



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

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

MATTER OF D-G- INC.

DATE: OCT. 25, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an information technology company, seeks to temporarily employ the Beneficiary as a "software programmer" under the H-1B nonimmigrant classification for specialty occupations. See Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director, Vermont Service Center, denied the petition. The Director concluded that the evidence of record does not establish: (1) that the Petitioner has specialty occupation work available for the Beneficiary, and thus, that the proffered position qualifies as a specialty occupation; and (2) that the Petitioner meets the regulatory filing requirements.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and a brief, and asserts that the Director erred in her findings.

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.

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. Proffered Position

In its support letter, the Petitioner submitted the following duties for the proffered position (verbatim):

- Modify existing software to correct errors, to adapt it to new hardware, or to upgrade interfaces and improve performance;
- Advise about or perform maintenance of software system as needed;
- Analyze information to determine, recommend, and plan installation of a new system or modification of an existing system;
- Consult with engineering staff to evaluate interface between hardware and software, develop specifications and performance requirements, or resolve customer problems;
- Involve in software programming and development of documentation;
- Store, retrieve, and manipulate data for analysis of system capabilities and requirements;
- Confer with data processing and/or project managers to obtain information on limitations or capabilities for data processing projects;

- Coordinate installation of software systems;
- Prepare reports or correspondence concerning project specifications, activities, or status;
- Utilize well-developed knowledge of software technologies such as C, C++, Core, Java, PL/SQL, Windows, MC Access, Oracle DB, Quality Center, MS Visio, MS Project, MS SharePoint, and Cloud computing concepts to design, develop code (software program) and implement software applications;
- Evaluate, maintain and support various online applications, including Server Systems and deploy internet based applications for use in connection with information systems;
- Convert data from project specifications and statements of problems and procedures to create, modify, and test computer programs;
- Analyze workflow charts and diagrams, apply knowledge of requirements analysis, design, test, and implement software applications, knowledge, transfer/user training activities, computer capabilities, subject matter, and symbolic logic;
- Compile and write documentation regarding program development and subsequent revisions;
- Deploy program codes into computer system and client communication concerning new program codes;
- Observe and debug computer system to interpret software program operating codes;
- Correct program errors using methods such as modifying program or altering sequence of program steps; and
- Analyze, review, and rewrite programs to increase operating efficiency or to adapt programs to new requirements.

In the same letter, the Petitioner summarized the responsibilities of the proffered position (and the percentages of time allotted to the responsibilities) as follows: analysis of software requirement and programming (30%); evaluation of interface feasibility between hardware and software (15%); software system design (using scientific analysis and mathematical models to predict and measure design consequences and future outcome) (35%); unit and integration testing (10%); and system installation (10%).

On appeal, the Petitioner reiterates the previously-stated job duties and provides additional duties for the Beneficiary, as follows:

- Directing and managing project development from beginning to end
- Defining project scope, goals and deliverables to support business goals
- Responsible for overall project management and managed several high performance cross-functional teams and vendors with overall accountability
- Planning and scheduling project timelines and milestones with budgetary guidelines

(b)(6)

*Matter of D-G- Inc.*

- Developing full-scale project plans and associated document
- Define project goals and expectations to team members clearly and timely
- Effectively prioritizing and executing tasks
- Coordinating training for new installations and unit expansions
- Conducting successful project handoffs to ongoing support and maintenance teams
- Effectively resolving project issues and escalations
- Developing best practices and tools for project execution, management, training and support

The Petitioner provides another summary of the responsibilities of the proffered position (and the percentages of time allotted to the responsibilities) as follows: analysis of software requirement and programming (30%); evaluation of interface feasibility between hardware and software (15%); software system design (using scientific analysis and mathematical models to predict and measure design consequences and future outcome) (30%); unit and integration testing (10%); system installation (10%); and system maintenance (5%).

According to the Petitioner, the proffered position requires at least a bachelor's degree in computer science, engineering, or a related field.

### C. Analysis

For H-1B approval, the Petitioner must demonstrate a legitimate need for an employee exists and to substantiate that it has H-1B caliber work for the Beneficiary for the period of employment requested in the petition. It is incumbent upon the Petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent, to perform duties at a level that requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.

In this matter, the Petitioner initially indicated that the Beneficiary will work in-house as a software programmer. Specifically, on the Form I-129, Petition for a Nonimmigrant Worker, and the supporting Labor Condition Application (LCA), the Petitioner represented that the Beneficiary will only work from the Petitioner's business premises in ██████████ New Jersey. However, upon review of the record of proceedings, we find that the Petitioner did not provide sufficient, credible evidence to establish in-house employment for the Beneficiary for the validity of the requested H-1B employment period.

First, the Petitioner did not submit a job description to adequately convey the substantive work the Beneficiary will perform. As reflected in the descriptions of the position as quoted above, the proffered position has been described in terms of generalized and generic functions that do not convey sufficient substantive information to establish the relative complexity, uniqueness and/or specialization of the proffered position or its duties. For example, the Petitioner stated that the

Beneficiary will “modify existing software to correct errors, to adapt it to new hardware, or to upgrade interfaces and improve performance”; “advise about or perform maintenance of software system as needed”; “analyze information to determine, recommend, and plan installation of a new system or modification of an existing system”; “compile and write documentation regarding program development and subsequent revisions”; and “deploy program codes into computer system and client communication concerning new program codes.” The Petitioner’s description is generalized in that the Petitioner does not convey the substantive nature of the work that the Beneficiary will actually perform, or any particular body of highly specialized knowledge that would have to be theoretically and practically applied to perform it. The responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties will manifest themselves in their day-to-day performance.

Second, the Petitioner’s descriptions of the proffered duties are inconsistent. On appeal, the Petitioner changes the percentages of time the Beneficiary will spend on his responsibilities. For instance, the Petitioner states on appeal that the Beneficiary will spend 30% (instead of 35%) of his time on software system design duties, and adds the duties of “[s]ystem maintenance – 5%.” More importantly, on appeal, the Petitioner adds an entirely new set of job duties to the proffered position. These new job duties, such as “[d]irecting and managing project development from beginning to end,” “defining project scope, goals and deliverables to support business goals,” and “responsible for overall project management,” are high-level duties directly related to project management; in fact, many of these new duties are also found verbatim in the Petitioner’s description of the duties of its “project manager” position. The Petitioner has not explained why its job descriptions for the Beneficiary changes on appeal.

Even if we were to consider the newly proffered project management duties, we find that they are not consistent with the Level I wage level selected on the LCA. That is, the Level I wage designation is indicative of a low, entry-level position relative to others within the occupational category, and hence one not likely with project-management or related higher-level duties.<sup>1</sup> The Petitioner’s inconsistent job descriptions, both in terms of the newly-added job duties and the

---

<sup>1</sup> The “Prevailing Wage Determination Policy Guidance” issued by the Department of Labor 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://flcdatacenter.com/download/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://flcdatacenter.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.* A Level I wage should be considered for research fellows, workers in training, or internships. *Id.*

Compare, for example, with the Level III (experienced) or Level IV (fully competent) wage levels, which are generally appropriate for positions involving supervisory or managerial duties. *Id.*

*Matter of D-G- Inc.*

inconsistent wage level designation, preclude us from discerning the substantive nature of the proffered position and its constituent duties.

“[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 also changes its statements regarding the project(s) to which the Beneficiary will be assigned. In a letter of support submitted with the petition, the Petitioner stated it will employ the Beneficiary for “multiple project initiatives.” In response to the Director’s request for evidence (RFE), the Petitioner stated that the Beneficiary will work as a software programmer for “different clients” including [REDACTED] and [REDACTED]. However, on appeal, the Petitioner asserts that the Beneficiary will only work on projects for [REDACTED]. The Petitioner’s appeal does not further mention the contracts with [REDACTED] or [REDACTED] and it is not apparent why the projects changed from the initial filing of the Form I-129 petition.

As previously mentioned, the Petitioner claimed that the Beneficiary will be assigned to its clients [REDACTED] and [REDACTED]. As evidence of its ongoing contracts with these clients, and thus the projects available to place the Beneficiary, the Petitioner submitted its master contract with [REDACTED] entered into on May 28, 2014. This master contract does not list a specific need for a software programmer or the Beneficiary. Further, it states that a statement of work will outline the exact work to be performed by the Petitioner and its provided resources. However, the Petitioner did not submit any statements of work for this client demonstrating that the Beneficiary will, in fact, be assigned to [REDACTED]. “[G]oing on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings.” *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

The Petitioner also submitted a statement of work with [REDACTED]. We observe that this contract was entered into on December 28, 2011. It is not evident whether the Petitioner is still working with this client nearly five years after entering into this contract. Nevertheless, even if the contract were still effective, the statement of work does not list the Beneficiary as an assigned resource nor does it state a specific need for a software programmer. Similar to the [REDACTED] contract, the [REDACTED] contract states that a work order outlining the exact work to be performed by the Petitioner will be provided, but the Petitioner did not submit an accompanying work order. Moreover, based on the submitted work order, the services to be provided by the Petitioner do not appear to encompass any software design or programming duties which comprise a large percentage of the Beneficiary’s job duties. Instead, the statement of work describes the scope of the Petitioner-provided services as limited to the areas of “computer audit and discovery,” “network monitoring and alerts,” “patch management,” “system administration and maintenance,” and “help desk and emergency support” services. The Petitioner has not sufficiently explained what the Beneficiary’s role will be, if any, with respect to this client.

*Matter of D-G- Inc.*

As evidence of its contracts with [REDACTED] the Petitioner submitted a statement of work with [REDACTED] in response to the RFE. This particular statement of work expired on June 30, 2016, prior to the end of the requested employment date. It also does not specifically list the Beneficiary as an assigned resource. On appeal, the Petitioner supplements the record with two new statements of work with [REDACTED]. Again, however, the Beneficiary is not listed as working on either project. We also observe that one of the new statements of work was signed on March 15, 2016, almost a year *after* filing the initial H-1B petition. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Not only are the Petitioner's statements of work with [REDACTED] deficient in that they do not specifically list the Beneficiary or a software programmer as an assigned resource and do not cover the entire validity period requested, but they are also deficient in another fundamental aspect: all of these statements of work are for services to be provided to [REDACTED] clients. That is, [REDACTED] is not the ultimate client receiving the Petitioner's services, contrary to the Petitioner's claims. For example, one of the statements of work submitted on appeal states that "Services shall be provided by [the Petitioner] to, and for the benefit of [REDACTED] Customer (also referred to as the 'Client')," elsewhere identified as [REDACTED]. The other statement of work submitted on appeal indicates that [REDACTED] is the ultimate client receiving the Petitioner's services. Meanwhile, the Petitioner's appeal identifies the only client involved as [REDACTED] and does not make any references to [REDACTED] or any other [REDACTED] clients.

Furthermore, the statement of work for [REDACTED] indicates that the Petitioner will perform *onsite* services. But the Petitioner indicated in its H-1B petition and LCA that the Beneficiary will only work from the Petitioner's office premises. The Petitioner has not explained and documented where exactly the Beneficiary will work from while purportedly providing services to [REDACTED] and any other clients of [REDACTED]. Again, it is incumbent upon the Petitioner to resolve inconsistencies in the record, and attempts to explain or reconcile such inconsistencies will not suffice absent competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

Without additional information and documentation establishing what projects have been secured, and accordingly, the specific duties the Beneficiary will perform on these projects and the knowledge required to perform these duties, we are unable to discern the substantive nature of the position and whether the position indeed qualifies as a specialty occupation. 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 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. The record of proceedings does not contain such evidence here.

As observed above, USCIS in this matter must review the actual duties the Beneficiary will be expected to perform to ascertain whether those duties require at least a baccalaureate degree in a specific specialty, or its equivalent, as required for classification as a specialty occupation. To accomplish that task in this matter, USCIS must analyze the actual duties in conjunction with the specific project(s) to which the Beneficiary will be assigned. To allow otherwise, results in generic descriptions of duties that, while they may appear (in some instances) to comprise the duties of a specialty occupation, are not related to any actual services the Beneficiary is expected to provide.

Overall, we find that the Petitioner did not provide sufficient documents to substantiate its claim that it has ongoing in-house projects for the Beneficiary for the entire H-1B validity period requested. Because the Petitioner has not established the substantive nature of the work to be performed by the Beneficiary, we are therefore 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 entry into 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.

## II. CONCLUSION

Because the Petitioner has not satisfied one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it has not demonstrated that the proffered position qualifies as a specialty occupation.<sup>2</sup> 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>2</sup> The Director also denied the petition for not meeting the regulatory filing requirements with regard to the \$2,000 fee imposed under Public Law 111-230. As the petition must be denied and the appeal dismissed for the reason discussed above, we will not address this issue at this time.

Furthermore, as the ground discussed above is dispositive of the Petitioner's eligibility for the benefit sought in this matter, we will not address and will instead reserve our determination on the additional issues and deficiencies that we observe in the record of proceedings with regard to the approval of the H-1B petition.

*Matter of D-G- Inc.*

**ORDER:** The appeal is dismissed.

Cite as *Matter of D-G- Inc.*, ID# 44444 (AAO Oct. 25, 2016)