



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

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

MATTER OF MUH-IT INC.

DATE: JUNE 21, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an information technology company, seeks to temporarily employ the Beneficiary as a “software developer” 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, denied the petition. The Director concluded that the proffered position is not a specialty occupation.

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 proffered position is not a specialty occupation.

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

I. SPECIALTY OCCUPATION

A. Legal Framework

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).

B. Proffered Position

In response to the Director’s request for additional evidence (RFE), the Petitioner described the Beneficiary’s day-to-day responsibilities as follows:

1. Develop and direct software systems testing and validation procedures, programming, and documentation 15%;
2. Modify existing software to correct errors in the existing hardware to improve system performance 15%;
3. Coordinate with systems analyst, engineers and programmers to design system software and obtain information on project limitations and capabilities, performance requirements and interfaces 10%;
4. Analyze user needs and software requirements 15%;
5. Develop designs with a specific timeframe 15%;
6. Design, develop and modify software systems using mathematical models to predict and measure the outcome of the applications 15%;
7. Store, retrieve and manipulate data for analysis of system capabilities and requirements and coordinate software system installation 10%;
8. Monitor equipment functioning to ensure specifications are met 5%

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 15-1132.¹

C. 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.²

1. The Petitioner Does Not Require a Bachelor’s Degree in a Specific Specialty

The Petitioner provided inconsistent statements regarding requirements for the proffered position and has not established that the duties of the proffered position require the attainment of at least a bachelor’s degree in a specific specialty, or its equivalent.

Specifically, the Petitioner initially stated that the proffered position requires a bachelor’s degree in “[s]cience, computer science, computer engineering, electronics, engineering, physical sciences or equivalent.” In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor’s or higher degree in more than one specialty is recognized as satisfying the “degree in the specific specialty (or its equivalent)” requirement of section 214(i)(1)(B) of the Act. In such a case, the required “body of highly specialized knowledge” would essentially be the same. Since there must be a close correlation between the required “body of highly specialized knowledge” and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be “in *the* specific specialty (or its equivalent),” unless the Petitioner establishes how each field is directly related to the duties and responsibilities of the particular

¹ The Petitioner classified the proffered position at a Level I wage (the lowest of four assignable wage levels). We will consider this selection in our analysis of the position. 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 she will be closely supervised and her work closely monitored and reviewed for accuracy; and (3) that she 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.*

² 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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position such that the required “body of highly specialized knowledge” is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory “the” and the regulatory “a” both denote a singular “specialty,” we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. *See* section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Here, the Petitioner claimed that the duties of the proffered position can be performed by an individual with a bachelor’s degree in science, computer science, computer engineering, electronics, engineering, physical sciences or equivalent. The issue here is that it is not readily apparent that all of these fields of study are closely related; or that, any science degree is directly related to the duties and responsibilities of the particular position proffered in this matter.

Here and as indicated above, the Petitioner, who bears the burden of proof in this proceeding, has not established either (1) that science, computer science, computer engineering, electronics, engineering, and physical sciences are closely related or (2) that any science field, such as chemistry, for example, would be directly related to the duties and responsibilities of the proffered position. Absent this evidence, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor’s or higher degree in a specific specialty, or its equivalent, under the Petitioner’s own standards. As explained above, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

In response to the RFE, the Petitioner submitted a position evaluation from [REDACTED] at [REDACTED] which stated that the software developer position requires “specialized knowledge through advanced post-secondary educational programs or through progressively responsible work experience in the field of Computer Science or a close related field.”³ Further, on appeal, the Petitioner now claims that it requires a “[b]achelor’s degree in

³ We carefully evaluated [REDACTED] assertions but, for the following reasons, determined his opinions lent little probative value. First, [REDACTED] does not reference, cite, or discuss any studies, surveys, industry publications, authoritative publications, or other sources of empirical information which he may have consulted to complete his evaluation. Second, [REDACTED] does not discuss the duties of the proffered position in any substantive detail. To the contrary, he simply listed the tasks in bullet-point fashion without discussion. Third, the record does not indicate whether [REDACTED] was aware that, as indicated by the Level I wage on the LCA, the Petitioner considered the proffered position to be an entry-level position for a beginning employee who has only a basic understanding of the occupation. In other words, the Petitioner has not demonstrated that [REDACTED] possessed the requisite information to adequately assess the nature of the position. As such, we find that [REDACTED] opinion letter lends little probative value.

computer science or a related field.” This is a much narrower requirement than the Petitioner originally stated. However, the Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. at 249.

The Petitioner has not demonstrated that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.

2. The Petitioner Has Not Established the Nature and Scope of the Beneficiary’s Employment

We also find that the proffered position does not qualify as a specialty occupation, as the evidence of record is insufficient to establish the substantive nature of the position and its constituent duties.

For instance, we observe that the job duties are copied verbatim from the O*NET Summary Report for the occupational category “Software Developers, Applications” corresponding to SOC code 15-1132.⁴ This type of description may be appropriate when defining the range of duties that may be performed within an occupational category, but it does not adequately convey the substantive work that the Beneficiary will perform within the Petitioner’s business operations and, thus, generally cannot be relied upon by a petitioner when discussing the duties attached to specific employment. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of that petitioner’s business operations, as well as demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the Beneficiary for the period of employment requested in the petition. Simply submitting a generic job description that is not specific to the Beneficiary and the Petitioner’s operations is insufficient to establish the substantive nature of the proffered position.

On appeal, the Petitioner submits another document titled “Description of work to be performed.” But the document also lists proposed duties in generalized and generic terms that do not sufficiently convey substantive information to establish the relative complexity, uniqueness and/or specialization of the proffered position. For example, the document states the Beneficiary will “collaborate with other programmers to design and implement product features,” “quickly produce well-organized, optimized, and documented source code,” and “create and document software tools required for product.” The Petitioner’s description is generalized and generic in that the Petitioner does not convey either the substantive nature of the work that the Beneficiary would actually perform, any particular body of highly specialized knowledge that would have to be theoretically and practically applied to perform it, or the educational level of any such knowledge that may be necessary. The abstract, speculative level of information regarding the proffered position and the duties is

⁴ For more information, see O*NET Online Summary Report for “Software Developers, Applications,” <http://www.onetonline.org/link/summary/15-1132.00> (last visited June 20, 2016).

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exemplified by the phrases “contribute to technical design documentation,” “contribute to qualify assurance and SDLC improvements,” and continuously learn and improve skills.”

We acknowledge that the Petitioner submits various other descriptions of the proffered position on appeal and asserts that the Beneficiary “will be focused on enhancing the online portal . . . specifically for the Petitioner’s client, [REDACTED].” But the record contains discrepancies and misleading information that undermine its claims regarding the project. Specifically, the Petitioner has not established that it has a contractual relationship with [REDACTED]. For example, the Petitioner submitted a purchase order; however, the purchase order is between [REDACTED] and [REDACTED]. Further, the description for the purchased item is described as “software support services” and “contracting services,” but there is no indication that such services relate to the Petitioner. However, even if this purchase order is for the Petitioner, it is dated after filing of this petition. 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). Moreover, the delivery date is listed as April 2016, which does not cover the dates of intended employment for the Beneficiary, from October 2015 to September 2018.

Further, the Petitioner provided inconsistent information regarding its relationship with [REDACTED]. On appeal, the Petitioner initially states that it “has an existing statement of work with its client, [REDACTED].” In support, the Petitioner submits a software reseller agreement but it identifies [REDACTED] as a reseller of the Petitioner’s product. [REDACTED] obligation includes “distribute and deliver products to customers,” “marketing,” “pricing,” “end-user license agreements and evaluation agreements,” and more.

On appeal, the Petitioner later claims that its [REDACTED] is being developed jointly with [REDACTED] pursuant to a partnership agreement. The Petitioner states that “two parties . . . have collaborated to work together on this application due to lack of all expertise available with each of them.” The record does not contain a partnership agreement, but the Petitioner submitted a master service agreement (MSA) between the two parties. The MSA indicates that the Petitioner will be added as one of [REDACTED] vendors and that the Petitioner will “begin furnishing the services according to the specifications and requirements of this agreement and the work order.” The Petitioner also submitted a work order with [REDACTED] which states “further to the request from [REDACTED] (Statement of work attached from Requestor) additional enhancements to the [REDACTED] product, [the Petitioner] will employ the services of [the Beneficiary] who will be working as a Software Developer.” Notably, the statement of work from [REDACTED] was not attached to the work order. Further, the project is misspelled as [REDACTED] instead of [REDACTED]. Moreover, even if this work order was properly executed and valid, it was signed on August 15, 2015, after filing of this petition.⁵ Again, USCIS regulations affirmatively require a petitioner to establish eligibility for the

⁵ 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:

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benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(1). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). Further, the projected completion date is November 1, 2017, which does not cover the duration of H-1B employment requested in the petition. Therefore, both documents hold little probative weight in these proceedings.

Further, the Petitioner's designation of this position as a Level I, entry-level position further undermines the Petitioner's characterizations of the proffered position.⁶ For example, the Petitioner indicated in response to the RFE that the job duties are "so complex and specialized because they require a highly advanced body of knowledge" and the Beneficiary "will be responsible for developing and directing the [redacted] systems testing, verification and validation procedures." However, in designating the proffered position at a Level I, entry-level wage rate, the Petitioner has indicated that the proffered position is a comparatively low, entry-level position relative to others within the occupation, in which the Beneficiary is only required to have a basic understanding of the occupation. The Petitioner's designation of the proffered position as a Level I, entry-level position thus undermines the Petitioner's claims regarding the proffered position, such as directing [redacted] system testing. No explanation for the variances was provided by the Petitioner.

In addition, the record contains inconsistencies regarding the Petitioner's location. On appeal, we issued an RFE noting that we are unable to verify that the Petitioner is registered to do business at

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).

⁶ Nevertheless, a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation, just as a Level IV wage-designation does not definitively establish such a classification. In certain occupations (e.g., doctors or lawyers), a Level I, entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty, or its equivalent. That is, a position's wage level designation may be a relevant factor but is not itself conclusive evidence that a proffered position meets the requirements of section 214(i)(1) of the Act.

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the location specified in the Form I-129. In response, the Petitioner submits its lease that matches the address provided in the petition; however, it is noted that the leased space is only for 169 square feet. The Petitioner states in its organization chart that it has one employee, three consultants, and two other H-1B employees in addition to the Beneficiary. Although the Petitioner's office space does not appear to have space for all of these worker, the Petitioner did not explain where its employee and contractors would perform their duties.

Further, all of the corporate documents the Petitioner has provided, including its tax returns, quarterly statements, agreements, and business certificates, list the Petitioner's address in [REDACTED] New Jersey. An Internet search further indicates that this address in [REDACTED] New Jersey is a private residence. Although the Petitioner has submitted a lease for a suite at an address in [REDACTED] and provided photos of some office furniture and equipment, the Petitioner has not sufficiently established that the Beneficiary will be employed in-house at the address specified in the petition.

"[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. "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.* at 591.

Because of the discrepancies discussed above, we cannot determine the nature and scope of the Beneficiary's employment. The record lacks evidence sufficiently concrete and informative to demonstrate: (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.

II. 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.⁷

ORDER: The appeal is dismissed.

Cite as *Matter of MUH-IT Inc.*, ID# 16401 (AAO June 21, 2016)

⁷ Since the identified bases for denial are dispositive of the Petitioner's appeal, we will not address any of the additional grounds of ineligibility we observe in the record of proceeding.