



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

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

MATTER OF J-S-T- INC.

DATE: MAY 24, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a computer software consultancy service, seeks to temporarily employ the Beneficiary in a "software engineer" position 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 within the record of proceedings did not demonstrate that, by the time of the petition's filing, the Petitioner had secured sufficient specialty occupation work for the Beneficiary.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that, contrary to the Director's decision, the evidence of record establishes that it has sufficient specialty occupation work to engage the Beneficiary for the period for which it seeks her services.

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.

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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).

II. SPECIALTY OCCUPATION

A. The Proffered Position

As we noted, the Petitioner assigned “software engineer” as the proffered position’s job title. By the certified labor condition application (LCA) that it submitted to support the visa petition, the Petitioner asserted that the proffered position belonged within the Software Developers occupational category as designated by the Standard Occupational Classification (SOC) system.¹

The Form I-129, Petition for a Nonimmigrant Worker, states that the Beneficiary would work at the Petitioner’s [REDACTED] New Jersey address, and the LCA is certified for employment at that address.

¹ Federal agencies – including the Department of Labor (DOL) – use the SOC system to classify workers into 840 distinct occupational categories for the purpose of collecting, calculating, or disseminating data. The Occupational Information Network (O*NET) and O*NET OnLine, its interactive application for exploring and searching occupations, as well as DOL’s *Occupational Outlook Handbook* address occupations by their SOC codes and titles.

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In its letter of support filed with the Form I-129, the Petitioner stated that the proffered position requires, *inter alia*:

- a. A college degree, at a minimum with five years of experience, or
- b. Have a minimum requisite computer skills.

The Petitioner's submissions of September 2015 include a table describing the proffered position as follows:

Job description	Responsibilities	As Petitioned	Weekly hour-break-down
The Lead (JAVA) Web Application Developer utilizes specialized in-depth analysis and experience to oversee the writing/modifying of complex web development and services to the next level with a dynamic data driven website javelinconsultings.com.	Design and implement technical solutions using Java, Eclipse, and Web Development Tools and Framework	1) A college degree, at a minimum with five years of experience, or have a minimum requisite computer skills [2] Strong engineering and/or analytical skills 3) A minimum of 3 years' experience/Expert knowledge of Javascript, HTML, CSS, and cross-browser development	Fundamentally required for most, if not all job duties. (Electrical and computer engineer candidate)
The ideal candidate should be able to create detailed specifications or designs, conduct quality assurance reviews, enhance peer application programming workflows and act as a mentor to users, teams and other stakeholders within these programs	Translates business requirements into technical design and ensures that development complies with Enterprise Standards and adheres to development guidelines	1) Skills in front end technologies 2) Knowledge of [REDACTED]	Variable 10 hrs

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Job description	Responsibilities	As Petitioned	Weekly hour-break-down
This position needs to lead application development, design and quality testing from conception to implementation	1) Translates business requirements into technical design and prepares functional design documents as per [redacted] methodologies 2) Ensures that all assigned deliverables are completed on time with impeccable quality 3) Supports production development and project go-live tasks	1) Utilize JAVA 3D standard extensions APIs to write applets and applications that provide 3 Dimensional interactive content to users. Competent in Web development service integrations ([redacted]), animation, multimedia design, editing for audio/video and digital imaging 2) Unit and integration testing	Variable 20 hrs
This position is competent to work at the highest technical level of all phases of application development activities	1) Provides timely support in troubleshooting defects and providing resolutions 2) Actively participates in team meetings and collaborates with other team members to carry out project deliverables 3) Performs other duties as assigned or requested	1)To assist customer/client[]s in developing software engineering procedures and processes 2) To test, troubleshoot and prepare summary reports in software engineering problems 3) Any additional or supplemental experience to the above	Variable 10 hrs (Candidate worked as a project manager) (Candidate was an IT Director)

B. Analysis

As we shall now discuss, the appeal will be dismissed because the evidence of record does not substantiate that, if the petition were approved, the Beneficiary would engage in the scope of work

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which the Petitioner's duty descriptions ascribed to the proffered position. As the Petitioner has not established that the Beneficiary would perform the duties that the Petitioner presents as the basis of its specialty occupation claim, we will not speculate as to whether the Petitioner might be able to produce software developer work for her sometime during the requested approximately nine-month period of employment.

The Petitioner attested that the Beneficiary would perform the above described duties exclusively in-house, that is, only at the Petitioner's office in [REDACTED] New Jersey. The Form I-129 specified an employment period of August 7, 2015 to March 4, 2016. However, the record of proceedings lacks evidence establishing the substantive nature of any in-house work that the Beneficiary would perform. More fundamentally, the evidence of record does not establish the extent of in-house work that had been secured for the Beneficiary by the time of the petition's filing.

The Petitioner's president's letter in response to the Director's request for evidence (RFE) included the following comments about the in-house project upon which the Beneficiary would work:

[A]s to in-house employment, we are in the process of developing a website portal with several web technologies that requires the skill-set of [the Beneficiary], and other such talented IT professionals. So I personally have knowledge of the needs of such skills-set of [the Beneficiary] and we want to place her as a lead web developer/software engineer. She will be involved in planning, designing, testing and implementation of it from the start. This marriage web portal shall be in several languages to make our clients more comfortable for online registration. For this assignment itself, we may require a few such talented professionals like [the Beneficiary].

The Petitioner has not supplemented its president's remarks with documentary evidence regarding the actual stage of the website-portal development process in which the Petitioner claimed to be engaged. Nor does the record of proceedings contain any documentary evidence demonstrating that the aforementioned website-portal project has reached a stage that requires the services of a software-developer working at a specialty-occupation level. Rather, the totality of the president's remarks begs the question of what work the Beneficiary would actually perform in-house if, as it appears, development of the in-house project may require more software developers who have not yet been hired. (In this regard, we note that the Form I-129 stated that the Petitioner only had "1 plus" employees in the United States.) "[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)).

The president's letter also stated that the Petitioner has plans to build an automobile-training application, and the record reflects that the Petitioner has had preliminary discussions with one potential client possibly interested in such a product. The president's letter also asserts that the Petitioner is seeking other clients for such an application. Also, according to the letter, the Petitioner

will require the Beneficiary's skill-sets "if the [automobile-training application] project materializes for her [in] in house employment as a lead web developer." The letter also stated that the Beneficiary "is expected to work closely with other software developers that we are hiring for this project." However, the record of proceedings does not indicate that the Petitioner had taken substantive steps towards the development of such an application. In this regard, we note also that the Petitioner did not document any steps it may have taken towards hiring other software developers whom it would require to complete its application-development team.

The record's copy of email correspondence between the Petitioner and the aforementioned potential customer for an automobile training application - submitted as part of the RFE response - reflects that the potential client's representative initiated contact, and did so because he was "investigating the possibility" of having such an application developed with the functions that he described in the email. Nothing in the record of proceedings indicates that the email correspondence resulted in a contract for the Petitioner to develop the application. Further, as the email correspondence took place in September 2015, after the petition's filing in August of that year, it is not indicative of any work that had been secured for the Beneficiary by the time of the petition's filing.

We need not address the copies of the agreement documents referencing the Petitioner and other business entities. Aside from the negligible weight of those documents because they do not bear signatures binding the other entities to any contractual commitments and do not reference the Beneficiary or the in-house project in which the Petitioner claims it will employ her, the Petitioner acknowledges on appeal that it submitted those documents to show its viability and ability to pay the Beneficiary - issues which are not before us on appeal or material to its proper disposition.²

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). However, we find that the evidence of record before us indicates that the Petitioner filed the petition on the basis of an employment prospect that was speculative and indefinite, and, as such, an insufficient basis for establishing the proffered position as a specialty occupation.³

² The agreements are either unsigned or signed by only one party. This aspect suggests that the documents were not fully executed and binding.

³ 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

That the Petitioner has promised to pay the proffered wage and constructs a chart of duties is not persuasive evidence of the existence of an in-house project that will continue throughout the period of requested employment that would require performance of the duties described by the Petitioner. The evidence of record does not show the existence of such a project. Although the Petitioner asserted that it is developing a marriage web portal, it has provided insufficient evidence to corroborate the existence of any such project. As the Petitioner provided insufficient evidence of the existence of in-house projects to which it could assign the Beneficiary, it has not established the substantive nature of the work, if any, that the Beneficiary would perform if the visa petition were approved.

Although the deficiencies discussed above preclude approval of the petition, we also observe that the Petitioner has not expressly asserted that the proffered position is a specialty occupation position. The Petitioner has not stated that the proffered position requires a minimum of a bachelor's degree in a specific specialty, or its equivalent; nor has it identified a specific specialty in which the performance of the proffered position would require at least a bachelor's degree or the equivalent.

In the brief, the Petitioner discusses the Beneficiary's qualifications for the proffered position and also discusses, at length, the Petitioner's ability to pay the Beneficiary the proffered wage. We observe that those issues form no part of the basis of the decision of denial. The denial was based on a finding that the Petitioner has not demonstrated that it has sufficient specialty occupation work to which it could assign the Beneficiary, at the Petitioner's own location, throughout the period of requested employment.

As to evidence that the Petitioner has such specialty occupation work, the Petitioner states: "Specialty occupation work for a computers science master's degree holder for nine months has been demonstrated by 40-hour work week chart showing professional work at prevailing wages."

That the Petitioner has promised to pay the proffered wage and constructs a chart of duties is not persuasive evidence of the existence of an in-house project that will continue throughout the period of requested employment that would require performance of the duties described by the Petitioner.

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 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).

The evidence of record does not show the existence of such a project. Although the Petitioner asserted that it is developing a marriage web portal, it has provided insufficient evidence to corroborate the existence of any such project. As the Petitioner provided insufficient evidence of the existence of in-house projects to which it could assign the Beneficiary, it has not established the substantive nature of the work, if any, that the Beneficiary would perform if the visa petition were approved.

In its letter of support submitted with the Form I-129, the Petitioner stated that the proffered position requires “a college degree, at a minimum with five years of experience,” or “minimum requisite computer skills.” It did not assert that, to satisfy the alternative requirements, a degree must be a minimum of a bachelor’s degree, that the degree must be in any specific specialty, that the degree considered together with the five years of experience would be equivalent to a bachelor’s degree in a specific specialty, or that the “minimum requisite computer skills” required by the proffered position would be equivalent to a minimum of a bachelor’s degree in a specific specialty or its equivalent, either with or without consideration of education and experience.

In the table in which the Petitioner stated the requirements of the proffered position, it again stated that the proffered position requires “A college degree, at a minimum with five years of experience, or have a minimum requisite computer skills.” Again, this does not appear to express a requirement of a minimum of a bachelor’s degree in a specific specialty or its equivalent.

In any event, the appeal must be dismissed, as the evidence of record does not establish that the petition was filed for definite, non-speculative work requiring the theoretical and practical application of at least a bachelor’s degree level of a body of highly specialized knowledge in a specific specialty, as required to establish a position as an H-1B specialty occupation in accordance with the governing statutory and regulatory framework.

For the reasons related in the preceding discussion, the Petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation.

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 J-S-T- Inc.*, ID# 17062 (AAO May 24, 2016)