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 a "Software 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, denied the petition. The Director concluded that the evidence of record is insufficient to establish that the proffered position qualifies as a specialty occupation.

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, we will dismiss the appeal.

I. SPECIALTY OCCUPATION

A. Legal Framework

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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.

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 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.

B. The Proffered Position

On the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner described itself as a 22-employee company that engages in the business of "Software Services and Application Development for proprietary The Petitioner seeks to employ the Beneficiary as a "software engineer" from October 1, 2015, to July 29, 2018, at a salary of $62,000 per year.

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 15-1131, "Computer Programmers," from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I, entry-level, position.

In its cover letter, the Petitioner explained that it "has built a multi channel digital ordering (Software as a Service – SaaS) platform – . . . [that] is an online food ordering service." The Petitioner stated that the Beneficiary "will be designated to primarily work at the [Petitioner's] business premises in CA on [its] internal software product suite - The Petitioner then described the duties of the proffered position as follows (verbatim):

> [The Beneficiary] will be responsible for evaluating [redacted] customers operational feasibility by problem definition, requirements analysis, solution development, and proposed solutions. His duties will include documenting solutions by developing flowcharts, layouts, diagrams, charts, code comments and clear code for [redacted] Preparing and installing solutions by determining and designing system specifications, standards, and programming based on [redacted] customers; Improving [redacted] customer operations by conducting systems analysis, recommending changes in policies and procedures and collecting, analyzing, and summarizing development and service issues of [redacted] old and new customers.

In response to the Director's request for evidence (RFE), the Petitioner elaborated upon the duties of the proffered position, as well as the time spent on each duty, as follows:

	Tasks	**Difficulty Level**	**% Time to be Spent**
1.	Develops information systems by designing, developing, and installing software solutions. Determines operational feasibility by evaluating analysis, problem definition, requirements, solution development, and proposed solutions. Documents and demonstrates solutions by developing documentation, flowcharts, layouts, diagrams, charts, code comments and clear code.	5	25%
2.	Prepares and installs solutions by determining and designing system specifications, standards, and programming. Improves operations by conducting systems analysis; recommending changes in policies and procedures.	4	15%
3.	Obtains and licenses software by obtaining required information from vendors; recommending purchases; testing and approving products.	4	15%
4.	Updates job knowledge by studying state-of-the-art development tools, programming techniques, and computing equipment; participating in educational opportunities; reading professional publications; maintaining personal networks; participating in professional organizations.	4	15%
5.	Protects operations by keeping information confidential. Provides information by collecting, analyzing, and summarizing development and service issues.	4	20%
6.	Accomplishes engineering and organization mission by completing related results as needed.	3	5%
7.	Develops software solutions by studying information needs; conferring with users; studying systems flow, data usage, and work processes; investigating problem areas; following the software development lifecycle.	4	5%

Notes on Difficulty Level	
1	Novice
2	Some Exposure
3	Familiarity with Computers
4	Bachelor's
5	Master's

The Petitioner stated that the proffered position requires a bachelor's degree in computer science, electronics engineering, computer information systems, or a related field, plus a minimum of two to four years of related experience.

C. Analysis

We find that the Petitioner has not credibly and sufficiently demonstrated what work its company or the Beneficiary will perform on the product. Accordingly, we cannot determine whether the proffered position qualifies as a specialty occupation.

As duly noted by the Director, is a product that belongs to the corporation The evidence of record contains, for example, the "Terms of User Agreement" which authorizes the use of the product by ' a corporation, incorporated under the laws of the State of Delaware." The U.S. Patent and Trademark Office application to trademark the " mark also identifies ' as the applicant. Other evidence in the record, such as marketing documents, invoices, and bank statements, similarly reference ' as the corporate entity which owns

The Petitioner has not sufficiently explained the nature of its relationship to That is, the Petitioner has not explained the roles, responsibilities, division of labor, and other salient aspects of the relationship between these two companies with respect to the product.[1] The Petitioner also has not submitted contracts or other evidence establishing the actual terms of agreement, if any, between and the Petitioner. Without additional

[1] The Petitioner initially signed the Attorney-Client Agreement for attorney services to trademark the mark. Subsequently, however, the actual trademark application was filed by not the Petitioner. We also note that the website states that was copyrighted by The website also states that is "A Product of and is "Brought to you by [the Petitioner]." Furthermore, and the Petitioner share the same address. In a proposal to the Petitioner submitted a "General Company Background" claiming that it is the "Parent Organization" of However, the Petitioner's federal tax returns do not indicate that the Petitioner owns stock in any other foreign or domestic corporation. The proposal also states that the company, identified as "[The Petitioner] has "80+" full-time employees. This is significantly higher than any number of employees the Petitioner has previously claimed, and raises the question of whether has its own set of employees. Overall, while it is evident that the Petitioner and are related, the specific relationship between the two companies is unclear.

information and evidence, we cannot determine whether the Petitioner has actual work available on the project, and can make a *bona fide* offer of employment for such work on the project.[2] While the Petitioner and may share a common owner, a corporation is nevertheless a separate and distinct legal entity from its owners or stockholders. *See Matter of M-*, 8 I&N Dec. 24, 50-51 (A.G., BIA 1958); *Matter of Aphrodite Invs. Ltd.*, 17 I&N Dec. 530 (Comm'r 1980); and *Matter of Tessel, Inc.*, 17 I&N Dec. 631 (Act. Assoc. Comm'r 1980).

Nevertheless, assuming *arguendo* that is a product of the Petitioner or that the Petitioner is otherwise authorized to perform work on the Petitioner has not submitted sufficient evidence to demonstrate exactly what work the Petitioner has available and will perform on the project.

The Petitioner provided generalized, broad descriptions of the work to be performed on the project. The "milestones" described in the "Product Overview with Milestone Development Plan" document are broadly termed and do not explain the actual work to be performed, and by whom. For example, the "milestones" to be completed include a "Private-Label and POS integration release" in May 2016 and release" in December 2016. However, there is no further explanation of what specific tasks are needed to achieve these broad milestones, who will perform these specific tasks, how many work hours are needed to accomplish each task, or any other pertinent information about the work to the completed. The Petitioner likewise provided a "Detailed Work streams" chart which lists the positions, wages by hour, location of work, and number of hours per month, but does not describe in detail the actual work to be performed.

In addition, the product overview lists the "Core Team" as: (1) the Petitioner's CEO/Founder; (2) an individual in "Engineering"; (3) an individual in "Marketing & Operations"; and (4) an individual in "Business Development." However, there is insufficient evidence establishing that these "Core Team" members were actively working for the Petitioner as of the time of filing. There is insufficient evidence that the Petitioner employs or has employed the individuals in "Engineering" and "Business Development" within the past several years, as neither individual appears on the Petitioner's organizational chart, 2013 and 2014 W-2 forms, or 2015 payroll information, among other documents. While the individual in "Marketing & Operations" appears to have been a former employee, she was not actively working for the Petitioner at the time of filing, according the Petitioner's organizational chart, 2015 Quarter 1 Form 941, and 2015 payroll records.[3] Even the Petitioner's CEO/Founder was not listed in the Petitioner's payroll records for all months in 2015. In the five months of 2015 that he appeared on the payroll, he was listed as having worked zero

[2] 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 additional questions regarding its ability to make a *bona fide* offer of employment.

[3] This individual was listed as a paid employee on the Petitioner's March, April, May, and June payroll records. However, she was listed as having worked zero hours in each of these months. She was no longer on the Petitioner's July and subsequent payroll records.

hours. The Petitioner has not explained and documented who constitutes actual, current "Core Team."

The Petitioner also has not specifically identified which of its other employees are actively working on the product. The Petitioner's organizational chart does not specifically identify which employees have been assigned to the team.[4] In fact, the organizational chart – which lists 36 different positions (not including contracted positions) – does not contain any of the 11 positions the Petitioner listed in a separate chart depicting the required labor or "Detailed Work streams" for the project (i.e., an Engagement Manager, Onsite – Manager, Project Manager, Sr. Architect, Test Manager, Android Developer, iOS Developer, Windows Mobile Developer, Web Developer, Manual Tester, and UI Designer).[5]

Notably, none of the individuals who hold the 11 positions listed on the "Detailed Work streams" chart will perform full-time work. To illustrate, for the entire month of April 2015, the Engagement Manager will work zero hours, the Onsite - Manager and Sr. Architect will work a total of 0.5 hours each, and six other positions will work only one hour each. The position having the most hours as of the end of Phase II, which ends in June 2017, is the Manual Tester position, which will have worked a total of 27 hours for the three-month period of April to June, 2017. Overall, the Petitioner has not sufficiently explained and documented its actual need for additional, full-time staffing on the project.

"[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.

It is important to note the Director's finding that the Petitioner had previously obtained approvals for at least 20 H-1B beneficiaries to work on the project. The Director also found that the Petitioner filed at least 15 new H-1B petitions to employ additional workers on the project starting from October 1, 2015. The record therefore indicates that the Petitioner has requested to employ at least 35 individuals on the project. In contrast, the Petitioner stated that it "will employ approximately 11 people to work out of [its] 2 office premises," and listed only 11 positions on the "Detailed Work streams" chart as required for the project. Moreover, the Director found that four of the Petitioner's H-1B beneficiaries who were supposed to have been assigned to the project were actually assigned to work in states far from California. The Petitioner has not provided an explanation, corroborated by objective evidence,

[4] The organizational chart does, however, specifically identify two of the Petitioner's contractors that are on the team (i.e., the UI Architect and UI Designer, both identified as a ').

[5] The Petitioner listed an on-site UI Designer as one of the required personnel on this chart. It is not clear whether this position is the same as the contracted UI Designer position depicted on the organizational chart.

reconciling its various claims regarding the required personnel for the project.[6] Again, it is incumbent upon the Petitioner to resolve inconsistencies in the record, and doubt cast on any aspect of the Petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Id.* at 591-2.

Regarding the sufficiency of the Petitioner's work space, the Petitioner initially indicated that the Beneficiary will work on the project from its office located in California. The Director also found that the 35 H-1B beneficiaries whom the Petitioner claimed were to work on the project were also supposed to be working from the same office. However, the lease for this particular office address reflects that these premises consist of only 250 square feet. The Petitioner has not sufficiently explained and documented how its office premises were sufficient to house the entire team, even at the time it entered into the lease on September 11, 2014. While the Petitioner has subsequently leased a larger office located in California, this new lease nevertheless does not overcome the Petitioner's initial lack of office space. 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).

Considering all of the above factors – including the Petitioner's vague descriptions of the work to be done on the inconsistent levels of staffing claimed, as well as the lack of adequate office space – we cannot find that the Petitioner has sufficiently demonstrated what work it has available and will actually perform on the project.

Moreover, the Petitioner has not consistently and credibly demonstrated what work, if any, the Beneficiary will actually perform for the project.

For instance, there is no specific mention of the Beneficiary or the role of the Software Engineer in the "Product Vision/Business Plan," "Product Overview with Milestone Development Plan," "Detailed Work streams" chart, or any other project document about The Petitioner has not specifically explained how the Beneficiary's duties correlate to the "milestones" described in the project overview, or how the Beneficiary's role fits in within the 11 other positions listed in the "Detailed Work streams" chart.

The Petitioner's descriptions of the proffered duties are also vague and duplicative. For example, the Petitioner stated that the Beneficiary will spend 25% of his time on the duties of: developing information systems by designing, developing, and installing software solutions; determining operational feasibility by evaluating analysis, problem definition, requirements, solution development, and proposed solutions; and documenting and demonstrating solutions by developing documentation, flowcharts, layouts, diagrams, charts, code comments and clear code. The Petitioner then stated that the Beneficiary will spend another 15% of his time on the duties of: preparing and

[6] On appeal, the Petitioner does not directly contest the Director's findings. Instead, the Petitioner vaguely states that the Service erred in "any and all other and/or relating issues raised in the denial or in this appeal."

installing solutions by determining and designing system specifications, standards, and programming; and improving operations by conducting systems analysis; recommending changes in policies and procedures. The Petitioner has not adequately distinguished the first set of duties from the second set of duties, even though they account for separate percentages of time.

With regard to the first set of duties, the Petitioner indicated that it is a "Difficulty Level" 5, which requires a master's degree. However, the Petitioner has never claimed that the proffered position requires a master's degree.[7] Nor has the Petitioner claimed that positions within the "Computer Programmers" occupational classification normally require a master's degree. Rather, the Petitioner repeatedly states that a bachelor's degree is the normal minimum requirement for this as well as other positions within the "Computer Programmers" occupational classification. We observe that the Petitioner designated the proffered position as a Level I (entry) position, which indicates that the proffered position is a comparatively low, entry-level position relative to others within the occupation.[8] The Petitioner's designation of this position as a Level I, entry-level position further undermines the Petitioner's characterizations of the proffered position.[9]

Finally, we note the Petitioner's statement that the Beneficiary "will be designated to primarily work at the [Petitioner's] business premises in CA on [its] internal software product suite - The use of the word "primarily" denotes that the Beneficiary may also be assigned to perform work other than at the Petitioner's business premises and/or on the project. We also note the Petitioner's Employment Agreements with the Beneficiary which state that the Beneficiary "shall also perform such other duties in the ordinary course of business as

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[7] The Petitioner also does not claim that the Beneficiary possesses a master's degree or its equivalent.

[8] 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.

[9] The Petitioner's designation of this position as a Level I, entry-level position undermines any claim that the position is particularly difficult, particularly as 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.

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]." These Employment Agreements further state that the Beneficiary's "duties shall be rendered at [Petitioner's] business premises or at such other places as the [Petitioner] may require."[10] 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 and the specific job duties to be performed.

For all of the above reasons, we find the evidence of record insufficient to demonstrate that the Petitioner has work available to perform on the project, and that the Petitioner will assign the Beneficiary to work on the project in the manner asserted. We are therefore precluded from understanding the substantive nature of the proffered position and its constituent duties.

Consequently, we are precluded from 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; (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 evidence does not satisfy 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. The appeal will be dismissed and the petition denied for this reason.

II. CONCLUSION

The Petitioner has not established that the proffered position, more likely than not, qualifies as a specialty occupation. 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 N-, Inc.*, ID# 16862 (AAO May 31, 2016)

[10] The Petitioner submitted an "amended" Employment Agreement in response to the Director's RFE which had noted several impermissible provisions relating to the LCA in the original Employment Agreement. Both Employment Agreements contain the above statements.