



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

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

MATTER OF SCMD- INC.

DATE: MAY 10, 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 classify the Beneficiary as a temporary worker in a specialty occupation under the H-1B nonimmigrant classification, for a position with the job title "business analyst." See Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director, California Service Center, denied the petition on several independent grounds. The Director concluded that (1) the Petitioner did not establish that the proffered position qualifies as a specialty occupation; (2) the Petitioner did not provide an itinerary for the entire H-1B requested employment period; (3) the labor condition application (LCA) does not correspond to the type of position for which the petition was filed, and therefore does not satisfy the pertinent H-1B regulatory requirement for an LCA certified for the proffered position; and (4) the evidence does not establish that the Beneficiary is qualified to perform the duties of the proffered position.

The matter is now before us on appeal. In its appeal, the Petitioner submits a brief and additional evidence and asserts that the proffered position qualifies as 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)(6)

Matter of SCMD- Inc.

- (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).

We note that, as recognized by the court in *Defensor*, 201 F.3d at 387-88, where - as in the matter before us - 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.

B. Proffered Position

The Petitioner is a 196-employee software and information technology consulting company located in [REDACTED] New Jersey. The Petitioner seeks to employ the Beneficiary as a full-time "business analyst" for a three-year period from October 1, 2015 to September 14, 2018, at an annual salary of

(b)(6)

Matter of SCMD- Inc.

\$63,100. The Petitioner states that the Beneficiary will be employed at [REDACTED] CA [REDACTED]

The LCA was certified for use within the management analysts occupational group (identified in the Occupational Information Network (O*NET) by the Standard Occupational Classification (SOC) code 13-1111) at a Level I (entry level) wage rate, the lowest of four assignable wage rates.

The record of proceedings reflects that four business entities are involved in the Beneficiary's employment scenario. They are (1) the Petitioner, (2) [REDACTED] (3) [REDACTED] and (4) the end-client, [REDACTED]

C. Evidence of Record

Here we will survey relevant information that we gleaned from the four entities' submissions into the record and from documents which they executed in the course of arranging for the Beneficiary's ultimate assignment to the end-client, [REDACTED]

1. From the Petitioner

As already noted, the Petitioner identified the proffered position as a job within the management analysts occupational group and identified it by the job title "business analyst." The Petitioner's letter of support filed with the Form I-129, Petition for a Nonimmigrant Worker, identifies [REDACTED] as a "vendor" and states that the Petitioner had "entered into a contract with [REDACTED] through [REDACTED] where we provide information technology development and infrastructure support services for enhancing, supporting, and maintaining its Projects."¹

The letter of support ascribes over a dozen sets of duties to the proffered position. The Petitioner's response to the Director's request for evidence (RFE) includes an expanded list of "proposed duties and responsibilities."

The Petitioner submitted copies of an employment agreement between it and the Beneficiary and an offer-of-employment letter that it issued to the Beneficiary for employment as a business analyst to commence on September 5, 2014. Both documents are dated September 3, 2014.

The Petitioner also submitted copies of several computer screenshots of email communications in which the Beneficiary participated in June and July 2015.

¹ Although the Petitioner refers to [REDACTED] as the end-client, the evidence of record reflects that [REDACTED] and [REDACTED] are separate entities and that [REDACTED] as the end-client, has contracted with [REDACTED] for services which the Beneficiary would provide.

(b)(6)

Matter of SCMD- Inc.

2. From [REDACTED]

The record includes a letter of July 8, 2015, from [REDACTED] CEO, submitted to confirm that [REDACTED] “contracted [with the Petitioner] for the services of [the Beneficiary] as a Business Analyst to work on assignment” at [REDACTED] client, [REDACTED] “pursuant to a confidential agreement between [REDACTED] and [REDACTED] CEO declined to provide a copy of the [REDACTED] contract, claiming confidentiality and [REDACTED] standard policy. The letter asserts, however, that the Beneficiary was currently working full-time, as a business analyst for [REDACTED] at [REDACTED] location in California. The letter lists 13 sets of duties as included in those “assigned by [the Beneficiary’s] employer.” The CEO also stated that the project upon which the Beneficiary was working was “an ongoing one and expected to continue for a longer period.”

The record of proceedings also includes a statement of work (SOW) signed by the Petitioner and [REDACTED]. The SOW listed the Beneficiary as the only person from the Petitioner who was performing services “for Client [REDACTED] located at [REDACTED] CA.” In the section of “Duration/End Date” the SOW stated “6+ months.” The start date is listed as March 30, 2015.

The Petitioner also submitted a copy of a Master Services Agreement (MSA) between the Petitioner and [REDACTED]. The MSA identifies terms and conditions to be automatically incorporated into any contract that might be executed under the MSA’s auspices. It acknowledges that its terms and conditions would extend to contracts whereby the Petitioner, as “Contractor,” would provide consultants to [REDACTED] to provide “computer consulting and/or data processing, and/or programming work or any other skills (hereinafter referred to as ‘Services’), either directly or indirectly to [REDACTED] Client.”

3. From [REDACTED]

The Petitioner submitted a letter from [REDACTED]. The letter states that the Beneficiary is “assigned to work with us on the [REDACTED] Portfolio distribution project,” and that the Beneficiary was working “in the capacity of a Business Analyst” at [REDACTED] offices in [REDACTED] California. The letter also listed 15 sets of duties as comprising the work that the Beneficiary will be performing. They are substantially the same as the duties that [REDACTED] listed in its employment-confirmation letter.

4. From the end-client, [REDACTED]

The documents submitted on appeal include an employment-confirmation letter from [REDACTED] section. The letter states that the Beneficiary has been “resourced as Contractor through our vendor [REDACTED] for our project in the role of Business Analyst at our facility [at the work address designated in the petition].” In contrast to the far more expansive descriptions elsewhere in the record, the [REDACTED] letter provides only four sets of duties.

Matter of SCMD- Inc.

D. Analysis

Upon review of the record in its totality and for the reasons set out below, we conclude 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 as they would be performed for the end-client.

As recognized in *Defensor v. Meissner*, 201 F.3d 384, 387-8, where the Petitioner is providing a beneficiary to work for another business entity, the end-client [REDACTED] must provide information, about the proposed job duties and associated performance requirements, that is sufficiently detailed to substantiate the minimum educational requirements necessary to perform the work to which the beneficiary would be assigned. 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.*

The record of proceedings before us contains only one document from the end-client, [REDACTED] that is, the aforementioned employment-confirmation letter.

The employment-confirmation letter from [REDACTED] states that the Beneficiary “is primarily involved in”:

- Gathering business requirements and understanding business needs. Open action items from meetings for project team[;]
- Creating various Portfolio reports for management, required for organizational analysis including head count data & financial data such as Contractor and proto expense[;]
- Data Analysis, validation of various Business Intelligence Reports, gap analysis, etc.
- Work extensively with team to find the solutions, coordinate with team to ensure change request[s] have been implemented. Be a part of various [REDACTED] meetings and representations.

We find that [REDACTED] limits its duty descriptions to generalized and generic functions. For example, the Petitioner listed one of the Beneficiary's job duties as “gathering business requirements and understanding business needs.” However, the Petitioner did not further elaborate on the specific tasks, methodologies, and applications of knowledge that would be required in furtherance of this overarching duty. As such, they do not convey the substantive nature of the actual tasks that the Beneficiary would perform on assignment to [REDACTED] and they do not establish any particular educational level of any body of highly specialized knowledge in a specific specialty that the Beneficiary would have to theoretically and practically apply in order to perform his duties.

We also note that the job and duty descriptions provided separately by [REDACTED] and [REDACTED] are not substantially the same as those provided by either the Petitioner or the end-client, [REDACTED]. Further, the

(b)(6)

Matter of SCMD- Inc.

Petitioner's descriptions of the proffered position and its constituent duties are substantially different from [REDACTED] descriptions. Although the information from the end-client, [REDACTED] is critically important for substantiating the nature and substantive requirements of the proffered position, and although the information from [REDACTED] is materially deficient in this regard, we must also note that the overall discrepancies in the duty descriptions from the entities involved in the Beneficiary's assignment undermine the credibility of the petition as to the nature and educational requirements of the proffered position. Further still, while the record reflects that [REDACTED] is the end-client who is ultimately paying for the Beneficiary's services and determining their scope and duration, there is no document from [REDACTED] that endorses or adopts the duties and responsibilities that either the Petitioner, [REDACTED] or [REDACTED] ascribed to the proffered position.

We next note additional evidence underlining the indefinite nature of the record's information about the project work that would engage the Beneficiary for the employment period sought in the petition. The SOW executed by the Petitioner and [REDACTED] indicated that the Beneficiary would work at the client site for "6+ months" from the specified start date of March 30, 2015. This vague period does not comport with the three-year employment period specified in the petition. In the same vein, the employment-confirmation letter from [REDACTED] CEO, which is dated July 8, 2015, indicated an imprecise period for the Beneficiary's work at [REDACTED] just stating that the Beneficiary joined "the project" on April 30, 2015, and that the "project" was "an ongoing one and expected to continue for a longer period." So, too, the letter from [REDACTED] dated October 5, 2015, does not specify a definite work-period, as it states that the Beneficiary "joined the project on 30the April 2015 and is presently working on an ongoing project," and that [REDACTED] expects its need for his services to continue until December 2017, "with possibility of extensions." Particularly in context with [REDACTED] relatively broad and abstract descriptions of the Beneficiary's at [REDACTED] and with the lack of substantive information regarding the "the project" for which the Beneficiary is assigned to [REDACTED] "the project's" indefinite end-time buttresses our finding that the record of proceeding does not establish the substantive scope of the Beneficiary's duties.

In the same regard, we also note that the SOW does not describe the project to be assigned beyond stating that the position is for senior business analyst. 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.²

² 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

Matter of SCMD- Inc.

We also note a discrepancy between the MSA submitted into the record and the [REDACTED] Petitioner SOW. The SOW references an MSA with a later date, which is not included in the record. Thus, the record's MSA has little probative value towards establishing that the proffered position is a specialty occupation; and it begs question of why it was submitted instead of the particular MSA one under which the SOW was issued. However, the Petitioner's submission of the MSA has a negative evidentiary impact in that the scope of services that it identifies as falling within the MSA expressly includes "computer consulting and/or data processing, and/or programming work, and any other skills," but not management analysis.

The fact that the record of proceedings does not establish 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. 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 for classification as a specialty occupation.

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. Accordingly, the petition will be dismissed.

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 petition for H-1B classification on the basis of facts not in existence at the time the instant petition was filed, it must nonetheless file a new petition to have these facts considered in any eligibility determination requested, as the agency may not consider them in this proceeding pursuant to the law and legal precedent cited, *supra*.

II. ADDITIONAL ISSUES

Since our determination on the specialty-occupation is dispositive of the Petitioner's appeal, we need not address the other grounds that the Director specified for denying the petition. However, we will address one of them: 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.³

We will now briefly note and summarize a ground of ineligibility, not identified by the Director, that we observe in the record of proceedings. We do this 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.

As we shall now discuss, the record of proceedings as presently comprised does not demonstrate that the indicia of control over the Beneficiary and his day-to-day work on assignment to the end-client weigh decisively in favor of the Petitioner as having an employer-employer relationship with the Beneficiary as a U.S. employer in accordance with the regulatory definition at 8 C.F.R. § 214.2(h)(4)(ii).

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 regular

³ 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.

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 the three other business entities involved in the Beneficiary’s assignment to [REDACTED]

We note that the Petitioner claims to be the Beneficiary’s employer and that [REDACTED] and [REDACTED] also expressly identify the Petitioner as the Beneficiary’s employee. We also have taken into account the [REDACTED] letter’s statement that the Petitioner alone retains all control over the Beneficiary’s employment, including, but not limited to the right to hire, fire, pay, and supervise the Beneficiary’s work. Further, we acknowledge that, in light of the overall evidentiary context of this petition, it is likely that the Petitioner has retained some control over future assignments of the Beneficiary. Along with all of the other information indicative of the Petitioner’s relationship with the Beneficiary, we also note that the Petitioner has identified a member of its staff as the Beneficiary’s supervisor and also attested that it requires weekly reports from the Beneficiary.

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 see, for instance, that the Petitioner would receive regular, periodic reports from the Beneficiary as to work that he 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. Further, there is no evidence in the record that [REDACTED] - presumably the ultimate decider of the terms and conditions by which temporarily assigned workers would perform [REDACTED] project work - has entered into any contractual relationship with the Petitioner or has in any way recognized considered the Petitioner as a party to any specific decisions regarding the Beneficiary’s assignment and supervision of specific tasks during the Beneficiary’s assignment to [REDACTED]. Also, the evidence of record does not establish that [REDACTED] is depending on the Petitioner, through the Beneficiary, to provide any instrumentalities necessary for the [REDACTED] assignment. Nor does the evidence indicate that [REDACTED] is relying upon the Petitioner for any proprietary applications or services.

(b)(6)

Matter of SCMD- Inc.

Then, too, there is countervailing evidence regarding the Petitioner's claim to the requisite employer-employee relationship. For instance, the email screenshot's identification tag for the Beneficiary [REDACTED] at [REDACTED] suggests that the project team with whom he is working regards him as a [REDACTED] asset – not an asset of the Petitioner.

Upon our review of the totality of the evidence, it appears that the Petitioner's contact and relationship with the Beneficiary does not exceed that of a staffing agency that maintains control of administrative matters regarding the Beneficiary, such as pay distribution and employment-related tax requirements, but cedes day-to-day control over beneficiary and his work to the end-client and other staffing entities interposed between it and the end-client. So, too, in the evidentiary context now before us, it appears that the Beneficiary is functioning as a temporary addition to [REDACTED] staff without substantive supervision or control by the Petitioner over the day-to-day services that he is providing to [REDACTED]

The documentary evidence is relevant, but it does not convey sufficiently extensive and credible common-law indicia of control to establish the requisite 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.

III. CONCLUSION

In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of SCMD- Inc.*, ID# 16338 (AAO May 10, 2016)