



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

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

MATTER OF S-S-, INC

DATE: MAR. 29, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a software consulting, training, and development company, seeks to temporarily employ the Beneficiary as a “Computer Programmer” under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) § 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 evidence did not sufficiently establish that the Petitioner would employ the Beneficiary in a specialty occupation position for the requested H-1B validity period, and that the Petitioner had made a reasonable and credible offer of employment to the Beneficiary.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Director erred in denying the petition.

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) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must meet one of the following criteria:

- (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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Fed. Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

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As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets 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 proffered 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”). Applying this standard, USCIS regularly approves H-1B petitions for qualified individuals who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. USCIS must examine the ultimate employment of the individual, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position or an employer’s self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

B. The Proffered Position

The labor condition application (LCA) submitted to support the visa petition states that the proffered position corresponds to Standard Occupational Classification (SOC) code and occupation title “15-1131, Computer Programmers,” from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I (entry) position.

In a letter dated March 29, 2014, the Petitioner explained that it is developing a new software product, [REDACTED] and that the Beneficiary will work on this in-house project. The Petitioner stated that it “aims to bring this product suite to the market in late 2015 and is currently in the process of engaging with potential clients to solidify the systems requirements and conduct prototype building.” The Petitioner further explained that it “forecasts a consistent need for IT resources including but not limited to Systems Analysts, [and] Programmer/Analysts . . . for the duration of this development effort and during the support and maintenance beyond 2015.”

In the same letter, the Petitioner submitted a lengthy list of duties for the proffered position, which include data analysis and design responsibilities, development responsibilities, test planning and execution responsibilities, and product support responsibilities.

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The Petitioner submitted a separate "Itinerary of Services" for the Beneficiary which listed the following job duties for the position titled "Computer Programmer Analyst" (verbatim):

1. Analyzing business requirements, participating in business and technical discussions with business analysts and team members.
2. Effectively interacting with clients directly and gathered the Requirements and delivering it within the deadline.
3. Preparing for Technical Specification Documentation & Quality Test Reports
4. Involving in Bug fixing, Performance Tuning of programs and overseeing the Quality procedures related to the project.
5. Work with Data Dictionary objects in ABAP Programming.
6. Development using Modularization techniques; Include, Subroutines, Function modules.
7. Reports: Creation of Classical, Interactive and ALV Reports.
8. Dialog Programming: Good knowledge on dialog programming.
9. OOPS: Knowledge on OOPS concepts.
10. ABAP Query's: Creation of reports using ABAP Query.
11. Conversion/Interfaces: Batch Data Communication (BDC), LSMW, BAPI.
12. Layout Sets: Create new and modify existing layouts using Scripts, Forms and Adobe Forms.
13. Enhancements: Work in Enhancements and Modifications using Enhancement framework, BADI's, Customer Exits & User Exits.
14. Cross Applications: Carry Data across Distribution using ALE, IDOCs and RFC
15. Work with the development team ensuring that consistent design standards reflecting best practices applied.
16. Work with project teams and customer service teams as a technical resource and contribute to successful implementation.

In a letter dated September 11, 2014, submitted in response to the Director's request for evidence (RFE), the Petitioner provided another list of job duties with percentages of time spent on each duty, as follows (verbatim):

- Part of requirement gathering Business Process Re-engineering, Blueprinting, configuration, Unit & Integration testing, Training, Documentation & Production support, Involve in Feasibility Analysis, Risk Analysis and Gap Analysis Configuration and Customization. (approximately 9-11% or 0.8 hours of daily work time);
- Involve in complex validation rules, cross module integration, workflows and approval processes to implement business logic. Design, develop and test our ERP products according to the company's specifications, technical requirements and process (approximately 9-11% or 0.8 hours of daily work time);
- Designing solution of Extraction, conversion by creating LSMW for uploading master data into the SAP system for Customer, Vendor, Material, Customer Material

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Info records and Pricing conditions. This is super critical as it is must and should be accurate before conversion. (approximately 9-11% or 0.8 hours of daily work time);

- Develop IDOC interface with message type MATMAS to send the data to third party system when a new material is created or an existing material is changed and create outbound IDOC to extract material category results. IDoc interface program that is triggers whenever there is creation/change of Purchase Order in ECC that sends message via Web Methods (EDI) in XML format to an Accounts Payable system. (approximately 9-11% or 0.8 hours of daily work time);
- Create a Remote enabled Function Module (RFC) to obtain the workflow status report on HR module (HRMS) and also develop Web Dynpro screens for status of Position Reassignment and Internal Moves Workflows. (approximately 9-11% or 0.8 hours of daily work time);
- Deployed a Web Dynpro ALV application through browser to display the sales document details for a particular period using BAPI Service Call. Develop Web Dynpro applications B2B workbench for handling IDoc and triggering them independently. (approximately 9-11% or 0.8 hours of daily work time);
- Design and develop a [REDACTED] form to print the Purchase Order form from the PO overview screen of SNC this provides the supplier with the ability to print the PO details of SNC into PDF format which is triggered using BAdi implementation. (approximately 9-11% or 0.8 hours of daily work time);
- Create and debug ALV Reports, SAP Scripts, [REDACTED] forms, Adobe Forms, BAPI, RFC, BDC, User-exits, Enhancements, BADI's for different modules as per company's technical and functional specifications. (approximately 9-11% or 0.8 hours of daily work time);
- Work on integration of different modules like Finance, Controlling, Warehouse Management, Material Management, Production Planning, and Customer Service with SAP Sales and Distribution. Integrate SAP ECC 6.0 with third party system like Oracle Transportation Management, 3rd Part Logistic Systems (3PL) using functionality like EDI, IDOC. (approximately 9-11% or 0.8 hours of daily work time);
- Provide technical support and consultations to the technical developers in the US and India to develop, design and test our own software product as per company's business blue print. (approximately 9-11% or 0.8 hours of daily work time);

C. Analysis

We find that the evidence of record is insufficient to demonstrate that the duties of the proffered position are in fact associated with a specialty occupation. That is, the Petitioner has not submitted sufficient, credible evidence to establish that the [REDACTED] project is a *bona fide* in-house project of the Petitioner, and that the Beneficiary will be exclusively assigned to it.

Several of the job duties do not appear relevant to the [REDACTED] project, such as: "design and develop a [REDACTED] form to print the Purchase Order form from the PO overview screen of SNC this provides

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the supplier with the ability to print the PO details of SNC into PDF format which is triggered using BAdi implementation (approximately 9-11% or 0.8 hours of daily work time)”; “create and debug ALV Reports, SAP Scripts, [REDACTED] forms, Adobe Forms, BAPI, RFC, BDC, User-exits, Enhancements, BADI’s for different modules as per company’s technical and functional specifications (approximately 9-11% or 0.8 hours of daily work time)”; and, “work on integration of different modules like Finance, Controlling, Warehouse Management, Material Management, Production Planning, and Customer Service with SAP Sales and Distribution”; “integrate SAP ECC 6.0 with third party system like Oracle Transportation Management, 3rd Part Logistic Systems (3PL) using functionality like EDI, IDOC (approximately 9-11% or 0.8 hours of daily work time).” The evidence of record does not indicate how these duties involving purchase orders, warehouse management, material management and production planning, which would consume nearly one-third of the Beneficiary’s time, are related to the development of an in-house software product geared towards the hospitality industry.

Furthermore, the Petitioner did not submit credible, objective documentation corroborating its claims regarding the Beneficiary’s assignment to the [REDACTED] project. In particular, the document “Software Product Development and Support for [REDACTED] (Draft v1.0)” contains no references to the Beneficiary or to the proffered position. In fact, this document contains a table entitled “Phase I Budget” listing the resources needed for “Phase I” of the project with an end date of June 26, 2015. However, this table does not include a computer programmer position as one of the required resources. The absence of the proffered position from this table is significant, in that the Petitioner requested employment dates from October 1, 2014 until September 8, 2017.

The Petitioner submitted a “Software Lease Agreement” dated January 15, 2014, through which the Petitioner is leasing the “SAP ECC 6.0 Software Package” from another company. The Petitioner stated that the [REDACTED] product is primarily developed with SAP technologies, and thus it is essential that the computer professionals have access to SAP ECC software in performing computer programming and testing. However, we note that the Petitioner requested a validity period of three years (beginning on October 1, 2014 and ending on September 8, 2017), whereas the lease has only a one-year term.

The Petitioner also submitted printouts of job openings at the company for computer programmers. All the job descriptions indicate that the employee will perform services for a client at a client site. This documentation lacks any information of the Petitioner building a software product for the hospitality industry.

There are other discrepancies that lead us to question whether the Beneficiary will be placed exclusively in-house, as claimed. For example, the Petitioner stated that the Beneficiary will work “under the direct supervision of [REDACTED] Accounts Manager.” However, according to the Petitioner’s organizational chart, the Beneficiary (identified as “New Employee”) is directly supervised by an unidentified person holding the position of “Recruitment” in the Sales and Marketing Department. Meanwhile, [REDACTED] is depicted as overseeing a

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Consulting/Operations department which includes the outsourced Indian contractors but not the Beneficiary.¹ Also, the organizational chart's depiction of the Beneficiary in a completely different department and chain of command from that of the outsourced Indian contractors undermines the Petitioner's explanation that it "intends to employ [the Beneficiary] as an in-house computer programmer to work on [REDACTED] in the United States, coordinating the software development with the counterparts in India."

Finally, while the Petitioner repeatedly stated that the Beneficiary "will work solely for [the Petitioner at its] office located at [REDACTED] MN," the Petitioner stated in a document entitled "Qualifying Employer-Employee Relationship" that the Beneficiary will "perform his/her duties on the client project at the client's location." Similarly, the Employment Offer Letter states that the Beneficiary's annual salary will be paid "upon timely submission of all time sheets approved by the client," thus indicating that the Beneficiary will be assigned to a client site.²

The Petitioner also provided a "technical handbook on the application of [REDACTED] [REDACTED] As noted by the Director, the information in this handbook appears to derive from other sources on the Internet. On appeal, the Petitioner states that the "Service should have given Petitioner an opportunity to respond to the alleged discrepancies in another notice." On appeal, the Petitioner states that the "Service's accusations against Petitioner regarding intellectual property issues are irrelevant to the question of a bona fide position." The Petitioner also states that the issue of a credible offer of employment was not raised in the RFE. As to the perceived error in the Director's failure to issue an RFE, we note that there is no requirement for USCIS to issue an RFE or to issue an RFE pertinent to a ground later identified in the decision denying the visa petition. The regulation at 8 C.F.R. § 103.2(b)(8) permits the Director to deny a petition for failure to establish eligibility without having to request evidence regarding the ground or grounds of ineligibility identified by the Director. Also, even if the Director had erred as a procedural matter in not issuing an RFE or NOID relative to the Petitioner's lack of evidence to establish the proffered position as a specialty occupation and evidence a bona fide position, it is not clear what remedy would be appropriate beyond the appeal process itself. The Petitioner has, in fact, supplemented the record on appeal. Therefore, it would serve no useful purpose to remand the case simply to afford the Petitioner yet another opportunity to supplement the record with new evidence. We conduct appellate review on a *de novo* basis.

"[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

¹ The Petitioner's CEO explained in an affidavit that the company "retained professional services of 4 Indian employees . . . in initiating and continuing the development of [REDACTED] The Petitioner explained that because [REDACTED] targets a U.S. clientele, it needs qualified computer professionals, such as the Beneficiary, in the United States to coordinate the developmental activities.

² This statement also calls into question on the validity of the LCA submitted in support of the petition.

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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.” *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

For all of the above reasons, we find that the evidence of record does not sufficiently demonstrate that the Beneficiary will be assigned to the in-house [REDACTED] project, if such a project exists. Moreover, even if it were established that the Beneficiary will be assigned to the [REDACTED] project, the evidence still does not sufficiently describe the duties to be performed by the Beneficiary. Consequently, we find that the evidence of record does not demonstrate the substantive nature of the proffered position and its constituent duties. The Petitioner has not established the substantive nature of the work to be performed by the Beneficiary, which therefore 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 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.

As this basis for denial is dispositive of the Petitioner’s eligibility for the benefit sought, we need not and will not address at this time any additional issues in the record of proceedings.

II. CONCLUSION

As set forth above, we find the evidence of record insufficient to establish that the proffered position qualifies as a specialty occupation. Accordingly, the appeal will be dismissed.

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) (citing *Matter of Brantigan*, 11 I&N Dec. 493, 495 (BIA 1966)). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of S-S-, Inc*, ID# 16018 (AAO Mar. 29, 2016)