- INC.

DATE: JUNE 7, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an information technology consulting company, seeks to temporarily employ the Beneficiary as a “software developer” 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, California Service Center, denied the petition. The Director concluded that the Petitioner had not demonstrated that the proffered position qualifies for treatment as a specialty occupation position.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the evidence submitted is sufficient to demonstrate eligibility.

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

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:

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- (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).

II. PROFFERED POSITION

In the H-1B petition, the Petitioner stated that the Beneficiary will serve as a “software developer.”¹ On the labor condition application (LCA) submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category “Software Developers, Applications” corresponding to the Standard Occupational Classification code 15-1132.²

In the H-1B petition, the Petitioner stated that the Beneficiary would work at [REDACTED] California from October 1, 2015, to September 2, 2018. Evidence in the

¹ 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.

² The Petitioner classified the proffered position at a Level I wage (the lowest of four assignable wage levels). The “Prevailing Wage Determination Policy Guidance” issued by the DOL provides a description of the wage levels. A Level I wage rate is generally appropriate for positions for which the Petitioner expects the Beneficiary to have a basic understanding of the occupation. This wage rate indicates: (1) that the Beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; (2) that he will be closely supervised and his work closely monitored and reviewed for accuracy; and (3) that he will receive specific instructions on required tasks and expected results. U.S. Dep’t of Labor, Emp’t & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf. A prevailing wage determination starts with an entry level wage and progresses to a higher wage level after considering the experience, education, and skill requirements of the Petitioner’s job opportunity. *Id.*

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record indicates that address is a location of [REDACTED], the claimed end-client. The LCA was certified for employment there and at the Petitioner's own location in [REDACTED] California.

The Petitioner submitted the following description of the duties of the proffered position when it filed the petition:

- Converting business requirements into functional and application system design documents;
- Constructing software applications using object-oriented language and development tools;
- Developing and implementing test validations of the applications;
- Analyzing test results and recommending modifications to the applications to meet project specification;
- Deploying the applications into existing systems and databases;
- Researching and analyzing existing systems for new systems and/or enhancements to existing systems; and
- Documenting modifications and enhancements made to the applications, systems and databases as required by the project.

The evidence of record indicates the path of contractual succession as follows: Petitioner → [REDACTED] → [REDACTED] → [REDACTED]

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. 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

We find that the Petitioner has not established the substantive nature of the duties the Beneficiary would perform if the H-1B petition were approved. For example, a letter from [REDACTED] contains the following description of the services the Beneficiary would provide:

- Developing testing framework and test suites using Java (J-Units for JBehave) to test new and existing [REDACTED] gateways (Both country specific and merchant specific)
- Creating test data and test plans for retail merchants for internet and point of sale transactions

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.

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- Collaborate with developers and test leads to improve test efficiency, automation and tools
- Work with development and operations to improve efficiency and effectiveness of automation
- Involved in developing and implementation of transaction logic for gateways
- Present technical and business solutions both internally and externally across multiple organization levels
- Maintain and/or update documentation (both internal and external i.e. merchant/customer specific) that communicates the standards and procedures
- Contributing to the team who is responsible in developing impact testing framework for [REDACTED] transactions
- Working very closely with Data Scientists to understand data requirements and also help with data mining and unscrambling.
- Tools used: Java 7, J-Behave, J-Units, Spring, Eclipse IDE, Bamboo, JIRA, Perl, Shell Scripting, JAXB Parser, XML, JSON

The duties are presented in abstract and generalized terms such as “work with development and operations,” “present technical and business solutions,” or “contributing to the team” that do not communicate what the Beneficiary would do on day-to-day basis or what bodies of knowledge are required to perform these duties. Further, the letter also states, “The project is expected to last through September 30, 2015.” That statement does not indicate that the project would continue through any part of the period of requested employment. As to the educational requirement of the proffered position, it states: “BS or MS in Software Engineering, Computer Science, IS, or other related field.”

A letter from [REDACTED] submitted reiterates the duty-descriptions provided by [REDACTED] but states that the proffered position is a “QA Analyst” position, which differs from the proffered position. It also states, “[REDACTED] has informed us they require the QA Analyst to hold at least a bachelor’s degree.”

In her request for evidence (RFE), the Director stated that “further evidence is still necessary such as recent statements of work (SOWs) Masters service Agreement and end-client letters between [REDACTED] and [REDACTED]. Acceptable SOWs and end-client letters should indicate the Beneficiary by name and the dates work will be provided for the Beneficiary.” In response, the Petitioner provided additional evidence. None of it came from [REDACTED]

In the decision of denial, the Director stated:

The entity ultimately employing the alien or using the alien’s services must submit a description of conditions of employment, such as contractual agreements, statements of work, work orders, service agreements, and/or letters from authorize officials of the ultimate client companies where the alien will work that describe, in detail, the duties that the alien will perform and the qualifications that are required to perform the job duties.

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On appeal, the Petitioner submits a letter, dated September 2, 2015, that it claims was prepared by [REDACTED]. On its face, the letter lists the duties proposed for the Beneficiary, indicates the percentages of time that will be spent performing the various duties, and states a requirement for a bachelor's degree in computer science or a related field. While this letter is acknowledged, we do not find it persuasive and will not discuss it further.⁴

Although the Director made clear in the RFE that the Petitioner should provide evidence from [REDACTED] showing the dates during which [REDACTED] had agreed to utilize the Beneficiary's services, no such evidence has been provided.⁵ The letter on appeal allegedly submitted by [REDACTED] indicates that the Beneficiary was then working at [REDACTED] but does not state whether [REDACTED] intends to utilize the Beneficiary's services at any point during the period of employment requested in this petition or, if it does, the beginning and end dates of that employment. As the evidence from [REDACTED] does not show that the Beneficiary would work at [REDACTED] location during the period of requested employment, the Petitioner has not shown that the Beneficiary would work there during that period, and has not, therefore, shown the substantive nature of the duties the Beneficiary would perform there during that period.

As recognized in *Defensor v. Meissner*, 201 F.3d 384, 387-8 (5th Cir. 2000), it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location in order to properly ascertain the minimum educational requirements necessary to perform those duties. In other words, as the nurses in that case would provide services to the end-client hospitals and not to the petitioning staffing company, the Petitioner-provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination. *See id.*

Further, the record lacks credible evidence that when the Petitioner filed the petition, the Petitioner had secured any other work of any type for the Beneficiary to perform during the requested period of employment. The record contains a Sub-Vendor Agreement executed by [REDACTED] and the Petitioner

⁴ Our finding that this letter lacks persuasive authority rests on several observations. First, the letterhead does not contain the end-client's address, telephone number, or any other contact information. The margins, line spacing, and justification are inconsistent, and the bullet-points are different sizes. Also, the end-client's logo is blurry, and the "@" symbol is blurry and nearly illegible.

The content of the letter contains similar deficiencies. As noted, the letter indicated the percentages of time the Beneficiary would spend performing the position's various duties. However, when added together those duties comprise more than 100% of the Beneficiary's time. Further, rather than provide dates of engagement, or even estimate, the letter states only that the end-client had contracted with [REDACTED] "for a long period of time." Such a vague statement does not demonstrate the existence of non-speculative work. Finally, we note that while the end-client addresses its agreement with [REDACTED] it does not address its agreement with [REDACTED] (in its letter dated March 23, 2015, [REDACTED] referenced a master services agreement executed between itself and the end-client).

Finally, there is no explanation as to why this letter was not submitted in response to the Director's RFE.

⁵ As indicated, this deficiency would exist even if we considered the letter submitted on appeal. "For a long period of time" is too vague of a statement to establish the Petitioner's claim.

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that sets out general terms pursuant to which the Petitioner might provide workers to [REDACTED] pursuant to the terms of work orders to be issued subsequently. A work order provided shows that [REDACTED] proposed that the Petitioner might assign the Beneficiary to it for assignment to the [REDACTED] California location of [REDACTED] from June 14, 2014, to June 16, 2015. The Petitioner also provided a list of companies for whom the Petitioner claims to be developing in-house projects, to which it claims it could assign the Beneficiary if no work was available at the [REDACTED] location. However, it provided insufficient evidence to corroborate the existence of those projects, or the substantive nature of the particular duties that their development would require.⁶

Further, the Petitioner made explicit in the employment agreement between it and the Beneficiary that it could assign the Beneficiary to a different, unidentified, project or projects and assign other, unidentified, duties to the Beneficiary as it deems appropriate. Even if [REDACTED] had stated that it intended to utilize the Beneficiary's services during all or part of the period of intended employment, that statement would not demonstrate that the Petitioner could not assign the Beneficiary elsewhere to perform other duties.⁷ For this additional reason, the Petitioner has not established the substantive nature of the duties the Beneficiary would perform if the visa petition were approved.

That the Petitioner did not establish the substantive nature of the work to be performed by the Beneficiary precludes a finding that the proffered position is a specialty occupation under 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

⁶ 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).

⁷ Although we will not discuss these issues in depth, the Petitioner's assertion that it may assign the Beneficiary to projects elsewhere raises the issue of whether the Beneficiary would work at a location for which the LCA is approved and whether, pursuant to the terms of the Beneficiary's placement on those other projects, the Petitioner would then exercise an employer-employee relationship with the Beneficiary.

appropriate for review for a common degree requirement, under the first alternate prong of criterion 2;⁸ (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.

For the reasons related in the preceding discussion, the Petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation.⁹

IV. CONCLUSION

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 E-S- Inc.*, ID# 16424 (AAO June 7, 2016)

⁸ The Beneficiary provided evidence that might ordinarily be relevant to various criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). For instance, the Petitioner provided vacancy announcements placed by other companies for software engineers and software developers. These might ordinarily be relevant to the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). In this case, however, because the Petitioner has not demonstrated the substantive nature of the duties the Beneficiary would perform if the visa petition were approved, it has not demonstrated that the Beneficiary would work as a software engineer or a software developer, and those vacancy announcements have not been shown to be relevant.

⁹ As this issue precludes approval of the petition, we need not and will not address any of the additional issues we have observed in our *de novo* review of this matter.