



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

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

MATTER OF F-C-, LLC

DATE: MAY 16, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an IT staffing and outsourcing services firm, seeks to temporarily employ the Beneficiary as a “systems engineer” 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 there is specialty occupation work available in the capacity described in the petition for the duration of the requested validity period.

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

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

I. 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:

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- (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 Form I-129, Petition for a Nonimmigrant Worker, the Petitioner stated that the Beneficiary will be employed at its premises as a “systems engineer” for its client [REDACTED]. The Petitioner also submitted a labor condition application (LCA) that listed two places of employment - the Petitioner’s offices in [REDACTED] Georgia, and an address for [REDACTED] in [REDACTED] Massachusetts.

The Petitioner’s support letter stated as follows, in pertinent part:

Upon joining [the Petitioner] on a valid H-1B visa, [the Beneficiary] will be working as a Systems Engineer for [REDACTED] from [the Petitioner’s] office [The Beneficiary] is expected to continue working for [REDACTED] from [the Petitioner’s] office for the duration of his H-1B validity period No other work locations are anticipated for him and accordingly this is the complete itinerary of the services to be performed by the Beneficiary. . . .

This specialty occupation position of a Systems Engineer within [the Petitioner] requires as a minimum a Bachelor’s degree or its equivalent with a minor or concentration in any branch of Science, Engineering, Computer Science, Computer Applications, Information Systems, or a related field. . . .

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The Petitioner also described the proffered duties and broke them down into percentages as follows (verbatim, but not in the chart format as used by the Petitioner):

- Administering [REDACTED] storage systems in [REDACTED], creating Aggregates, Vservers/Vfilers, Volumes, [REDACTED] SnapShot, SnapManager, SnapVault and all other services. [15%]
- Preparing utilization reports using [REDACTED] Analyze and suggest corrective methods on performance issues. Enable, configure, extend [REDACTED] and map to [REDACTED] Configuring and extending [REDACTED] Space on UNIX servers. [15%]
- Flex Clone/Flexible Volume Management and Data [REDACTED] clustering and fail-over management. Configuration of zones adding devices on [REDACTED] switches. [35%]
- Configuration of initial Filer deployment in Data Center, [REDACTED] Volume, Aggregates and SnapShots, multiprotocol management, [p]rovisioning of storage allocations capacity management with performance analysis, tuning and management. [15%]
- Perform daily checkouts on backups and coordinate for resolution with Backup team with power down checkouts. Administer and maintain day-to-day operational support, implementations and periodic hardware and software maintenance. [10%]
- Configuring files for different [REDACTED] environments and binding the active directory, and configuring the [REDACTED] and [REDACTED] ports for remote administration. Implementation of Enterprise Vault for Microsoft exchange archiving as well as [REDACTED] File system archiving. [10%]

On the LCA, the Petitioner designated the proffered position under the occupational category "Network and Computer Systems Administrators" corresponding to the Standard Occupational Classification code 15-1142.

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. Specifically, the record (1) does not describe the position's duties with sufficient detail; and (2) does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.¹

¹ The Petitioner submitted documentation to support the H-1B petition, including evidence regarding the proffered position and its business operations. While we may not discuss every document submitted, we have reviewed and considered each one.

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We find that the record of proceedings contains inconsistencies that undermine the Petitioner's claims regarding the proffered position. The Petitioner claims that its end-client is [REDACTED] and the Beneficiary will work on a project for [REDACTED] for the entire duration of the petition. However, the master subcontracting agreement between the Petitioner and [REDACTED] dated February 12, 2014, contradicts this claim. Specifically, the Petitioner's relationship with [REDACTED] is summarized as follows:

1. Structure of the Relationship Between Parties.

- 1.1. Engagements. Pursuant to this Agreement, [REDACTED] may retain [the Petitioner] to act as [REDACTED] subcontractor to provide Services to End-Client. Work shall not begin without Norwin's issuance of a Statement of Work ("SOW"). Work commenced by [the Petitioner] without a SOW shall be deemed "at-risk." An engagement shall be effective upon acceptance by [the Petitioner] of the [REDACTED] issued SOW (an "Engagement"). Each Engagement shall constitute a separate transaction between the parties, but shall be subject to the terms and conditions of this Agreement, the applicable Agreement Addendum, and the applicable SOW.

This agreement indicates that [REDACTED] may retain the Petitioner to act as its subcontractor to provide services for the end-client, which contradicts the Petitioner's claim that [REDACTED] is the end-client. On appeal, the Petitioner submits a letter from [REDACTED] which states that "[REDACTED] is the end client and [the Petitioner] is the vendor to [REDACTED] however, it does not contain sufficient evidence to resolve inconsistencies in the record of proceedings. Specifically, the Petitioner submits a project proposal titled "[The Petitioner's] Solution Proposal to [REDACTED] [REDACTED] dated December 2014. Notably, the project states under the section "Terms & Conditions" that [REDACTED] is to issue a "formal [p]urchase order," and the Petitioner proposes that "[REDACTED] and [the Petitioner] could enter into a 'contract' that will govern the terms and conditions of this project." However, the Petitioner did not submit a purchase order or a contract with [REDACTED]

Further, the proposal document contains information that contradicts [REDACTED] letter provided on appeal. The document proposed that the Beneficiary work as an "Infrastructure Migration Engineer/Systems Engineer." On page 14 of the proposal, the duties of the Infrastructure Migration Engineer are as follows:

- Work on Manual and Tool based Migration of P2V / V2V
- Work on VM configurations
- OpenStack operations

However, in the letter on appeal, [REDACTED] states that the Beneficiary will be employed as a "systems engineer." Further, on appeal, [REDACTED] provides duties verbatim from its support letter, which differ from those proffered in the proposal and does not include migration, configurations, or operations. Specifically, in addition to the duties provided verbatim from the support letter, the letter on appeal

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states that the Beneficiary duties include “storage administration and management projects, tasks including installation and replacements, changes, implementation, storage provisioning, capacity planning and management, and basic problem management.” Further, the skillset requirement listed on the proposal to perform these duties in the proposal was six to eight years of experience, without any mention of the degree requirement; however, on appeal, as will be discussed below, [REDACTED] lists degree requirements. Moreover, the timeline provided for the project on the proposal was from October 2015 to December 2016, but the letter on appeal states that duration is “3+ years and multiple extensions.” The Petitioner did not explain the discrepancies.

Without a purchase order or contract that outlines the terms and conditions of the Beneficiary’s employment and information regarding specific projects to which the Beneficiary would be assigned that covers the duration of the period of employment requested, we are not able to ascertain what the Beneficiary would do, where the Beneficiary would work, as well as how this would impact circumstances of his relationship with the Petitioner. 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. The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the Petitioner or Beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg’l Comm’r 1978).²

We further find that there are significant discrepancies in the record of proceedings with regard to the Petitioner’s occupational classification for the proffered position. Specifically, while the Petitioner asserts that the proffered position is that of a “systems engineer,” the Petitioner indicated in the LCA that the proffered position corresponds to the occupational category of “Network and Computer Systems Administrators.”³ On appeal, the Petitioner discusses educational requirements

² 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).

³ Further, the prevailing wage for “Network and Computer Systems Administrators” at Level I is \$53,789 per year in Georgia. We note that as of the date the LCA was certified on March 9, 2015, the Level I prevailing wage for

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and duties for other related occupations such as computer scientists, systems analysts, computer programmers, systems engineer, and software engineer. The Petitioner also provides information regarding the prevailing wage and Occupational Information Network (O*NET) online summary for the occupational title of "Computer Occupations, All Other," which covers the position of "Computer Systems Engineers/Architects." It is not clear which occupational category corresponds to the proffered position.⁴ 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, 249 (Reg'l Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Because of the discrepancies discussed above, we cannot determine the nature and scope of the Beneficiary's employment. The record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position qualifies as a specialty occupation. Therefore, we cannot determine that description of the proffered position communicates: (1) the actual work that the Beneficiary would perform; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. "[I]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence." *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92.

The inability to establish the substantive nature of the work to be performed by the Beneficiary consequently precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines: (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1;

"Computer Occupations, All Other," covering the location where the Petitioner stated the Beneficiary would primarily work, was \$55,162 per year. *See* <http://www.flcdatcenter.com/OesQuickResults.aspx?area= &code=15-1199&year=15&source=1> (last visited May 12, 2016).

⁴ With respect to the LCA, the U.S. Department of Labor (DOL) provides clear guidance for selecting the most relevant Occupational Information Network (O*NET) code classification. The "Prevailing Wage Determination Policy Guidance" states "[i]n determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification If the employer's job opportunity has worker requirements described in a combination of O*NET occupations, the [determiner] should default directly to the relevant O*NET-SOC occupational code for the highest paying occupation. "

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the Beneficiary. If it is the Petitioner's argument on appeal that the proffered position is actually a computer systems engineer, then the Petitioner has not submitted a certified LCA that corresponds to the petition, and the petition would have to be denied for this additional reason.

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(2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Accordingly, as the Petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation.

However, even if the Petitioner had credibly established substantive nature of the proffered position, we find that there is insufficient evidence to establish that the proffered position qualifies as a specialty occupation. That is, the proffered position does not require the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as the minimum requirement for entry into the occupation. *See* Section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii).

The Petitioner indicated in its support letter that the education requirement for the proffered position is “a Bachelor’s degree or its equivalent with a minor or concentration in any branch of Science, Engineering, Computer Science, Computer Applications, Information Technology, or a related field.” On appeal, the Petitioner submits a letter from [REDACTED] which confirmed the same requirement.

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

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

Here, both the Petitioner and [REDACTED] claim that the duties of the proffered position can be performed by an individual with a bachelor’s degree in “Science, Engineering, Computer Science, Computer Applications, Information Technology, or a related field.” The issue here is that it is not readily

apparent that these fields of study are closely related or that the field of science is directly related to the duties and responsibilities of the particular position proffered in this matter.

As the evidence of record does not establish how these dissimilar fields of study form either a body of highly specialized knowledge or a specific specialty, or its equivalent, the Petitioner's assertion that the job duties of this particular position can be performed by an individual with a bachelor's degree in any of these fields suggests that the proffered position is not a specialty occupation. Therefore, absent probative evidence of a direct relationship between the claimed degrees required and the duties and responsibilities of the position, it cannot be found that the proffered position requires, at best, anything more than a general bachelor's degree. Going 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 California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

IV. DUE PROCESS

On appeal, the Petitioner asserts that the Director did not provide an opportunity to address the Director's concerns in the denial through a Request for Evidence (RFE), and its rights to procedural due process were violated. 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 relative to the Petitioner's lack of evidence to establish the proffered position as a specialty occupation, 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.

We further note that with respect to a constitutional due process challenge, we have no authority to entertain constitutional challenges to a USCIS action. *Cf. Matter of Salazar-Regino*, 23 I&N Dec. 223, 231 (BIA 2002) (BIA lacks authority to rule on constitutionality of statutes it administers). Even if we had the authority to entertain constitutional challenges, the Petitioner has not shown that any violation of the regulations resulted in "substantial prejudice" to the petitioning company or the Beneficiary. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that a foreign national "must make an initial showing of substantial prejudice" to prevail on a due process challenge).

V. CONCLUSION

The burden is on the Petitioner to show eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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ORDER: The appeal is dismissed.

Cite as *Matter of F-C-, LLC*, ID# 16403 (AAO May 16, 2016)