



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

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

MATTER OF K- INC.

DATE: MAY 25, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a software development and IT consulting firm, seeks to temporarily employ the Beneficiary as a “data warehouse 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, California Service Center denied the petition. The Director concluded that the Petitioner (1) had not demonstrated that the proffered position qualifies for treatment as a specialty occupation and (2) had not shown that it would have an employer-employee relationship with the Beneficiary.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred pertinent to both bases for the denial.

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

I. SPECIALTY OCCUPATION

A. 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.

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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).

B. The Proffered Position

In the H-1B petition, the Petitioner stated that the Beneficiary will serve as a “data warehouse analyst.”¹ In a letter submitted in support of the petition, the Petitioner stated that the Beneficiary would provide his services to the [REDACTED] a client of [REDACTED] pursuant to an agreement executed between the Petitioner and [REDACTED]. According to the Petitioner, the proffered position requires a minimum of a bachelor’s degree in electrical engineering, computer science, electronics engineering, or a closely related field.

On the labor condition application (LCA) submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category “Computer Systems Analysts” corresponding to the Standard Occupational Classification code 15-1121.² The LCA was certified

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.

² The Petitioner classified the proffered position at a Level I wage (the lowest of four assignable wage levels). We will consider this selection in our analysis of the position. The “Prevailing Wage Determination Policy Guidance” issued by

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for employment in and near the Petitioner's [REDACTED] North Carolina address and in and near [REDACTED] in [REDACTED] Wisconsin. Evidence in the record indicates that the Wisconsin address is a location of [REDACTED]

The Petitioner provided the following duty description in its support letter:

- Worked on Data Warehouse & BI projects, gathering & documenting requirements, designing solutions, developing ETL using [REDACTED] developing universes and reports using Business Objects, testing, and implementing solutions. (10%)
- Created both ETL and business intelligence report design, development, testing, maintenance, metadata, and implementation of data warehouse initiatives. Understand user requirements, and implement solutions that ensure requirements can be achieved through high quality deliverables. (10%)
- Extensively used [REDACTED] client tools Source Analyzer, Warehouse designer, Mapping Designer, Mapplet Designer, Transformation Developer, [REDACTED] Manager and [REDACTED] (10%)
- Design and Development of ETL routines, using [REDACTED] within the [REDACTED] usage of Lookups, Aggregator, Ranking, Mapplets, connected and unconnected stored procedures / functions / Lookups, SQL overrides usage in Lookups and unconnected stored procedures / functions / Lookups, SQL overrides in usage in lookups and source filter usage in Source qualifiers and data flow management into multiple targets using Routers were extensively done.
- Develop ETL mapping specifications for loading information into the data warehouse and for ensuring reliability of information loaded. Seek continuous improvement in performance & tuning of data warehouse and ensure security of data Perform analysis and testing of relational databases and investigate any data load failures or data retrieval issues. (10%)
- Implemented various loads like Daily Loads, Weekly Loads, and Quarterly Loads using Incremental Loading Strategy. (10%)
- Worked on designing and building complex BO Universes, and created the objects and classes for Adhoc reporting purposes. (10%)

the DOL provides a description of the wage levels. A Level I wage rate is generally appropriate for positions for which the Petitioner expects the Beneficiary to have a basic understanding of the occupation. This wage rate indicates: (1) that the Beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; (2) that he will be closely supervised and his work closely monitored and reviewed for accuracy; and (3) that he will receive specific instructions on required tasks and expected results. U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://flicdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf. A prevailing wage determination starts with an entry level wage and progresses to a higher wage level after considering the experience, education, and skill requirements of the Petitioner's job opportunity. *Id.*

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- Developed and published highly formatted accounting and financial reports, customer account information, defaulters' reports, claim reports, co-pay related reports, healthcare reports, and legal-advocacy reports using Crystal Reports and WebI. (5%)
- Created linked sub reports using Open Doc URLs, worked on creating complex reports, used cross-tabs to display data in grid form (5%)
- Worked extensively with Business Objects report functions like Alerts, Filters, Sorts, and Drill filters, Crystal Reports IX Design and Development. (10%)
- Provided Production Support. (10%)

A letter from [REDACTED] recites substantially the same duties, and states that the Beneficiary would perform those duties "pursuant to a confidential agreement between [REDACTED] and [REDACTED]"

C. 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.

We find that the record of proceedings contains inconsistencies that undermine the Petitioner's claims regarding the proffered position. As mentioned, [REDACTED] stated that the Beneficiary is working on a project pursuant to "a confidential agreement" with [REDACTED]. Notably, at the time of filing, the Petitioner indicated the contractual succession as follows: Petitioner → [REDACTED]. However, documents submitted in response to the Director's request for evidence (RFE) revealed the actual path of contractual succession to be as follows: Petitioner → [REDACTED]. In other words, it appears that "confidential agreement" between [REDACTED] and the [REDACTED] *does not exist*, and the Petitioner did not reveal the existence of a second middle-vendor, [REDACTED] at the time of filing. Therefore, the Petitioner's representation of the path of contractual succession, a material fact in this proceeding, was not accurate.³ Without contracts or agreements

³ The misrepresentation of a material fact may lead to multiple consequences in immigration proceedings. First, as an evidentiary matter, the misrepresentation may impact the review and adjudication of the visa petition or immigration application. If USCIS does not believe that a fact stated in the petition is true, USCIS may reject that assertion. See section 214(c)(1) of the Act, 8 U.S.C. § 1184(c)(1); *cf. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001); *Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir. 1989). The Petitioner's submission of false statements may also call into question the reliability and sufficiency of the remaining evidence offered in support of the visa petition. See *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Next, a material misrepresentation that is found to be willful under section 212(a)(6)(C) of the Act may make an individual ineligible to receive a visa and ineligible to be admitted to the United States. See, e.g., *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995). Finally, a USCIS finding of willful, material misrepresentation may lead to criminal penalties. See 18 U.S.C. §§ 1001, 1546; see also *United States v. O'Connor*, 158 F. Supp.2d 697 (E.D. Va. 2001).

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between all the parties that outline the terms and conditions of the Beneficiary's employment and information regarding specific projects to which the Beneficiary would be assigned, we are not able to fully 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.

Further, the record of proceedings in this case is devoid of sufficient information from the end-client, [REDACTED] regarding the job duties to be performed by the Beneficiary and the requirements for the position. As recognized in *Defensor*, 201 F.3d at 387-88, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location(s) in order to properly ascertain the minimum educational requirements necessary to perform those duties. In other words, as the nurses in that case would provide services to the end-client hospitals and not to the petitioning staffing company, the Petitioner-provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination. *See id.*

Specifically, where the work is to be performed for entities other than the Petitioner, evidence of the client companies' job requirements is critical. In *Defensor*, 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 a beneficiary's services. Such evidence must be sufficiently detailed and explained as to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

While the work orders between the Petitioner and [REDACTED] are acknowledged, without a contract that outlines the substantive nature of the Beneficiary's work for the end-client, we are unable to determine that the Beneficiary will be employed in the capacity specified in the petition for the duration of the requested employment period. Specifically, the work order does not contain sufficient information to illuminate the specific tasks to be performed by the Beneficiary. For example, it states that the Beneficiary shall: "be responsible for accepting the assignment and for the performance of the requested services in timely, thorough and professional manner"; "comply with all corporate and departmental standards of Client and Company"; "be responsible for effectively communicating problems and concerns to Client and Company"; and "perform the requested Services at Client's location or some other suitable location that is mutually agreed to by the parties." However, the work orders do not provide any particular details regarding the demands, level of responsibilities and requirements necessary for the performance of the "assignment" and "the requested services."

We note that the letters from the Petitioner and [REDACTED] describing the duties and requirements of the proffered position are entitled to little probative weight, since they were not issued directly by the end-client. Overall, based upon the limited evidence in the record, we cannot find that the Petitioner has established the substantive nature of the work to be performed by the Beneficiary.

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That the Petitioner did not establish the substantive nature of the work to be performed by the Beneficiary precludes a finding that the proffered position is a specialty occupation under 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; (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 4.⁴

Further, we find that the Petitioner has not established that it has specialty occupation work available for the Beneficiary. That is, the Petitioner has not established that it has definite, non-speculative work for the Beneficiary for the entire validity period requested.

Notably, the work orders in the record does not cover the duration of the requested employment period. One of the work orders expired prior to the requested start date. Further, the other one was executed on September 28, 2015, subsequent to the filing of the instant petition, and had a retroactive date of July 1, 2015. On appeal, a letter from [REDACTED] stated it is able to execute the work

⁴ Even if the proffered position were established as being located within the “Computer Systems Analysts” occupational category (the occupational classification certified on the submitted LCA), a review of the U.S. Department of Labor’s (DOL’s) *Occupational Outlook Handbook (Handbook)* does not indicate that, simply by virtue of its occupational classification, such a position qualifies as a specialty occupation. More specifically, the information on the educational requirements in the “Computer Systems Analysts” chapter of the 2016-17 edition of the *Handbook* indicates at most that a bachelor’s or higher degree in a computer or information science field may be a common preference, but not a standard occupational, entry requirement. See U.S. Dep’t of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., “Computer Systems Analysts,” <http://www.bls.gov/ooh/computer-and-information-technology/print/computer-systems-analysts.htm> (last visited May 19, 2016).

This section of the *Handbook’s* narrative begins by stating that a bachelor’s degree in a related field is not a requirement. The *Handbook* continues by stating that there is a wide-range of degrees that are acceptable for positions located within this occupational category, including general purpose degrees such as business and liberal arts. While the *Handbook* indicates that a bachelor’s degree in a computer or information science field is common, it does not report that such a degree is normally a minimum requirement for entry.

According to the *Handbook*, many individuals working in positions within this occupational category have liberal arts degrees and have gained programming or technical expertise elsewhere. It further reports that many have technical degrees. We observe that the *Handbook* does not specify a degree level (e.g., associate’s degree, baccalaureate) for these technical degrees. Moreover, it specifically states that such a degree is not always a requirement. Thus, the *Handbook* does not support the claim that the occupational category of computer systems analyst is one for which normally the minimum requirement for entry is a baccalaureate degree (or higher) in a specific specialty, or its equivalent. Even if it did, the record lacks sufficient evidence to support a finding that the particular position proffered here, an entry-level position relative to others within the occupational category, would normally have such a minimum, specialty degree requirement or its equivalent. See *id.* As such, absent evidence that the position would actually be one located within the claimed occupational category, and that it would satisfy one of the alternative criteria available under 8 C.F.R. § 214.2(h)(4)(iii)(A), the petition could not be approved for this additional reason.

orders “in this fashion because the contracts are still valid.” However, it is not clear what contracts it is referring to, since the record of proceedings does not contain a contract with the end-client. “[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)). Further, the work order is valid only until January 25, 2017, which does not cover the duration of the requested employment.

We note that the Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the Petitioner or the Beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg’l Comm’r 1978). As such, eligibility for the benefit sought must be assessed and weighed based on the facts as they existed at the time the instant petition was filed and not based on what were merely speculative facts not then in existence.

The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor’s degree. See section 214(i) of the Immigration and Nationality Act (the “Act”). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30,419, 30,419-20 (proposed June 4, 1998) (to be codified at 8 C.F.R. pt. 214). 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*.

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. The appeal will be dismissed for this reason.

II. EMPLOYER-EMPLOYEE

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

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

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

As such, 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, where will the work be located, 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, the Director would be unable to properly assess whether the requisite employer-employee relationship will exist between the Petitioner and the Beneficiary. Therefore, the Director’s decision is affirmed, and the appeal is dismissed for this additional reason.

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III. 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.

ORDER: The appeal is dismissed.

Cite as *Matter of K- Inc.*, ID# 17023 (AAO May 25, 2016)