



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

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

MATTER OF SCMD- INC.

DATE: MAY 3, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a software and information technology consulting company, seeks to temporarily employ the Beneficiary as a “programmer analyst” under the H-1B nonimmigrant classification. *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 Petitioner (1) did not establish that the proffered position qualifies as a specialty occupation; and (2) did not provide an itinerary for the entire H-1B requested employment period.

The matter is now before us on appeal. In its appeal, the Petitioner submits a brief and additional evidence, and it asserts that neither of the Director’s grounds for denial comport with the evidence of record.

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

I. 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:

(b)(6)

Matter of SCMD- Inc.

- (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 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.

II. PROFFERED POSITION

The Petitioner, a 196-employee software and information technology consulting company in [REDACTED] New Jersey, seeks to classify the Beneficiary as an H-1B temporary worker in a “programmer analyst” job for a three-year period (i.e., October 1, 2015 to September 1, 2018), at an annual salary of \$56,900.

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 Petitioner attests that two other business entities are also involved in the employment scenario for which the petition was filed. They are [REDACTED] and [REDACTED].

(b)(6)

Matter of SCMD- Inc.

█ The Petitioner characterizes █ as a vendor through which it will supply the Beneficiary to █. The Petitioner identifies █ as “the end client.”

In its support letter filed with the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner stated that it had “entered into a contract with █ through █ where we provide information technology development and infrastructure support services for enhancing, supporting, and maintaining its Projects.”

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 as the evidence of record is insufficient to establish the substantive nature of the position and its constituent duties. Specifically, we find that there are inconsistencies and discrepancies in the petition and supporting documents, which lead us to question the services the Beneficiary will perform, as well as the actual nature and requirements of the proffered position. When a petition includes numerous discrepancies, those inconsistencies will raise concerns about the veracity of the Petitioner’s assertions.

For example, the employment agreement between the Petitioner and the Beneficiary, which was executed on October 13, 2014, states that the Beneficiary would serve as “a QA Engineer” - a different job title than specified in the petition. Also, the agreement does not specify any particular duties that the Beneficiary would perform, but rather indicates that they would be subject to change at the discretion of the Petitioner’s president. The employment-offer letter also refers to a QA engineering position, and it lists roles and responsibilities that do not match the duties that the Petitioner ascribed to the proffered “programmer analyst” position that is the subject of this petition.

Likewise, a letter from the vendor of the Beneficiaries services, █ states that it has engaged the Beneficiary’s services “as a Senior Software Engineer” which again is a different job title. █ provides a list of job duties, which, we note, do not match the duties that the Petitioner ascribed to the proffered position in its reply to the Director’s request for evidence (RFE).

Further, we note not only that the job title identified in the █ letter differs from the one that the Petitioner uses, but also that the task order signed by the Petitioner and █ provides the acronym █ as the “Description of Services” that the Beneficiary would perform for █. The record of proceedings does not include an explanation of the acronym and does not describe the task order’s project with any greater detail than █.

Moreover, the task order, signed in October 2014, specifies an anticipated start date of October 13, 2014, and the estimated assignment length as 24 weeks. Thus, the information within the four corners of the task order indicates that it does not pertain to work to be performed during the period of employment specified in the instant petition, that is, November 2015 to November 2018. The Petitioner did not provide a new task order for the employment dates listed on the Form I-129.

(b)(6)

Matter of SCMD- Inc.

Without sufficient information regarding the Beneficiary's duties and duration of the project, this document does not establish availability of continued, non-speculative employment for the Beneficiary for the entire H-1B validity period requested in the petition.¹

In its response to the RFE, the Petitioner provided an extensive list of duties that the Beneficiary would perform as a programmer-analyst. As we have noted, the job information that the Petitioner provided about the proffered position does not match the information provided by the vendor, [REDACTED] in either duties or job title.

As the Director expressly noted, at the time of her decision the record proceedings contained no documentary evidence from the end-client - [REDACTED] - addressing the terms and conditions of any contract or agreement it entered with regard to the Beneficiary's work for it. As evidence of the Beneficiary's working at [REDACTED] the Petitioner provides copies of email correspondence reflecting the Beneficiary's coordination with other workers through [REDACTED] email directory on what appears to be IT-related issues. However, those email documents do not contain information sufficient to establish the range of duties that the Beneficiary would perform at [REDACTED] their substantive performance requirements, or the nature and educational level of substantive knowledge in a specific specialty that the Beneficiary would have to practically and theoretically apply to perform them.

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

¹ It is noted that 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 the Beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978). As such, eligibility for the benefit sought must be assessed and weighed based on the facts as they existed at the time the instant petition was filed and not based on what were merely speculative facts not then in existence.

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).

(b)(6)

Matter of SCMD- Inc.

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.*

As would be reasonably expected in the business world, it is [REDACTED] the end-client here, that, by operation of the terms and conditions that it has placed in the contractual documents that it has executed with [REDACTED], ultimately determines the substantive nature and particular scope of actual work that the Beneficiary would perform for it. Yet, the Petitioner has provided no evidence from [REDACTED] with regard to the spectrum of duties for which it is accepting the Beneficiary as a worker, any educational/experience requirements that it may have set for the Beneficiary, or even the period of time for which it has contracted for the Beneficiary's services. Further, the record of proceedings does not contain any documentation from the end-client that confirms either the Petitioner's or [REDACTED] descriptions of the Beneficiary's duties. Nor does the record contain any documentation in which the end-client endorses, adopts, or otherwise corroborates the record's assertions to the effect that the end-client has committed to continue using the Beneficiary's services for the three-year period claimed in the petition.

Thus, we conclude that the evidence of record is insufficient to establish the range of substantive duties that the Beneficiary is to perform on assignment to [REDACTED] the type of occupation that those duties would comprise, the educational level of highly specialized knowledge in a specific specialty that the Beneficiary would have to theoretically and practically apply to perform them, or even the length of time that the Beneficiary would be assigned to the end-client, [REDACTED] to perform any definite set of duties.

In addition, an offer letter to the Beneficiary states that the Beneficiary will be compensated an hourly pay rate of \$40 an hour which would be approximately \$83,000 per year. However, the Form I-129 and the LCA indicates the salary as \$56,900. "[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.

Accordingly, upon review of the totality of the record, we conclude that the Petitioner has not provided substantive information and supportive documentation sufficient to establish that, in fact, the Beneficiary would be performing services primarily as a "programmer-analyst" for the duration of the requested employment period. The fact that the Petitioner has not established the substantive nature of the work to be performed by the Beneficiary 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 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.

IV. ADDITIONAL ISSUES

We further conclude that the evidence of record as expanded on appeal overcomes the Director's determination that the petition should also be denied for lack of an itinerary supporting all of the locations where the Beneficiary would work if the petition were approved. The pertinent documentary evidence indicates that the Petitioner was claiming only a single place of employment for the Beneficiary. Accordingly, that determination is withdrawn and is no longer a basis for denying the petition in this particular case.²

Since the identified basis for denial is dispositive of the Petitioner's appeal, we need not address another ground of ineligibility we observe in the record of proceedings. Nevertheless, we will briefly note and summarize it here with the hope and intention that, if the Petitioner seeks again to employ the Beneficiary or another individual as an H-1B employee in the proffered position, it will submit sufficient independent objective evidence to address and overcome this additional ground in any future filing.

Specifically, we will briefly address the issue of whether or not the Petitioner qualifies as an H-1B employer. The United States Supreme Court determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (quoting *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

"In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the

² The Petitioner should note that, as reflected in the Director's instructions included with her decision denying the requested change of nonimmigrant status, that issue is outside our jurisdiction., but could have been contested by a timely motion to the Director.

(b)(6)

Matter of SCMD- Inc.

regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.”

Id.; see also *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 445 (2003) (quoting *Darden*, 503 U.S. at 323). As the common-law test contains “no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968)).

In applying the *Darden* and *Clackamas* tests to this matter, it appears to us that the Petitioner has not established that it will be a “United States employer” having an “employer-employee relationship” with the Beneficiary as an H-1B temporary “employee.” In reaching this conclusion, we have taken into account all of the statements and documentary evidence submitted into the record by the Petitioner and by [REDACTED].

The Petitioner stated that “[i]n order to assure the beneficiary is meeting or exceeding our standards, we supervise the beneficiary’s work through weekly reports the beneficiary is required to send us. These reports contain information regarding what the beneficiary is currently working on as well as what she is going to work on the following week.” That the Beneficiary is the one providing such updates to the Petitioner about her current and new assignments, as opposed to the other way around, suggests that the Petitioner does not exercise regular oversight of the Beneficiary’s day-to-day work. The Petitioner has not explained and documented who actually assigns the Beneficiary the work stated in the weekly reports. Furthermore, the Petitioner stated that the Vice President of Sales will supervise the Beneficiary. It is not clear how the Vice President of Sales will assign the Beneficiary computer programming work.

Next, we have weighed both the Petitioner’s and [REDACTED] statements to the effect that the Petitioner, and the Petitioner alone, will directly pay the Beneficiary, maintain the right to assign her to work for entities other than the end-client, [REDACTED] and have the right to control the Beneficiary and her work as it is being performed at [REDACTED]. While these factors weigh in favor of a common-law employer-employee relationship, they are not decisive. The record lacks contractual and other documentary evidence from the end-client that are relevant to determining such material factors of control over the Beneficiary and his work as, for instance, where the authority would reside to determine and assign day-to-day project tasks for the Beneficiary, and who would evaluate the quality, efficiency, and acceptability of the Beneficiary’s work as it is being performed at the end-client’s location.

We also see, for instance, that the Petitioner would receive regular, periodic reports from the Beneficiary as to work that she has been performing at [REDACTED] but there is no evidence in the record that [REDACTED] in anyway defers to, depends on, takes into account, or even considers those reports.

The documentary evidence submitted by the Petitioner and [REDACTED] are relevant, but they do not convey sufficiently extensive and credible common-law indicia of control to establish the requisite

(b)(6)

Matter of SCMD- Inc.

relationship between the Beneficiary and the Petitioner to qualify the Petitioner as a U.S. employer as defined at 8 C.F.R. § 214.2(h)(4)(ii).

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control the Beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the Beneficiary, who will provide the instrumentalities and tools, and who has the right or ability to affect the projects to which the Beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the Beneficiary's employer. Without full disclosure of all of the relevant factors, we are unable to find that the requisite employer-employee relationship will exist between the Petitioner and the Beneficiary. In this regard, we note that the Contractor Services Agreement (CSA) between the Petitioner and [REDACTED] contains language reflecting that [REDACTED] - not the Petitioner - would set the terms and conditions of the Beneficiary's project work at [REDACTED] and would ultimately decide whether it is acceptable and worthy of pay. We also note that the record does not address such other relevant factors as whether [REDACTED] has contracted for any proprietary applications or the Petitioner and would depend upon the Petitioner for, or would provide the Petitioner with, instrumentalities needed to perform the Beneficiary's work at [REDACTED].

The evidence, therefore, is insufficient to establish that the Petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming that the Beneficiary is the Petitioner's employee and that the Petitioner exercises control over the Beneficiary is not sufficient absent comprehensive evidence whose weight establishes an employer-employee relationship under the common-law test that we discussed above.

Also, even if it were found that the Petitioner would be the Beneficiary's United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), the Petitioner has not demonstrated that it would maintain such an employer-employee relationship for the duration of the three-year period requested from October 1, 2015, to September 1, 2018. 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 (Reg'l Comm'r 1978).

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.

Matter of SCMD- Inc.

ORDER: The appeal is dismissed.

Cite as *Matter of SCMD- Inc.*, ID# 16332 (AAO May 3, 2016)