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

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

MATTER OF D-R- INC.

DATE: JUNE 13, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an IT 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, California Service Center, denied the petition. The Director concluded 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. PROCEDURAL HISTORY

In the Form I-129, Petition for a Nonimmigrant Worker, and the supporting documentation, the Petitioner indicated that the Beneficiary will work in-house at its location in [REDACTED] Illinois. 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 I (entry) wage level.

The Director found that another petitioner, [REDACTED] filed an H-1B petition on behalf of the same Beneficiary. The Director sent a notice of intent to deny (NOID) noting that the Petitioner and [REDACTED] may be related entities based on the following similarities:

- Both companies are located at the same address;
- Both companies are seeking to employ the beneficiary for the same position of software engineer;

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- Both companies are offering an annual salary of \$75,000/yr.;
- Both companies are seeking to employ the beneficiary for the same period of time;
- Both companies have the same CFO, [REDACTED];
- Both petition[s] were signed the same day;
- Both petitions have the same representative, [REDACTED];
- Both letters of support show identical formats and are mostly verbatim[: and]
- Both companies claim to provide in-house employment.

In response to the NOID, the Petitioner highlighted differences in the companies and asserted that they were not related. The Director denied the petition, noting that both companies' federal income tax returns in 2014 showed 100 percent ownership by the same individual, [REDACTED]. Therefore, the Director found that the Petitioner and [REDACTED] were affiliate entities that filed multiple H-1B petitions on behalf of the same Beneficiary without a legitimate business need.

II. MULTIPLE H-1B FILING

A. Law

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.

B. Analysis

We reviewed the record in its entirety, including the H-1B petition filed by [REDACTED] and determine that the Petitioner has not demonstrated that it did not file duplicate H-1B petitions for the

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same Beneficiary.¹ Specifically, the Petitioner has not adequately established that it is not related to [REDACTED]

On appeal, the Petitioner claims that its prior corporate affiliation with [REDACTED] terminated before the present petition was filed. In support, the Petitioner submits the following documentation, which includes:

- Stock transfer agreement;²
- Letter from the attorney who prepared the stock transfer paperwork;
- Letter from [REDACTED] stating a transfer of ownership has taken place;
- Corporate file detail report; and
- Change of registered office.

The documents indicate that ownership transfer took place immediately prior to filing the petition, and that [REDACTED] is the new stockholder. However, we note that as general evidence of ownership, stock transfer documentation alone is not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, to determine whether de facto control exists, the Petitioner should disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986). The Petitioner does not include copies of its corporate stock certificate ledger, stock certificate registry, corporate bylaws, and minutes. Without full disclosure of all relevant documents, we are unable to determine the elements of ownership and control.

Further, we note that despite transfer of the Petitioner's shares, the Petitioner and [REDACTED] are still in the same office space, share the same chief financial officer, and filed nearly identical petitions on the Beneficiary's behalf. Further, the Petitioner's new stockholder is the chief technical officer for [REDACTED]

In sum, we find that the Petitioner has not submitted sufficient documentation to demonstrate that its previous owner no longer has any ownership interest in or control over the Petitioner given the close nexus in business operations that still appears to exist between the two companies. Therefore, the

¹ The file number for the petition filed by [REDACTED] is [REDACTED]. The Petitioner submitted documentation to support the H-1B petition, including evidence regarding the proffered position and the Petitioner's business operations. While we may not discuss every document submitted, we have reviewed and considered each one.

² The transfer agreement is dated January 2, 2015; notably, the annual report indicates that shares of stock were authorized and issued only on December 31, 2014, immediately prior to the sale, when the Petitioner was established in 2009.

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Petitioner has not established that the Director's decision to deny the petition pursuant to 8 C.F.R. § 214.2(h)(2)(i)(G) was in error.

III. SPECIALTY OCCUPATION

As an additional basis, even if the Petitioner could demonstrate that it is no longer related to [REDACTED] and it did not file multiple H-1B petitions in violation of 8 C.F.R. § 214.2(h)(2)(i)(G), we find that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation.³ 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.⁴

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

³ In reviewing a matter *de novo*, we may identify additional issues not addressed below in the Director's decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003) ("The AAO may deny an application or petition on a ground not identified by the Service Center.").

⁴ 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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- (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).

B. Analysis

We find that the record of proceedings contains inconsistencies that undermine the Petitioner’s claims regarding the proffered position.⁵ Specifically, in response to the NOID, the Petitioner stated that the Beneficiary “will be working on supporting our customer [redacted] by completing engineering and development tasks from the [Petitioner’s] office in [redacted] IL” and that he “will . . . become part of the [redacted] support team.” According to the Petitioner’s master services agreement (MSA) with [redacted] which is located in California, a Statement of Work (SOW) has to be issued for services and deliverables. However, the Petitioner did not submit a copy of SOW in support of the MSA. Without a copy of the SOW or similar documentation describing the specific duties the Petitioner requires the Beneficiary 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).⁷

⁵ The Petitioner listed the worksite as in-house at [redacted] IL [redacted]. However, the copy of the lease submitted by the Petitioner for the [redacted] address indicates that the lease is for 200 square feet of space. The Petitioner has not indicated how many employees are working at this location; however, it seems unlikely that 200 square feet of space is sufficient given that both the Petitioner and [redacted] share this office suite.

⁶ We note that the copy of the contract submitted was only signed by the Petitioner and not by [redacted] which calls into question the existence of specialty occupation work for the Beneficiary.

⁷ 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

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. "[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 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.

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).

IV. EMPLOYER-EMPLOYEE

Finally, 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 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. Therefore, the petition cannot be approved for this additional reason.

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 D-R- Inc.*, ID# 16708 (AAO June 13, 2016)