



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

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

MATTER OF N-, INC.

DATE: MAY 31, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a computer company, seeks to temporarily employ the Beneficiary as an "Applications Systems Engineer" under the H-1B nonimmigrant classification for specialty occupations. See Immigration and Nationality Act (the Act) § 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, revoked the approval of the petition. The Director concluded that the statement of facts contained in the approved petition was not true and correct pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(2).

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Director's conclusion is erroneous.

Upon *de novo* review, the appeal will be dismissed.

I. REVOCATION

A. Legal Framework

U.S. Citizenship and Immigration Services (USCIS) may revoke the approval of an H-1B petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii), which states the following:

- (A) Grounds for revocation. The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:
 - (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or

- (2) The statement of facts contained in the petition or on the application for a temporary labor certification was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
- (3) The petitioner violated terms and conditions of the approved petition; or
- (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
- (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

B. Analysis

Upon review of the record, we determine that the Director properly revoked the approval of the petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(2): the statement of facts contained in the petition was not true and correct.

On the Form I-129, the Petitioner represented that it has 23 current employees in the United States. On the Form I-129, H-1B and H-1B1 Data Collection and Filing Fee Exemption Supplement, the Petitioner represented that it has a total of 25 or fewer full-time equivalent employees in the United States. The Petitioner also represented that it was eligible to pay the lower fee (\$750) mandated by the American Competitiveness and Workforce Improvement Act (ACWIA) based on its number of employees. The Petitioner signed both forms under the penalty of perjury, certifying that all the information contained therein was true and correct to the best of its knowledge.

In its notice of intent to revoke (NOIR) the approval of the petition, the Director advised the Petitioner that she had obtained evidence indicating that the Petitioner employed 30 U.S. employees at the time the Form I-129 was filed. In response to the NOIR, the Petitioner explained that it had relied upon its February 2015, payroll, which was the last available payroll, in order to prepare and file the petition in March 2015. The Petitioner attested in an affidavit that it had 23 employees in February 2015, and thus, its number of employees on the Form I-129 was not untrue and incorrect.

We find that the Director's revocation of the approval was proper. The Petitioner's explanations are neither reasonable, nor supported by objective, credible evidence. In essence, the Petitioner is asserting that it was unaware of its true number of employees as of March 2015, when the petition was prepared and filed. However, as pointed out by the Director, that information should have been available to the Petitioner as the purported employer of these individuals. Moreover, the Petitioner asserts that the actual number of employees increased because "[s]ome employees joined the petitioner in the month of March 2015." However, the Petitioner did not explain why it did not account for these newly-joined employees on the Form I-129. In other words, the Petitioner has not established that its decision to rely upon its February payroll was reasonable, given its knowledge that new employees had joined the company in March.

Notably, the Petitioner's List of Active Employees does not indicate that any employees joined the company in March 2015, thus undermining the Petitioner's explanation.¹ In addition, this list contains the names and information of 33 current employees – all of whom had joined the company prior to March 2015.² This information further undermines the credibility of the Petitioner's explanation, e.g., that it only had 23 employees in February 2015.

We thus find that the statement of facts contained in the petition was not true and correct, and that the Director properly revoked the approval of the petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(2).

II. SPECIALTY OCCUPATION

We will also address another additional, independent ground, not identified by the Director's notice of revocation, that could also warrant initiation of revocation proceedings at the discretion of the Director. Specifically, we find that the evidence of record is insufficient to establish that the proffered position qualifies as a specialty occupation, and thus, that the approval of the petition violated paragraph (h) of this section or involved gross error. 8 C.F.R. § 214.2(h)(11)(iii)(A)(5).

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) 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) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

¹ The list contains a total of 34 employees. Only one individual joined the company after March 2015.

² These 33 employees include one employee who the Petitioner indicated was on extended leave in India. Even without this individual, the Petitioner had at least 32 active employees in March 2015.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must meet one of the following criteria:

- (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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Fed. Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets 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 proffered 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”). Applying this standard, USCIS regularly approves H-1B petitions for qualified individuals who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, directly related to the duties and

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responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the individual, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

We note that, as recognized by the court in *Defensor*, 201 F.3d at 387-88, where the 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. The Proffered Position

According to the Form I-129, the Petitioner seeks to employ the Beneficiary as an "Applications Systems Engineer" from October 1, 2015, to July 19, 2018. The Petitioner indicated that the Beneficiary will work off-site in Michigan.

The labor condition application (LCA) submitted to support the visa petition states that the proffered position corresponds to Standard Occupational Classification (SOC) code and occupation title 15-1121, "Computer Systems Analysts," from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I position. The LCA lists the sole place of employment as the Michigan address.

In its cover letter, the Petitioner stated that the Beneficiary will work out of the worksite of its "direct-client," whose office is located in [REDACTED] Michigan. The Petitioner listed the duties of the proffered position as follows (verbatim):

- Engineering, design, and evaluation of new and current production application systems and supporting infrastructure
- Operational planning, design and implementation for new and updated programs, inclusive of effectively utilizing tier partners
- Systems analysis and support for Internet-based solutions

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- Provide extensive troubleshooting and technical expertise in identifying issues that impact service delivery
- Provide comprehensive troubleshooting and recommend fixes for application issues, including batch jobs, data store, application functionality and presentation layers
- Provide design requirements, feedback and guidance to software development teams for operational best practices
- Analysis, stability and support of a specific subset Expedia production systems
- Operational support as application SME for 24x7 systems, including on call rotation duties
- Utilizing your enterprise technical expertise to drive the improvements of production systems
- Utilizing your support expertise to set and improve existing standards for system administration, such as process, builds, monitoring, reporting and documentation.

In support of the petition, the Petitioner submitted an Employment Agreement it executed with the Beneficiary which provides the following description of duties (verbatim):³

[The Beneficiary] will be responsible for Core Development of the Credit Engine in the project ASAP. It includes development of both web layer and business Layer for the credit module using JSP's, EJB's, DAO's, JMS and Struts Framework and deployment of the application on WebLogic. Production and QA support for the developed components including bug fixing and enhancements. Creating clustered Weblogic domains and deploying all the modules of the application and integrating all the modules. Deploying and integrating every release in Onsite environments. Written ant scripts for creating clustered domains and deploying all the modules. Automating the process of build and deployment using ant and also involved in the development of Automatic Patch Process for [REDACTED] using Java and Ant.

C. Analysis

As a preliminary matter, we find that the record of proceedings does not contain sufficient evidence establishing the minimum educational requirement for the proffered position. There is no documentation directly from the end-client specifying its educational requirement for the position; the Assigned Personnel Form simply describes the "Hiring Requirements" as "Application Systems Engineer." Despite the Petitioner's claim that the contract signed between the end-client and the Petitioner confirms a "Bachelor's degree requirement," the contract does not contain any provisions regarding the minimum educational requirement for assigned personnel. "[G]oing on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in

³ The Petitioner subsequently submitted an "amended" Employment Agreement in response to the Director's NOIR which noted several impermissible provisions relating to the LCA in the original Employment Agreement. Both Employment Agreements contain virtually the same description of duties.

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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)).

Even if the contract did indicate that a bachelor’s degree is required, as claimed by the Petitioner, the mere requirement of a general bachelor’s degree, without more, would be inadequate to establish that a position qualifies as a specialty occupation.⁴ A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. There must be a close correlation between the required specialized studies and the position; thus, the mere requirement of a degree, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm’r 1988) (“The mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility.”). Thus, while a general-purpose bachelor’s degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

Moreover, it also cannot be found that the proffered position qualifies as a specialty occupation because the Petitioner has not credibly and sufficiently demonstrated the substantive nature of the proffered position.⁵

The evidence of record contains generalized, broad descriptions of the work to be performed by the Beneficiary. For instance, the Assigned Personnel Form signed by the Petitioner and the end-client simply describes the “Services to be performed” as “Design, Coding and unit testing core components and client customization of the product.” No further details about these job duties or what “product” the Beneficiary will work on was provided in the Assigned Personnel Form. Nor does the record of proceedings contain any other documentation directly from the end-client verifying and describing the terms of the Beneficiary’s assignment.

Notably, the evidence of record does not contain any detailed explanation about what project(s) the Beneficiary will be assigned to work for the end-client, such as the nature, complexity, and length of this particular project. Equally, if not more, significant is that the Petitioner has indicated that the Beneficiary will be assigned to various projects at different end-clients. More specifically, the Petitioner’s description of the proffered position contains the duty of “[a]nalysis, stability and support of a specific subset [redacted] productions systems.” In addition, the Employment Agreement states that the Beneficiary “will be responsible for Core Development of the Credit Engine in the

⁴ The Petitioner also indicated that the Beneficiary is qualified for the position by virtue of his educational qualifications. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself qualifies as a specialty occupation.

⁵ The California Secretary of State website indicates that the Petitioner’s corporate status has been suspended. That is, the Petitioner’s powers, rights and privileges, including the right to use its corporate name in California, were suspended. *See* attached print-outs. The Petitioner’s corporate status raises questions regarding whether the Petitioner’s offer of employment to the Beneficiary is *bona fide*.

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project [REDACTED] and will also be “involved in the development of Automatic Patch Process for [REDACTED]. The Petitioner has not explained how these references to [REDACTED] “Credit Engine in the project [REDACTED] and [REDACTED] relate to the end-client project. The Petitioner has not submitted sufficient objective documentation establishing exactly what project(s) the Beneficiary will work on, and for whom.

“[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. “Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.” *Id.* at 591.

The Petitioner states that the Beneficiary will serve as a subject matter expert or “SME” for certain systems. In contrast, the Petitioner designated the proffered position as a Level I (entry) position.⁶ In designating the proffered position at a Level I wage rate, the Petitioner has indicated that the proffered position is a comparatively low, entry-level position relative to others within the occupation.⁷ That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the Beneficiary is only required to have a basic understanding of the occupation and will perform routine tasks that require limited, if any, exercise of judgment. See U.S. Dep’t of Labor, Emp’t & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf. The

⁶ A Level I wage rate is described as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer’s methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

See U.S. Dep’t of Labor, Emp’t & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

⁷ The Petitioner’s designation of this position as a Level I, entry-level position undermines its claim that the position is a higher-level position compared to other positions *within the same occupation*. Nevertheless, a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation, just as a Level IV wage-designation does not definitively establish such a classification. In certain occupations (e.g., doctors or lawyers), a Level I, entry-level position would still require a minimum of a bachelor’s degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor’s degree in a specific specialty, or its equivalent. That is, a position’s wage level designation may be a relevant factor but is not itself conclusive evidence that a proffered position meets the requirements of section 214(i)(1) of the Act.

Petitioner's designation of the proffered position as a Level I, entry-level position is inconsistent with this stated job duty, and further precludes an understanding the substantive nature of the proffered position.

The evidence of record contains other vague statements by the Petitioner and the end-client regarding the Beneficiary's actual job duties and work location. For instance, the Assigned Personnel Form lists the Beneficiary's "Primary work location" as the end-client's Michigan premises. The use of the word "Primary" denotes that the Beneficiary may also be assigned to perform work at other, unspecified locations. In addition, the Petitioner stated in its cover letter that "[t]he petitioner has enough resources and financial strength to continue paying the beneficiary even without specific project/s," and that "[i]f required, the petitioner can place the beneficiary in place of any one of those contractor positions" which are "sourced through third party companies."⁸ Likewise, the Petitioner's Employment Agreements with the Beneficiary contain provisions indicating that the Beneficiary may be assigned to perform undisclosed work, such as that the Beneficiary's "duties shall be rendered at [Petitioner's] business premises or at such other places as the [Petitioner] may require" and that he "shall also perform such other duties in the ordinary course of business as performed by other persons in similar such positions, as well as such other reasonable duties as may be assigned from time to time by the [Petitioner]." When considered as a whole, the evidence of record lacks a sufficient, detailed explanation of all the work the Beneficiary will be assigned to perform during the entire validity period requested, including the location(s) of such work, the end-client(s) involved, and the specific job duties to be performed.

Finally, we note that the Assigned Personnel Form misspells the Beneficiary's name and lists his end-date as October 12, 2018, even though the Petitioner requested a validity period ending on July 19, 2018.⁹ The Petitioner's Employment Agreements also misspell the Beneficiary's name. We thus must question whether there exists a legally binding contract between the Beneficiary and the Petitioner, as well as between the Petitioner and the end-client utilizing the Beneficiary's services, as claimed.

For all of the above reasons, we find the evidence of record insufficient to demonstrate the substantive nature of the proffered position and its constituent duties. Consequently, the evidence of record does not demonstrate the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of the proffered position 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

⁸ The Petitioner states that it has a direct contractual relationship with the end-client, thus indicating that there are no third-party or vendor companies involved.

⁹ The Petitioner did not request the maximum three years for the Beneficiary's duration of stay, which would have ended on September 30, 2018.

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issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

As the evidence of record is insufficient to establish that the proffered position qualifies as a specialty occupation, it would have been within the scope of the Director's authority to initiate revocation-on-notice proceedings regarding this issue upon proper notice to the Petitioner of her intent to do so.

III. CONCLUSION

Upon review of the record, we determine that the Director properly revoked the approval of the petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(2). The petition will remain revoked and the appeal dismissed. 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) (citing *Matter of Brantigan*, 11 I&N Dec. 493, 495 (BIA 1966)). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of N-, Inc.*, ID# 17016 (AAO May 31, 2016)