



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

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

MATTER OF T- CORP.

DATE: SEPT. 30, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

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

The Director, California Service Center, denied the petition. The Director concluded that the Petitioner had not demonstrated that: (1) the proffered position qualifies as a specialty occupation position; and (2) the Petitioner would have an employer-employee relationship with the Beneficiary.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that it has satisfied all evidentiary requirements.

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. Proffered Position

The Petitioner seeks to employ the Beneficiary in a full-time “software developer” position, and states that he will be assigned to two in-house projects: the [REDACTED] project, and the [REDACTED] project. In response to the Director’s request for evidence (RFE), the Petitioner described the duties of the proffered position as follows (note: errors in the original text have not been changed):

35% of time will be spent on:

- Design, build and deliver solutions that will meet and often exceed business objectives and needs. Be involved with the requirement analysis, design, review and deployment. Write supportable, maintainable, reusable and scalable codes. Responsible for creating initial set up like development environment setup, conducting project audit by interacting with Quality team. Analyze the Petitioner’s needs, then design, test, and develop software. Design each piece of the application or system and plan how the pieces will work together. Work with Application and Systems Administrators to ensure solutions are stable, scalable and performing.

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15% of time will be spent on:

- Ensure that the software continues to function normally through software maintenance and testing. Document every aspect of the application or system as a reference for future maintenance and upgrades. Collaborate with other computer specialists to create optimum software.

5% of time will be spent on:

- Research/troubleshoot complex system performance and stability issues. Develop solutions for highly integrated, high volume, high speed applications. Utilize analytical and problem solving skills.

35% of time will be spent on:

- Develop robust monitoring and exception handling processes. Provide input into project estimates and plans. Insure established standards and software development processes are followed. Be responsible for the overall success of the team and supported applications. Design each piece of the application or system and plan how the pieces will work together.

10% of time will be spent on:

- Attend daily team briefing meetings. Discuss issues, progress of project, understand changes, should think creatively with artistic contributions, ideas, new applications and designs, always having fluency of a topic or idea.

According to the Petitioner, the proffered position requires a bachelor's degree or higher in computer science, engineering, information technology, mathematics, or a related field.

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, there are discrepancies in the record that cast doubt on whether the Petitioner has accurately described its in-house projects and the Beneficiary's participation in them.

The Petitioner has asserted that the Beneficiary will perform the duties described on particular identified projects, namely, its [REDACTED] project and its [REDACTED] project. As initial evidence, the Petitioner submitted a Project Charter for both projects. They show, among other things, the personnel required for each project, including numerous software developer positions and at least one lead software developer position. However, the Project Charters do not specifically reference the Beneficiary by name, and we cannot determine which of the software developer positions (if any) refer to her. For instance, the Project Charter for the [REDACTED] describes the project responsibilities of the software

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developers as simply “[s]oftware developer who can write code to develop the software.”¹ But the Petitioner’s job descriptions for the Beneficiary indicate that she will perform numerous other duties that go beyond writing code to develop software. Her duties of requirement analysis, software testing, and systems design encompass the job duties for other positions listed in the Project Charter, such as the business analyst (whose duties include “assessing the business model”), the software QA analysts (whose duties include “test[ing] the software”), and the build and release engineer (who is “[r]esponsible for the Build and Release of Software”).

The Project Charter for the [REDACTED] indicates that \$500,000 is budgeted for the project, which will require at least 10 different positions in addition to “the newly formed Auditing Services team.”² The amount budgeted appears inadequate to recompense the amount of people required – including a whole new team of IT auditors – for the anticipated length of this project.³ Likewise, the Project Charter for the [REDACTED] reflects a budget of \$200,000, which also appears inadequate to recompense the at least six resources needed on the project.⁴ We have further reason to doubt the reliability of the Petitioner’s financial projections, especially considering that the Petitioner listed a net annual income of only \$32,500 on the H-1B petition (filed in April 2015), and reported a business income loss of -\$30,774 in its 2014 federal tax return. We therefore find inadequate evidence to corroborate the claimed scope of these two projects and, accordingly, the Petitioner’s need for the Beneficiary’s services in the manner asserted.⁵

We must further question the project descriptions and the Petitioner’s need for the Beneficiary’s services, as the Petitioner provided additional inconsistent evidence in response to the Director’s RFE. More specifically, the Petitioner stated regarding the [REDACTED] “Number of Employees Working on it: 2.” It then, contradicted its claim by listing *three* workers as currently working on the project in the capacity of a project manager, software developer, and data modeler. The Petitioner also stated that the project requires, in addition, a resource manager/financial analyst, an ASP.NET/software developer, a business analyst, a programmer analyst, and a computer system analyst. But the initial Project Charter did not indicate that this project will require a data modeler, a resource manager/financial analyst, an “ASP.NET” developer, a programmer analyst, or a computer system analyst. Conversely, the Project Charter listed the

¹ The Project Charter for the [REDACTED] does not provide a job description for the software developer positions.

² The Project Charter makes clear that this auditing team does not yet exist, as the Petitioner “is planning to offer [REDACTED] through this “new team of IT Auditors.”

³ As will be explained *infra*, there are also discrepancies regarding the expected length of the project.

⁴ This Project Charter lists the required resources as including an unspecified number of “software developers.” The Petitioner does not further identify how many software developers will be assigned to this particular project.

We recognize the possibility that the same personnel would work on both the [REDACTED] and [REDACTED] projects. Even if this were the case, however, the Petitioner has not sufficiently documented that it has the means to support both projects projected to have a total budget of \$700,000.

⁵ The Project Charters indicate that \$150,000 will come from a business loan, while another \$100,000 will be loaned from the Petitioner’s owner’s spouse. The Petitioner did not submit objective evidence of these claimed loans.

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required resources as including an IT project lead, a lead software developer, a software QA analyst, and a build and release engineer, but the Petitioner did not list these positions in its RFE response.

As to the [REDACTED] the Petitioner similarly stated that there are two employees "working on it," but then confusingly listed *four* employees as currently working on the project. The Petitioner's RFE response further stated that this project requires, in addition, a resource manager/financial analyst, an ASP.NET/software developer, a business analyst, a programmer analyst, and a computer system analyst. But again, the initial Project Charter did not indicate that the project will require these positions, and the positions listed in the Project Charter are not the same as those listed in the Petitioner's RFE response.

The Petitioner's RFE response indicates that both projects will begin in early 2015 and will end in 18-24 months. But the Project Charter for the [REDACTED] states that the "estimated project duration is 24-36 months." The Project Charter for the [REDACTED] states that "total effort for the development is 18-24 months," yet states elsewhere that the total number of days needed to complete the project is 395 days. The Petitioner has not resolved these inconsistencies. We note that the Petitioner is requesting a validity date through September 9, 2018, and thus, has not adequately explained and documented how it will utilize the Beneficiary's services for the entire validity period requested.

Considering overall the Petitioner's inconsistent and unsupported statements regarding critical aspects of the projects, such as their funding, required resources, and timelines, the Petitioner has not established that it has sufficient specialty occupation work available for the Beneficiary for the entire validity period requested.⁶

⁶ The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

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

Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30,419, 30,419-20 (proposed June 4, 1998) (to be codified at 8 C.F.R. pt. 214). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

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Here, we will address the Director's comment that the Petitioner's Project Charter for the [REDACTED] was "copied from the internet." We share the Petitioner's concern that the Director did not identify what portion of the Project Charter was "copied," and thus, did not explain the significance of the "copied" content. Absent a more detailed explanation from the Director, we find the Petitioner's explanations on appeal (i.e., that it utilized an online template for its Project Charter, and that its president was awarded [REDACTED] by [REDACTED] to be reasonable. Nevertheless, based on the above-discussed deficiencies and inconsistencies presented by the Project Charters and other evidence, we agree with the Director's ultimate conclusion that the Petitioner has not established that it has sufficient specialty occupation work available for the Beneficiary for the entire validity period requested.

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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). It is incumbent upon the Petitioner to resolve any inconsistencies in the record with independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 591-592.

To continue, 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.⁷

In its initial support letter the Petitioner stated: "**Please note**, [the Petitioner] has offered this position to the beneficiary as she is a strong fit and possesses the required skills for not only their In-House project but, also, if she had to be placed on any other project." In its RFE response, the Petitioner stated: "[The Petitioner's] workers are mostly IT consultants . . . who are currently working at client projects in various locations. Further, the Petitioner is hiring employees who can work on the in-house projects and, when required to be placed on the client's projects." In another letter submitted in response to the RFE, the Petitioner indicated that its internal projects have been delayed "[d]ue to current employees working on various End client projects and lack of workforce." This language collectively suggests that the Petitioner might assign the Beneficiary to work elsewhere on other projects for other clients. The terms of her possible reassignment to other companies' projects at their locations and the duties she would perform there are unknown to us.

The actual duties the Beneficiary will perform are not sufficiently described, either. The job duties are overly broad and the Petitioner did not adequately explain why those duties will require a

⁷ 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.

minimum of a bachelor's degree in a specific specialty or its equivalent. For example, the Petitioner states that the Beneficiary will spend 35% of her time on the duty of "[d]esign, build and deliver solutions that will meet and often exceed business objectives and needs." The Petitioner then stated that the Beneficiary will spend another 5% of her time on the duty of "[d]evelop solutions for highly integrated, high volume, high speed applications," and yet another 35% of her time on the duty of "[d]esign each piece of the application or system and plan how the pieces will work together." The Petitioner did not sufficiently distinguish these duties, each of which purportedly account for a different percentage of the Beneficiary's time. The Petitioner also did not otherwise elaborate on the specific tasks, methodologies, and applications of knowledge that would be required in furtherance of these overarching duties.

Yet further, the Petitioner asserted that the essential duties of the proffered position are not limited to those described, but that the Beneficiary may perform other duties that have not been described. That is, in the Petitioner's initial support letter, it listed the Beneficiary's job duties and then stated that the listed duties "are not limited to the following," and that the Beneficiary "may perform other functions that may be assigned." We are unable to determine whether those other additional duties would be specialty occupation duties.

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

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.

II. EMPLOYER-EMPLOYEE RELATIONSHIP

In addition, we find that the evidence of record does not establish that the Petitioner will be a "United States employer" having "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii).

A. Legal Framework

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant, in pertinent part, as an individual:

[S]ubject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . , who meets the requirements for the occupation specified in section 214(i)(2) . . . , and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1)

The term “United States employer” is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) *Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and*
- (3) Has an Internal Revenue Service Tax identification number.

(Emphasis added); *see* Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 56 Fed. Reg. 61,111, 61,121 (Dec. 2, 1991) (to be codified at 8 C.F.R. pt. 214).

Although “United States employer” is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), the terms “employee” and “employer-employee relationship” are not defined for purposes of the H-1B visa classification. Therefore, in considering whether or not one will be an “employee” in an “employer-employee relationship” with a “United States employer” for purposes of H-1B nonimmigrant petitions, USCIS will look to common-law agency doctrine and focus on the common-law touchstone of “control.” *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992); *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440 (2003).

The factors indicating that a worker is or will be an “employee” of an “employer” are clearly delineated in both the *Darden* and *Clackamas* decisions. *Darden*, 503 U.S. at 323-24; *Clackamas*, 538 U.S. at 445; *see also* *Restatement (Second) of Agency* § 220(2) (1958) (defining “servant”). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker’s relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer’s regular business. *See Clackamas*, 538 U.S. at 445; *see also* EEOC Compl. Man. at § 2-III(A)(1) (adopting a

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materially identical test and indicating that said test was based on the *Darden* decision); *Defensor v. Meissner*, 201 F.3d at 388 (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant to control may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-49; EEOC Compl. Man. at § 2-III(A)(1).

B. Analysis

Applying the *Darden* and *Clackamas* tests to this matter, we find that the evidence of record does not establish that the Petitioner will be a "United States employer" having an "employer-employee relationship" with the Beneficiary as an H-1B temporary "employee."

As detailed above, the record of proceedings lacks sufficient documentation evidencing what exactly the Beneficiary will do for the period of time requested or where exactly and for whom the Beneficiary will be providing services. Given this specific lack of evidence, the Petitioner has not established who has or will have actual control over the Beneficiary's work or duties, or the condition and scope of the Beneficiary's services. In other words, the Petitioner has not established whether it has made a bona fide offer of employment to the Beneficiary based on the evidence of record or that the Petitioner, or any other company which it may represent, will have and maintain an employer-employee relationship with the Beneficiary for the duration of the requested employment period. *See* 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer" and requiring the Petitioner to engage the Beneficiary to work such that it will have and maintain an employer-employee relationship with respect to the sponsored H-1B nonimmigrant worker).

We again highlight the Petitioner's statements that it is "hiring employees who can work on the in-house projects and, when required to be placed on the client's projects," and that the Petitioner is offering this position to the Beneficiary "as she is a strong fit and possesses the required skills for not only their In-House project but, also, if she had to be placed on any other project." This language, as well as the Petitioner's acknowledged business practice of mainly offering consultancy services at clients' off-site locations, suggests that the Petitioner will likely reassign the Beneficiary to other companies' projects at their locations.

It is also important to highlight language found in the Petitioner's service contracts with its clients. For example, the Petitioner's consulting services agreement with [REDACTED] states that the Petitioner's personnel's "activities under this Agreement shall be subject to the

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direction of designated associates of [REDACTED]. The Petitioner's agreement with [REDACTED] states that the Petitioner's personnel "shall be assigned such services as set forth in Exhibit A attached hereto, and as the Client Supervisor and/or [REDACTED] Supervisor and/or their designees may from time to time reasonably determine." This agreement also states that the Petitioner's personnel "shall provide services at the Contract Site(s), and such other locations and offices as [REDACTED] and/or the Client may reasonably require, and shall do such traveling or undertake temporary assignments at other locations, as may be required in the performance of [Petitioner's] services." The attached Exhibit A describes the duties to be provided by the Petitioner's consultant as "QA Tester and/or such other duties and responsibilities reasonably required by [REDACTED] and/or client," and assigns an "[REDACTED] Supervisor" and "Client Supervisor" for this individual. Taken as a whole, these documents indicate that the work of the Petitioner's personnel are actually supervised and controlled by entities other than the Petitioner. Therefore, the key element in this matter, which is who will exercise control over the Beneficiary, has not been substantiated.

While payroll and other related benefits are still relevant factors in determining who will control the Beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the Beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the Beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the Beneficiary's employer. Without full disclosure of all of the relevant factors, we are unable to find that the Petitioner will be a "United States employer" having an "employer-employee relationship" with the Beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).

III. CONCLUSION

The burden is on the Petitioner to show eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of T- Corp.*, ID# 123513 (AAO Sept. 30, 2016)