



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

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

MATTER OF S-I-

DATE: MAY 23, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an information technology consulting company, 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 of the California Service Center denied the petition, concluding that the Petitioner did not establish that the Beneficiary is qualified to serve in a specialty occupation position in accordance with the applicable statutory and regulatory provisions.

On appeal, the Petitioner submits additional evidence and asserts that the Beneficiary is qualified to serve in a specialty occupation position.

Upon review, the Director’s decision will be withdrawn and the petition will be remanded for entry of a new decision.

I. BENEFICIARY’S QUALIFICATIONS

The Director denied the petition, concluding that the Petitioner did not establish that the Beneficiary is qualified to perform services in a specialty occupation. However, a beneficiary’s credentials to perform a particular job are relevant only when the job is found to qualify as a specialty occupation. U.S. Citizenship and Immigration Services is required to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether a beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. Cf. *Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm’r 1988) (“The facts of a beneficiary’s background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].”). In the instant case, the record of proceedings does not establish that the proffered position qualifies as a specialty occupation. Thus, the matter will be remanded to the Director for review and issuance of a new decision.

II. PROFFERED POSITION

According to the H-1B petition, the Petitioner seeks to employ the Beneficiary in-house at its business premises in North Carolina from October 2016 through August 2019. The Petitioner specified that the Beneficiary will not work off-site at any other company's location.

In its letter of support submitted with the H-1B petition, the Petitioner stated that the Beneficiary will serve as a software developer and perform the following job duties:

- Modify existing software to correct errors, allow it to adapt to new hardware, or to improve its performance.
- Develop and direct software system testing and validation procedures, programming, and documentation.
- Confer with systems analysts, engineers, programmers and others to design system and to obtain information on project limitations and capabilities, performance requirements and interfaces.
- Analyze user needs and software requirements to determine feasibility of design within time and cost constraints.
- Design, develop and modify software systems, using scientific analysis and mathematical models to predict and measure outcome and consequences of design.
- Store, retrieve, and manipulate data for analysis of system capabilities and requirements.
- Consult with customers about software system design and maintenance.
- Supervise the work of programmers, technologists and technicians and other engineering and scientific personnel.
- Coordinate software system installation and monitor equipment functioning to ensure specifications are met.
- Obtain and evaluate information on factors such as reporting formats required, costs, and security needs to determine hardware configuration.
- Determine system performance standards.

In response to the Director's request for evidence (RFE), the Petitioner provided the following breakdown of the Beneficiary's job duties and time spent on each duty per week:

- Modify existing software to correct errors, allow it to adapt to new hardware, or to improve its performance. (20 hrs/week)
- Develop and direct software system testing and validation procedures, programming, and documentation. (10 hrs/week)
- Confer with systems analysts, engineers, programmers and others to design system and to obtain information on project limitations and capabilities, performance requirements and interfaces. (5 hrs/week)
- Analyze user needs and software requirements to determine feasibility of design within time and cost constraints. (2 ½ hrs/week)

- Design develop and modify software systems, using scientific analysis and mathematical models to predict and measure outcome and consequences of design. (2 ½ hrs/week)

In another letter submitted in response to the RFE, the Petitioner stated that it “is committed in building a product called [REDACTED] to maintain an optimal inventory for any kind of retail industry.” The Petitioner then stated that the Beneficiary “will work for [its] clients [REDACTED] and [REDACTED] and provided the following breakdown of the Beneficiary’s job duties and time spent on each duty per week:

Responsibility	% of time
Confer with systems analysts, engineers, programmers and others to design system and to obtain information on project limitations and capabilities, performance requirements and interfaces.	15%
Develop and direct software system testing and validation procedures, programming, and documentation.	15%
Analyze user needs and software requirements to determine feasibility of design within time and cost constraints.	30%
Design, develop and modify software systems, using scientific analysis and mathematical models to predict and measure outcome and consequences of design.	40%

Further in response to the RFE, the Petitioner submitted, *inter alia*, an itinerary listing some of the above job duties and identifying the project details as “Develop Software Solutions for [REDACTED] the duration of the project as “12 months + extension,” and the client name and address as the Petitioner and the Petitioner’s location in North Carolina.

According to the Petitioner, the proffered position requires a bachelor’s degree in computer science, engineering, information science, or the equivalent.

III. SPECIALTY OCCUPATION

Although not addressed in the Director’s decision, we conclude that the record as presently constituted does not establish that the proffered position qualifies for classification as a specialty

occupation.¹ Accordingly, the Director should review this issue on remand and request any additional evidence deemed necessary.

A. Legal Framework

Section 214(i)(1) of the Act, 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). We have consistently interpreted the term “degree” 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).

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

¹ The Petitioner submitted documentation in support of 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.

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.

B. Analysis

Upon review, the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation. Specifically, the record does not consistently and sufficiently describe the substantive nature of the proffered position and its associated job duties, which therefore precludes a finding that the job duties require an educational background (or its equivalent) commensurate with a specialty occupation.

For instance, the Petitioner initially presented a job description consisting of 11 job duties. In response to the Director's RFE, however, the Petitioner reduced the number of job duties the Beneficiary will perform and provided inconsistent information about the amount of time she will spend on them. To illustrate, one of the job descriptions submitted in response to the RFE had the Beneficiary performing only 5 of the 11 previously listed job duties, and had her spending 20 hours per week (equal to half of her 40-hour work week) on the single duty of "[m]odify existing software to correct errors, allow it to adapt to new hardware, or to improve its performance." The other job description submitted in response to the RFE had the Beneficiary performing even fewer job duties (4 of the 11 previously listed job duties) and in different allocations of time. In particular, the other job description eliminated the above-stated primary job duty of modifying existing software, and instead identified the Beneficiary's primary job duty as to "[d]esign, develop and modify software systems, using scientific analysis and mathematical models to predict and measure outcome and consequences of design" (which the former description indicated will account for only 2 ½ hours per week).

Thus, rather than providing clarification about the specific job duties the Beneficiary will perform, the Petitioner's RFE response raised additional questions about the Beneficiary's job duties. The Petitioner has not explained these numerous discrepancies and demonstrated which of the stated job duties the Beneficiary will actually perform and the amount of time devoted to each job duty. The Petitioner must reconcile these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

In addition to being inconsistent, the Petitioner's job descriptions are also deficient in that they were recited virtually verbatim from the Occupational Information Network (O*NET) Details Report for

the occupation “Software Developers, Applications” (corresponding to the Standard Occupational Classification code 15-1132).² This type of description may be appropriate when defining the range of duties that may be performed within an occupational category, but it does not adequately convey the substantive work that the Beneficiary will perform within the context of the Petitioner’s operations, or in this case, its client’s operations.

As previously discussed, where the work to be performed is for entities other than the Petitioner, evidence of the client companies’ job requirements is critical. *Defensor*, 201 F.3d at 387-88. The Petitioner acknowledged as much, stating that “[t]he services to be provided and the educational qualification of the beneficiary depends on the end-user requirements.” Critically, however, the Petitioner has not sufficiently and consistently documented what services and end-user requirements are applicable here, and at an even more basic level, which end-client(s) the Beneficiary will service.

The Petitioner stated in response to the RFE that the Beneficiary will service the Petitioner’s clients, [REDACTED] and [REDACTED]. But the Petitioner’s itinerary mentions only one client, [REDACTED] and does not mention the other client, [REDACTED]. Additionally, the Petitioner submitted a master services agreement and purchase order executed with another client, [REDACTED] but did not state whether the Beneficiary will also service [REDACTED]. These ambiguities further raise questions about which client or clients the Beneficiary will service, and where he will provide her services.

Although the Petitioner claimed on the H-1B petition that the Beneficiary will only work in-house at the Petitioner’s premises in North Carolina, the record does not sufficiently corroborate this claim. For example, the master services agreements and statements of work executed with [REDACTED] and [REDACTED] shows that these companies are located in Georgia and Florida, respectively. Moreover, these master services agreements specifically contemplate the provision of services at the clients’ worksites. For instance, the agreement with [REDACTED] requires “[the Petitioner’s] personnel to observe [REDACTED] safety policies and building rules when on [REDACTED] site.” The agreement with [REDACTED] states that “[the Petitioner’s] personnel provided under this Agreement shall perform their assignments in accordance with the directions of [REDACTED]” and further, that “[w]hile [the Petitioner’s] personnel are on [REDACTED] premises in connection with the performance of any assignment, they shall comply with all rules, regulations and policies concerning such matters as working hours (which will be established by [REDACTED], attire, and customary security measures.”⁴ The Petitioner has not explained how it can and will comply with these contractual provisions, and at the same time, comply with its attestations on the H-1B petition that the Beneficiary will not be placed off-site.

² O*NET Details Report for “Software Developers, Applications,” <https://www.onetonline.org/link/details/15-1132.00> (last visited May 22, 2017). The Petitioner classified the proffered position under this occupational category on the labor condition application submitted in support of the H-1B petition.

³ The itinerary is a material and mandatory document for any H-1B petition involving employment at multiple locations. 8 C.F.R. § 214.2(h)(2)(i)(B).

⁴ These provisions also raise questions regarding the Petitioner’s employer-employee relationship with the Beneficiary.

Moreover, the master services agreements and statements of work with [REDACTED] and [REDACTED] do not specifically identify the Beneficiary, or even a software developer position, as an assigned resource. Nor do they provide details about the job duties to be performed. They also do not list specific end dates or contain sufficient information indicating that the projects would last the duration of the requested validity period ending in August 2019. For instance, the statement of work with [REDACTED] vaguely states the project's end date as "up to 12+ months" from March 2016 and the statement of work with [REDACTED] is blank with respect to the project's estimated end date.⁵ Moreover, none of these documents articulate any educational requirement for this position.

Further still, the same master services agreement states that the Petitioner "will invoice [REDACTED] . . . for services rendered to [REDACTED] and/or Client of [REDACTED]". This provision raises additional questions of whether the Beneficiary will be assigned to another, unidentified client and client site. We also note the Petitioner's statements that "[t]he beneficiary will be working as a consultant, developing projects, at the client site or developing projects in-house" and that software developers such as the Beneficiary "develop customized solutions both in-house and at client sites." The Petitioner has not further explained these vague statements about the Beneficiary's work at "client sites." Considering the record as a whole, we find that the Petitioner has not sufficiently demonstrated what the Beneficiary will be doing for the entire validity period, for whom, and where.

Finally, the Petitioner asserted that the Beneficiary will work on the [REDACTED] project and provided general technical information about its software application. But the submitted documentation does not provide sufficient, relevant information about the Petitioner's [REDACTED] project or product, such as its developmental stage, anticipated timelines, and work to be performed on it. This missing information further prevents us from understanding exactly what the Beneficiary will be doing for the Petitioner and its claimed clients.

For all of the reasons, we find the record insufficient to establish 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.

Accordingly, the Petitioner has not satisfied one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, has not demonstrated that the proffered position qualifies as a specialty occupation.

⁵ The Petitioner's itinerary lists the duration of the [REDACTED] project as "12 months + extension."

IV. CONCLUSION

Based on the foregoing discussion, although the Director's decision will be withdrawn, the evidence of record as presently constituted does not establish eligibility for the benefit sought. Accordingly, we will remand this matter to the Director for further action and entry of a new decision.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of S-I-*, ID# 324389 (AAO May 23, 2017)