



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

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

MATTER OF S-, LLP

DATE: MAY 31, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an information technology business, seeks to temporarily employ the Beneficiary as a "QA tester" 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 proffered position is not a specialty occupation and that the Petitioner did not establish 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 in her decision.

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

## I. SPECIALTY OCCUPATION

### 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.

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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 Form I-129, Petition for a Nonimmigrant Worker, the Petitioner stated that the Beneficiary will be employed off-site as a “QA tester” at [REDACTED] from October 1, 2015, to September 13, 2018. The Petitioner initially stated in its support letter that the project entailed “wi-fi testing” and described the proffered duties as follows:

- Recognize and adopt best practices in software engineering: design, testing, version control, documentation, build, and deployment – all with an emphasis on software quality;
- Utilize in-depth understanding of formal software development processes and procedures;
- Learn about new technologies and new test methodologies through actively reading, training, and sharing information with other engineers;
- Write test plans and test cases that are high quality, high value, and maintainable;
- Create and improve test automation scripts;
- Address testing and process problems at their roots;
- Develop pragmatic solutions;

- Implement flexible/scalable processes and choose simple, straightforward solutions over more complex ones;
- Utilize a broad range of testing methodologies and software testing techniques, such as equivalence class partitioning, boundary value testing, domain analysis testing, orthogonal arrays, etc.;
- Anticipate and prevent future problems from occurring;
- Adopt solutions that get code to production and that do not make continued testing after release (regression testing) difficult, labor intensive, or impossible;
- Understand the features and detailed functional requirements in order to ensure that end users' needs are accounted for throughout the product lifecycle;
- Collaborate to ensure that decisions are based on the merit of the proposal;
- Communicate clearly both verbally and in writing with the team and other groups; and
- Translate detailed technical problems into communicable messages.

The Petitioner also stated that it requires "at least a Bachelor's degree in Engineering, Computer Science, Business Administration, Information Systems or a related field and relevant work experience." The Petitioner further stated that "[a]ll of our QA Testers are required to have at least the minimum of a Bachelor's degree in the specific field of endeavor."

### 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.<sup>1</sup>

#### 1. The Petitioner Does Not Require a Bachelor's Degree in a Specific Specialty

As a preliminary matter, it must be noted that the Petitioner's claimed entry requirement of at least a bachelor's degree in "Engineering, Computer Science, Business Administration, Information Systems or a related field" for the proffered position, without more, is inadequate to establish that the proposed position qualifies as a specialty occupation. In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however,

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<sup>1</sup> 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.

a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be “in *the* specific specialty (or its equivalent),” unless the Petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required “body of highly specialized knowledge” is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

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

In this case, the Petitioner claims that the duties of the proffered position can be performed by an individual with a bachelor’s degree in engineering, business, computer science or information systems or related field. The issue here is that it is not readily apparent that engineering, business, and computer science are closely related or that the field of business or engineering is directly related to the duties and responsibilities of the particular position proffered in this matter.

Here and as indicated above, the Petitioner, who bears the burden of proof in this proceeding, has not established either (1) that business, engineering, and computer science are closely related fields or (2) that the field of business or engineering is directly related to the duties and responsibilities of the proffered position. Absent this evidence, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor’s or higher degree in a specific specialty, or its equivalent, under the Petitioner’s own standards.

Further, we note that the Petitioner indicates that a bachelor’s degree in business administration is sufficient to perform the duties of the proffered position. However, the requirement of a bachelor’s degree in business administration is inadequate to establish that a position qualifies as a specialty occupation.<sup>2</sup> 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. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at

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<sup>2</sup> A general degree requirement does not necessarily preclude a proffered position from qualifying as a specialty occupation. For example, an entry requirement of a bachelor’s or higher degree in business administration with a concentration in a specific field, or a bachelor’s or higher degree in business administration combined with relevant education, training, and/or experience may, in certain instances, qualify the proffered position as a specialty occupation. In either case, it must be demonstrated that the entry requirement is equivalent to a bachelor’s or higher degree in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

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147 (recognizing a business administration degree as a general-purpose degree); *cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm'r 1988) (the mere requirement of a degree, without further specification, does not establish the position as a specialty occupation). The Petitioner has not demonstrated that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation. Without more, the Petitioner's statement alone indicates that the proffered position is not in fact a specialty occupation. The Director's decision must therefore be affirmed and the appeal dismissed on this basis alone.

2. The Petitioner Has Not Sufficiently Established the Nature and Scope of the Beneficiary's Employment

The record of proceedings contains discrepancies and misleading information that undermine the Petitioner's claims regarding the proffered position. For example, in this case, the Petitioner is located in [REDACTED] New Jersey. The Petitioner indicated that the Beneficiary will be working for the [REDACTED] in [REDACTED] Illinois, for the duration of the requested employment period. However, the evidence in the record of proceedings does not support its claims.

Specifically, with the Form I-129, the Petitioner submitted a Master Services Agreement (MSA) with [REDACTED] effective September 17, 2014, along with a work order for the Beneficiary's services to work at [REDACTED] for 12 months starting on October 1, 2015. However, the work order was issued by [REDACTED] and did not match the MSA submitted.

On appeal, the Petitioner submits a copy of a staffing services supplier agreement with [REDACTED] to provide staffing services to [REDACTED] client, [REDACTED]. However, this agreement was signed in June 2015, after the petition was filed. Further, the Petitioner does not provide copies of any contracts that may exist between [REDACTED] and [REDACTED].

Also on appeal, the Petitioner submitted a letter purportedly from the End Client, [REDACTED]. However, the letter from the End-Client, dated December 7, 2015, is not on the company letterhead. Further, even if we assume that the letter is from the End-Client, the letter does not include sufficient information regarding the project or detail the Beneficiary's actual day-to-day duties for that project.

For example, the letter from the End-Client states that the Beneficiary's responsibilities include "analyzing and testing for financial and insurance applications," "creating and executing test scripts in QTP through keyword review and expert view," and "preparing requirements traceability matrix . . ." Such generalized information does not in itself establish a correlation between any dimension of the proffered position and a need for a particular level of education, or educational equivalency, in a body of highly specialized knowledge in a specific specialty. Therefore, it is not evident that the duties as described in this record of proceedings, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. The duties as described give very little insight to actual tasks that the Beneficiary would perform on a day-to-day basis. Furthermore, we find that the Petitioner has not supplemented the job and duty descriptions with documentary evidence

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establishing the substantive nature of the work that the Beneficiary would perform, whatever practical and theoretical applications of highly specialized knowledge in a specific specialty would be required to perform such substantive work, and whatever correlation may exist between such work and associated performance-required knowledge and attainment of a particular level of education, or educational equivalency, in a specific specialty. Specifically, the letter does not state educational requirement for the project. While it states experience requirements such as “expertise in black box testing, functional testing, integration testing, back-end testing, grey box testing, and regression testing,” it does not specify that the expertise must be equivalent to a bachelor’s degree in a specific specialty.

In addition, as discussed above, [REDACTED] states on appeal that the End-Client’s work for the Beneficiary is only confirmed for 12 months. The Petitioner does not submit further documents to establish that another work or purchase order has been issued covering the duration of the Beneficiary’s requested employment period, from October 1, 2015, to September 13, 2018. Therefore, we are unable to determine if the Beneficiary will be working on the project for the requested employment period. A petition must be filed for non-speculative work for the Beneficiary, for the entire period requested, that existed as of the time of the petition’s filing. Without copies of the contracts covering the duration of the period of employment requested, we are not able to ascertain what the Beneficiary would do, where the Beneficiary would work, as well as how this would impact circumstances of her relationship with the Petitioner.<sup>3</sup> Thus, even if it were found that the Petitioner would be the Beneficiary’s United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), the Petitioner has not demonstrated that it would maintain such an employer-employee relationship for the duration of the period requested.

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. The court held that the former Immigration and Naturalization Service had reasonably

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<sup>3</sup> 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 individual 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 individual 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 individual 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 individual 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).

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. See *Defensor v. Meissner*, 201 F.3d at 384. 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. As noted above, the Petitioner did not submit copies of all the relevant contracts and work orders and the letter that is purportedly from the End-Client is not on a letterhead. Further, as discussed, the letter does not contain sufficient information about proposed duties and the requirements for the position.

Because of the discrepancies discussed above, we cannot determine the nature and scope of the Beneficiary's employment. The record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position qualifies as a specialty occupation. Therefore, we cannot determine that description of the proffered position communicates: (1) the actual work that the Beneficiary would perform; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty.

The inability to establish the substantive nature of the work to be performed by the Beneficiary consequently precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines: (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Accordingly, as the Petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation.

## II. EMPLOYER-EMPLOYEE RELATIONSHIP

We will briefly address the issue of whether or not the Petitioner qualifies as an H-1B employer. The United States Supreme Court has 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

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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.

The record in this matter does not include probative evidence establishing the Petitioner's mechanism to control and direct the Beneficiary's work while offsite. According to the staffing services supplier agreement, "[the Petitioner] will assign certain employees ("CLRs") with the skills Client requests, to perform Client's work." Importantly, the Exhibit A (accompanying the staffing agreement) defines the term "CLR" as referring to "individuals [who] provide Contingent Labor Services on a temporary basis for [redacted] . . . and take day to day direct instruction from their [redacted] manager." Further, Exhibit A-7 (also accompanying the staffing agreement) similarly states that "CLRs shall work under the direct supervision and control of a project manager, as designated by [redacted] in the Purchase Order," and "[w]hen a CLR is working under a Purchase Order, the [redacted] project manager identified in the Purchase Order shall take delivery of the Deliverables of that Purchase Order." From this evidence, it appears that [redacted] supervises the Beneficiary's work on a day-to-day basis.

Further, under the copy of the employment agreement the Petitioner submits on appeal, the "[e]mployee agrees to maintain records of the hours that services have been performed on a bi-monthly basis as per the policies and procedures of [the Petitioner] and/or the client of [the Petitioner] and have a representative of the client, where the employee is situated . . . verify and approve Employee's hours worked . . ." Therefore, it appears that it is the End-Client who will ultimately verify the Beneficiary's work and validate the hours worked. These documents do not sufficiently explain the manner through which the Petitioner will supervise the Beneficiary's offsite work.

We find that the Petitioner has not provided sufficient evidence with regard to how the Petitioner remotely controls the manner and means by which the services are provided. It cannot be concluded, therefore, that the Petitioner has satisfied its burden and established that it qualifies as a United States employer with standing to file the instant petition in this matter. *See* section 214(c)(1) of the Act (requiring an “Importing Employer”); 8 C.F.R. § 214.2(h)(2)(i)(A) (stating that the “United States employer . . . must file” the petition); 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991) (explaining that only “United States employers can file an H-1B petition” and adding the definition of that term at 8 C.F.R. § 214.2(h)(4)(ii) as clarification).

### 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.<sup>4</sup>

**ORDER:** The appeal is dismissed.

Cite as *Matter of S-, LLP*, ID# 17131 (AAO May 31, 2016)

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<sup>4</sup> Since the identified bases for denial are dispositive of the Petitioner’s appeal, we will not address any of the additional grounds of ineligibility we observe in the record of proceeding, including whether the Petitioner has complied with the itinerary and LCA requirements.