



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

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

MATTER OF M- LLC

DATE: MAY 4, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a computer consulting company, seeks to temporarily employ the Beneficiary as a “programmer analyst” 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 evidence of record does not establish that the Petitioner will employ the Beneficiary in a specialty occupation position.

The matter is now before us on appeal. In its appeal, the Petitioner states that the Director erred in concluding that the proffered position did not qualify as a specialty occupation and submits additional evidence.

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

## I. LAW

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term “specialty occupation” as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) largely restates this statutory definition, but adds a non-exhaustive list of fields of endeavor. In addition, the regulations provide that the proffered position must meet one of the following criteria to qualify as a specialty occupation:

(b)(6)

*Matter of M- LLC*

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. § 214.2(h)(4)(iii)(A). U.S. Citizenship and Immigration Services (USCIS) has consistently interpreted the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing “a degree requirement in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular position”); *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

## II. PROFFERED POSITION

In the H-1B petition, the Petitioner stated that the Beneficiary will serve as a “programmer analyst.” The Petitioner provided the following job duties for the proffered position (verbatim):

- Provide decision-support to Engineering and Product Management teams by performing descriptive and predictive analysis
- Extract relevant insights from billions of rows of data to meaningfully improve user experience.
- Translate unstructured, complex business problems into an abstract analytical or mathematical framework.
- Develop deep analyses and use product sense to interpret the results and help drive key product decisions.
- Effectively communicate the results with the product teams to apply the learnings for improving user experience.
- Work with large data sets, work with distributed computing tools MapReduce, Pig, Hive or other NoSQL
- Work with analytical tools supporting data analysis, reporting and visualization Tableau, D3 or other data viz tools
- Define data requirements and gather/validate information, applying judgment and statistical tests
- Synthesize quantitative results to derive implications and recommendations

*Matter of M- LLC*

- Work with statistical software packages &/or machine learning tools (R, Matlab, SPSS, SAS, SciPy, Mahout, Torch)
- Drive the collection of new data and the refinement of existing data sources
- Work closely with product engineering team to identify and answer important product questions
- Answer product questions by using appropriate statistical techniques on available data
- Work with other IT staff members to ensure cross-training and provide back-up support

According to the Petitioner, the position requires an individual with at least a bachelor's degree in engineering, computer science, computer applications, information technology, or related fields.

In response to the Director's request for evidence (RFE), the Petitioner stated that the Beneficiary would perform the following job duties (verbatim):

- Analyzing computer software applications using various software's and interface with the technical staff in the complex programming needs and document modifications concerning the systems software; - 30%
- Responsible for improvements in software computer utilization and determine necessity for modifications; - 10%
- Reviewing software programs for compliance with company standards requirements and assisting in identifying deficiencies of computer runs and perform specialized programming assessments; -10%
- Evaluating the software systems for wider applications and customize it for specific requirements; - 5%
- Using analytical tools to analyze and implement new reports with GUI and analyze software requirement's to determine feasibility of design within time and cost constraints; - 15%
- Identify deficiencies, troubleshooting problems and supporting user needs with professional knowledge for test planning, defect tracking and provide assistance to the team; - 10%
- Analysis and Design of system which includes Preparation of Process Flow Diagrams, Entity Relationship Diagrams, File design, Program Specification and Design Document; - 10%
- Interacting with other technical staff in researching and interpreting technical data; - 5%
- Assisting as part of the team to resolve technical problems requiring good judgment and creativity in developing solutions. - 5%

The Petitioner also submitted a labor condition application (LCA) in support of the instant H-1B petition. The LCA designation for the proffered position corresponds to the occupational classification of "Computer Systems Analysts" – SOC (ONET/OES) Code 15-1121. The Petitioner

(b)(6)

*Matter of M- LLC*

indicated in the LCA that the Beneficiary will work at the Petitioner's [REDACTED] Texas location and did not provide any additional work sites.

### III. ANALYSIS

On appeal, the Petitioner asserts that the Director erred in concluding that the proffered position did not qualify as a specialty occupation. 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; (2) does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation; and (3) does not demonstrate that the Petitioner has non-speculative work for the Beneficiary.<sup>1</sup>

For H-1B approval, the Petitioner must demonstrate a legitimate need for an employee exists and to substantiate that it has H-1B caliber work for the Beneficiary for the period of employment requested in the petition. However, the Petitioner has not provided sufficient, credible evidence to establish in-house employment for the Beneficiary for the validity of the requested H-1B employment period. The abstract level of information regarding the proffered position and the duties comprising it is exemplified by the phrases "[w]ork closely," "[w]ork with other IT staff," "[w]ork with analytical tools," "[e]ffectively communicate the results," and "[d]evelop deep analysis."

In addition, the Petitioner's employment agreement with the Beneficiary states that he was hired "to provide professional data processing services." The Petitioner has not further explained the nature of these "data processing services." The Petitioner also has not explained how "data processing services" is consistent with the Beneficiary's other stated job duties, such as his duty of "[a]nalyzing computer software applications . . . and interface with the technical staff in the complex programming needs and document modifications concerning the systems software."

In its RFE response letter, the Petitioner stated that the Beneficiary will be working on "the development of [REDACTED] product" at the Petitioner's [REDACTED] Texas location. The Petitioner explained that the [REDACTED] product "for the past two years, has been developed by [the Petitioner's] engineers in [its] India Development Center," and that the Petitioner "is now ready to market this product in the United States and continue to develop it through [the Petitioner's] Texas office." The Petitioner also submitted evidence that its [REDACTED] product has been developed and is actively being marketed in the United States. Such evidence includes screenshots of the [REDACTED] product, marketing material, evidence of its recent exhibition during [REDACTED] in the United States, and evidence of [REDACTED] recognition of the Petitioner as a [REDACTED] partner.

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<sup>1</sup> 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.

(b)(6)

*Matter of M- LLC*

Considering that [REDACTED] has already been developed in substantial part and is currently being marketed, the Petitioner has not sufficiently explained what development work remains to be performed by either the Petitioner or the Beneficiary. For example, while the Petitioner's states that it plans to begin "transferring employees from [its] India development center to [its] Texas office," the Petitioner has not further explained and documented who these employees from its India office are, and what work they will perform at the Petitioner's Texas development center.<sup>2</sup> The Petitioner has not delineated what development functions will continue to be performed in India, and what functions will be transferred to Texas. The Petitioner's [REDACTED] and "Project Plan" both contain broad overviews of the remaining work to be performed from 2016 to 2018, but do not provide sufficiently detailed, relevant information such as the specific tasks to be performed, who will perform these tasks, and where they will be performed.

Notably, the tables in the "Project Plan" listing the "Organizational Structure" and "Roles & Responsibilities" for personnel involved in the project do not specifically mention either the Beneficiary or a programmer analyst position. Nor is it readily apparent that these tables refer to the Beneficiary or his purported job duties in the programmer analyst position. For example, the "Organizational Structure" table indicates that the Petitioner will employ ten "Technical Consultants" and eight "Developers," but does not identify these employees or their specific roles with respect to the project. Without further relevant information, we cannot determine whether the proffered position falls under one of the positions listed in this table. Similarly, the "Roles & Responsibilities" table indicates that the Petitioner will employ unidentified "Team Members" who will "provide support to the project through completion of tasks on time and within budget." Again, without further relevant information, this type of generalized description is insufficient to establish that the Beneficiary will be one of the project's "Team Members."<sup>3</sup>

In addition, the record of proceeding does not contain sufficient documentary evidence such as master agreements or statements of work demonstrating that the Petitioner has procured any specific assignments for the Beneficiary to perform on the [REDACTED] product. Therefore, the evidence of the record does not support the conclusion that the Petitioner has definite, non-speculative work for the Beneficiary to perform in-house on its [REDACTED] project.

Rather, the evidence of record indicates that the Beneficiary will be assigned to one or more undetermined end-clients. For instance, the Petitioner's employment agreement with the Beneficiary specifically states that the Beneficiary "desires to obtain an employment position with [the Petitioner] to provide professional data processing services *for [Petitioner's] Client or End User.*" and that the Petitioner "hires [the Beneficiary] to provide professional data processing services and [the Beneficiary] agrees to provide such services *upon the terms and conditions set forth in this agreement*" (emphasis added). Other language in the employment agreement also suggests that the

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<sup>2</sup> The Petitioner does not claim that the Beneficiary is one of its employees it is seeking to transfer from India.

<sup>3</sup> According to the Petitioner's offer letter to the Beneficiary, the Beneficiary will report to [REDACTED] who is identified elsewhere in the record as the Petitioner's human resources assistant. Neither [REDACTED] nor the human resources assistant position is listed in the "Project Plan" tables as one of the responsible parties for the [REDACTED] project.

(b)(6)

*Matter of M- LLC*

Beneficiary's employment is heavily dependent on the terms of an agreement reached with a "Client or End User," contrary to the Petitioner's claim that the proffered duties will be performed in-house. For example, Article 8 of the employment agreement states that the Beneficiary's employment may be terminated "[i]f the Client or End User at which Employee is providing services cancels its Agreement with [the Petitioner] for the Employee." Article 11 of the agreement further states that the Petitioner may withhold the Beneficiary's salary "[i]f the Client or End User at which Employee is providing services fails or refuses to pay an invoice for work provided by Employee."

Likewise, the Petitioner's offer letter to the Beneficiary states that, during the period of his employment, "[the Beneficiary] may be transferred to any other work center in the interest of the company or may be required to undertake temporary duties in places other than those in which you are ordinarily engaged to work." As such, the language of the offer letter and employment agreement indicates that the Beneficiary's employment will depend on project availability for the Petitioner's clients who have not been identified for the record. As we discussed above, the record of proceedings does not contain sufficient documentary evidence such as master agreements or work statements demonstrating that the Petitioner has secured work for the Beneficiary on the [REDACTED] or any other project at the time the petition was filed.

We also consider the insufficiency of the Petitioner's secured work space in Texas. The Petitioner's lease, which is for a one-year term from April 2015 to March 2016, is for office space for only two people. The Petitioner has not sufficiently explained and documented how its Texas premises would be sufficient to house its entire [REDACTED] development team. As previously noted, the "Project Plan" indicates that the Petitioner will employ, *inter alia*, ten "Technical Consultants" and eight "Developers" in the United States. Although the Petitioner asserts on appeal that its lease has "the ability to expand whenever it is required," the Petitioner has not pointed to any provisions in the lease or submitted other documentation to support this assertion. "[G]oing on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings." *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

A petition must be filed for non-speculative work for the Beneficiary for the entire period requested that existed as of the time of the petition's filing. 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). Again, 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. at 249. Here, the Petitioner has not submitted sufficient credible documentary evidence that it had specialty occupation work available for the Beneficiary, as of the time of filing, for the duration of the requested time period.<sup>4</sup>

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<sup>4</sup> 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:

(b)(6)

*Matter of M- LLC*

Regarding the opinion letter from [REDACTED] we find this evaluation insufficient to establish that the proffered position qualifies as a specialty occupation. In his letter, [REDACTED] does not specifically discuss the proffered position or its associated duties, or the Beneficiary. Rather, he focuses his analysis on the [REDACTED] project and what type of professionals an employer must hire in order to complete such a project. [REDACTED] states that the Petitioner “seeks to employ a highly trained team of IT professionals with specialized knowledge of computer systems, databases, and specifically of [REDACTED] system design, planning, installation, configuration, customization, and support.” However, there is no indication that he possesses any knowledge of the proffered position. Furthermore, [REDACTED] does not indicate whether he visited the Petitioner’s business, observed the Petitioner’s employees, interviewed them about the nature of their work, or documented the knowledge that these workers apply on the job. His level of familiarity with the actual job duties as they would be performed in the context of the Petitioner’s business has therefore not been substantiated.<sup>5</sup>

We may, in our discretion, use opinion statements submitted by the Petitioner as advisory. *Matter of Caron Int’l, Inc.*, 19 I&N Dec. 791, 795 (Comm’r 1988). However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Id.*

Based upon a complete review of the record of proceeding, we find that the Petitioner has not established (1) the actual work that the Beneficiary will 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. Consequently, these material omissions preclude a determination that the Petitioner’s proffered position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions. There is insufficient probative evidence substantiating the Petitioner’s claims with regard to the duties, responsibilities and requirements of the proffered position.

Accordingly, there is insufficient evidence establishing the substantive nature of the work to be performed by the Beneficiary. We are therefore precluded from 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.

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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. . . . Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). 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).

<sup>5</sup> For all of these reasons, the opinion letter does not satisfy any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 as a specialty occupation.

Finally, we will withdraw the Director's comment that "USCIS acknowledges that the position of programmer analyst is normally regarded as a specialty occupation." The Director has not provided any reasoning nor cited to any authoritative sources to support this statement.

#### IV. CONCLUSION

The Petitioner has not sufficiently established that the proffered position qualifies as a specialty occupation. 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 M- LLC*, ID# 17298 (AAO May 4, 2016)