



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

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

In Re: 10205922

Date: JULY 20, 2020

Appeal of California Service Center Decision

Form I-129, Petition for Nonimmigrant Worker (H-1B)

The Petitioner, a management consulting services firm, seeks to temporarily employ the Beneficiary as a “QA automation engineer” 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 evidence of record did not establish eligibility for the immigration benefit sought. On appeal, the Petitioner asserts that the Director erred and that the proffered position is a specialty occupation.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We review the questions in this matter *de novo*. *See Matter of Christo’s Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant as a foreign national “who is coming temporarily to the United States to perform *services . . . in a specialty occupation* described in section 214(i)(1) . . .” (emphasis added). Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term “specialty occupation” as an occupation that requires “theoretical and practical application of a body of highly specialized knowledge, and 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 section 214(i)(1) of the Act, but adds a non-exhaustive list of fields of endeavor. In addition, 8 C.F.R. § 214.2(h)(4)(iii)(A) provides that the proffered position must meet one of four criteria to qualify as a specialty occupation position.¹ Lastly,

¹ 8 C.F.R. § 214.2(h)(4)(iii)(A) must be read with the statutory and regulatory definitions of a specialty occupation under section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). We construe the term “degree” to mean not just any

8 C.F.R. § 214.2(h)(4)(i)(A)(1) states that an H-1B classification may be granted to a foreign national who “*will perform services in a specialty occupation . . .*” (emphasis added).

Accordingly, to determine whether the Beneficiary will be employed in a specialty occupation, we look to the record to ascertain the services the Beneficiary will perform and whether such services require the theoretical and practical application of a body of highly specialized knowledge attained through at least a bachelor’s degree or higher in a specific specialty or its equivalent. Without sufficient evidence regarding the duties the Beneficiary will perform, we are unable to determine whether the Beneficiary will be employed in an occupation that meets the statutory and regulatory definitions of a specialty occupation and a position that also satisfies at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). The services the Beneficiary will perform in the position determine: (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. 8 C.F.R. § 214.2(h)(4)(iii)(A).

By regulation, the Director is charged with determining whether the petition involves a specialty occupation as defined in section 214(i)(1) of the Act. 8 C.F.R. § 214.2(h)(4)(i)(B)(2). The Director may request additional evidence in the course of making this determination. 8 C.F.R. § 103.2(b)(8). In addition, a petitioner must establish eligibility at the time of filing the petition and must continue to be eligible through adjudication. 8 C.F.R. § 103.2(b)(1).

II. ANALYSIS

For the reasons set out below, we determine that the proffered position does not qualify as a specialty occupation. Specifically, the record provides inconsistent and insufficient information regarding the proffered position, which in turn precludes us from understanding the position’s substantive nature and determining whether the proffered position qualifies as a specialty occupation.²

The Petitioner offers multiple services, to include staffing and outsourcing, and seeks to employ the Beneficiary offsite to provide services for K- [end-client] as a “QA [a]utomation [e]ngineer.” The Petitioner’s description of the job duties of the position suggest that the Beneficiary will be predominantly involved in computer programming and software testing activities. However, the contractual agreements between the end-client and the Petitioner do not substantiate the Petitioner’s assertions regarding the work the Beneficiary would perform at the end-client worksite.³

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”).

² 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.

³ Although a petitioner is not required by existing regulation to submit contracts or legal agreements between the petitioner

According to the end-client's 2013 consulting agreement, the Petitioner will provide services to the end-client "as defined in a Statement of Work ("SOW")." The SOW submitted to evidence the terms and conditions of the Beneficiary's proposed employment indicates a two-year performance period terminating in February 2020 for the provision of "application and platform support" services including "facilitation and coordination for [the end-client's] Oracle WebCenter Sites, Open API platforms, TVS, KIOSK, ATG, MOSAIC, MDM, Analytics, and Big Data platforms." Additionally, the Petitioner is to provide "dedicated 24x7 support staff that can be contacted by [the end-client] by phone. . . to escalate [and resolve] all related [s]ervice issues and risks." The SOW further indicates that the Petitioner's staff "will operate under direction of the [end-client's] Project Manager, based on the [end-client's] Agile Standards and Agile Processes."

This SOW also describes several "offshore and onshore" roles or positions for the end-client's projects, but a "QA automation engineer" is not among them. Rather, the positions identified under the SOW are "Support Analyst/Support Engineer, Support Lead/Sr. Developer, Technical Architect, and Sr. Production Support Lead." While "high-quality engineering/unit testing" is one of the services to be provided under the SOW, the Petitioner did not explain or document which role encompassed such duties under the SOW, and whether the Beneficiary will be engaged in delivering these services. Even if the Beneficiary was added to this SOW at a later date, the SOW indicated that any additional resources added to it would require an executed "Change Order," which the Petitioner did not provide. As a result, the Petitioner has not demonstrated that the Beneficiary would be a necessary resource on the project under the SOW. The Petitioner must resolve these inconsistencies and ambiguities in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Moreover, even if the Petitioner demonstrated that the Beneficiary is to be employed in one of the positions identified in the SOW, the Petitioner's stated minimum position requirement of a bachelor's degree in electronic engineering or a related degree is inconsistent with the end-client's requirements for positions under the SOW. The SOW defined the "skill requirements" which the Petitioner's staff "must meet or exceed" for each position, but the end-client did not delineate a requirement for a bachelor's degree in a specific specialty for any of the positions identified therein. For instance, the end-client required "Support Analyst/Support Engineer" positions to have "3+ years" of information technology (IT) experience in "design, development and documentation, quality engineering, [and] develop & sustain Oracle Webcenter sites, content management and web-based n-tier," as well as knowledge of various programming languages and information technology tools. Likewise, "Support Lead/Sr. Developer" positions need "6+ years" of IT work experience, and knowledge of various programming languages and information technology tools.

The Petitioner does not explain the reasons for the variances in the position requirements within the material in the record. Therefore, we conclude that the Petitioner has not demonstrated the position requirements contained within its own correspondence are the end-client's actual requirements. As recognized in *Defensor*, 201 F.3d at 387-88, when the work is to be performed for entities other than the

and third parties to establish an employer-employee relationship, "the petitioner must demonstrate eligibility for the benefit sought" and "if a petitioner provides contracts or legal agreements, [an] officer is not precluded from evaluating that evidence in the adjudication of other eligibility criteria." USCIS Policy Memorandum PM-602-0114, *Rescission of Policy Memoranda* at 3 (June 17, 2020), <http://www.uscis.gov/legal-resources/policy-memoranda>.

petitioner, evidence of the client companies' job requirements is critical. The Petitioner must also resolve this inconsistency and ambiguity with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, Dec. 591-92.

Turning to the end-client letter, we conclude this evidence is insufficient to satisfy the Petitioner's burden of proof for multiple reasons. The end-client indicates "[the Petitioner] has assigned [the Beneficiary] to provide services as a contractor to [the end-client]," that the Beneficiary is "currently providing those services in India," and "is qualified to provide these services by virtue of his combined education and experience." The end-client letter does not discuss the nature of the project(s) to which the Beneficiary will be assigned, his position title, or the specific duties that he will perform. Notably absent from the end-client letter are any prerequisites it requires to perform the proffered position's duties even though the Director's request for evidence (RFE) notified the Petitioner that this information should be included in any end-client letter.⁴ The material within the record does not reflect what the end-client requires as a prerequisite for the proffered position, other than the previously discussed "skill requirements" specified in the SOW, which as we discussed do not require at least a bachelor's degree in a specific specialty. This lack of information alone is sufficient to preclude the petition's approval, as the Petitioner has not demonstrated that the offered position satisfies the definition of a specialty occupation found at section 214(i)(1) of the Act.

Moreover, the Petitioner has presented insufficient and inconsistent evidence regarding the roles and responsibilities of the proffered position. The Petitioner initially identified the position as a QA Automation Engineer, and designated the proffered position under the occupational category "Electronics Engineer, Except Computer" corresponding to the Standard Occupational Classification (SOC) code 12-2072, at a Level I wage on the labor condition application (LCA)⁵ submitted in support of the H-1B petition.⁶

The Director requested organization charts in her RFE that would delineate the Petitioner's staffing hierarchy and the Beneficiary's role therein, but the Petitioner did not sufficiently address this aspect.⁷ The Petitioner provided material in the RFE response which indicates that the Beneficiary reports to "the Practice Head of [redacted]" and indicates that the "Merchandising Assortment Planning (MAP)" project that the Beneficiary will be assigned to will be "executed with average team size of 20 personnel," which without more lends little insight into the proffered position's placement within the Petitioner's organizational hierarchy. The Petitioner also did not detail the nature of the Beneficiary's leadership or supervisory role, if any, on the MAP project team.

⁴ "Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the [petition]." 8 C.F.R. § 103.2(b)(14).

⁵ A petitioner submits the LCA to the U.S. Department of Labor to demonstrate that it will pay an H-1B worker the higher of either the prevailing wage for the occupational classification in the area of employment or the actual wage paid by the employer to other employees with similar duties, experience, and qualifications. Section 212(n)(1) of the Act; 20 C.F.R. § 655.731(a).

⁶ The Petitioner classified the proffered position at a Level I wage (the lowest of four assignable wage levels). 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://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

⁷ 8 C.F.R. § 103.2(b)(14).

The Petitioner submitted its March 2019 employment agreement with the Beneficiary which states that he will be hired as a “QA Automation Lead.” The Petitioner’s December 2019 letter similarly asserts that the Beneficiary will be employed by the end-client as a “QA Automation Lead.” The end-client’s letter notes that the Beneficiary will be performing the same duties he “is currently performing in India.” The Petitioner submitted the Beneficiary’s resume which reflects that he has been employed by the Petitioner since March 2018 as “tech lead,” and is engaged in “leading a team of 8 for site support and Unified Fast Track (UFT) project” for a different end-client. However, the Petitioner does not discuss the nature of the Beneficiary’s foreign work assignments for the Petitioner, nor does it confirm that the Beneficiary has been engaged in providing services to the end-client from abroad.

Collectively considering the evidence in the record regarding the nature of the proffered position, we conclude that the Petitioner has not sufficiently established the substantive nature of the Beneficiary’s role as a QA automation engineer within the context of the end-client’s projects.⁸ Here, the documentation provided is not probative towards establishing the terms and conditions of the Beneficiary’s assignment *as imposed by the end-client*.⁹ It is the Petitioner’s burden to prove by a preponderance of evidence that it is qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. at 376. In evaluating the evidence, eligibility is to be determined not by the quantity of evidence alone but by its quality. *Id.*

Furthermore, there are inconsistencies in the record which raise questions about whether the Petitioner’s selection of the “Electronics Engineers, Except Computer” occupational category in the LCA properly corresponds to the duties of the proffered position.¹⁰ According to O*NET individuals within this occupation:¹¹

Research, design, develop, or test electronic components and systems for commercial, industrial, military, or scientific use employing knowledge of electronic theory and materials properties. Design electronic circuits and components for use in fields such as telecommunications, aerospace guidance and propulsion control, acoustics, or instruments and controls.

In determining the nature of a proffered position, the critical element is not the title of the position, but the duties of the underlying position. As part of our analysis, we review the duties of the proffered position to assess the duties and determine whether the described duties correspond to the duties and tasks listed in the Occupational Information Network (O*NET) summary report for the occupation

⁸ On appeal, the Petitioner maintains that the proffered position’s Level I wage was correctly determined using the five-step processing outlined in DOL’s *Prevailing Wage Determination Policy Guidance*. However, the inconsistent and ambiguous material in the record regarding the proffered position raises questions regarding the substantive nature of the position, and whether the Petitioner properly accounted for the experience, education, special skills, and supervisory duties, if any, of the position. *Matter of Ho*, 19 I&N Dec. at 591-92.

⁹ See *Defensor*, 201 F.3d at 387-88

¹⁰ 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA supports the H-1B petition filed on behalf of the Beneficiary.

¹¹ The O*NET summary report for “Electronic Engineers, Except Computer” may be viewed at <https://www.onetonline.org/link/summary/17-2072.00>, (Last visited July 17, 2020).

designated in the LCA. In the absence of probative evidence from the end-client, for the purposes of our discussion we will consider the job functions outlined by the Petitioner within the context of the end-client's *MAP* project that the Petitioner asserts will require the Beneficiary's services, as follows:¹²

1. Attending Project Kick-Off & Test Estimation
2. Test Planning
3. Test Automation Code Development
4. Test Execution & Reporting
5. Test Defect Triage
6. Test Closure
7. Release Certification
8. Team Coordination
9. Cross Functional Team Coordination

The Petitioner provided the duties of the proffered position which appear to comport, in small part, with the typical tasks performed by individuals employed in the "Electronics Engineers, Except Computer" occupational category. For instance, out of the twenty tasks listed in the O*NET summary report for the occupation, there is only *one* task that specifically appears to involve testing procedures - "[d]evelop or perform operational, maintenance, or *testing procedures* for electronic products, components, equipment, or systems."¹³ However, all of the job functions and underlying position duties specified by the Petitioner involve tasks associated with the testing of computer software.

For instance, the Petitioner indicates that the Beneficiary will perform such duties as "analyze[] the software product to identify intended functionality and scope of testing by going through SDS (Software Document Specification)," "[w]rite new Java/Ruby code for testing UI functionalities using Selenium automation tool version 3.0 libraries," "[r]e-run the timeout failures and see if they are valid failures and fix as needed," and "[p]erform onsite and offshore team co-ordination, assign tasks to offshore team and help them with their programming blockers/queries with respect to application functionality as well as automation code." The Petitioner has not provided evidence sufficient to show that the duties of the proffered position are consonant with those typically performed by individuals employed in the "Electronics Engineers, Except Computer" occupational category.

The Petitioner asserts "some of the less known applications that [it] is developing for the end-client, such as TVS Applications, MDM, K-Line and Big Data, [are] applications that require an electronics engineers to understand the signal processing, design specifications, data, and digital communication, etc." We acknowledge that the end-client's SOW references these work products. But, the Petitioner does not claim that the *Beneficiary* will be involved in these development efforts. Rather, it asserts that the Beneficiary will be assigned to the *MAP* project, which it describes as "a cloud-based [end-client] developed application used by the Buying Offices for pre-season and in-season merchandise planning," which is used to address "3 main business concerns including reviewing the full [retail

¹² We acknowledge that the Petitioner submitted additional information for the job duties, and have closely considered and reviewed this material, as with all evidence in the record.

¹³ See the O*NET summary report for "Electronic Engineers, Except Computer," <https://www.onetonline.org/link/summary/17-2072.00>, (Last visited July 17, 2020).

product] assortment, creating Buyer Targets, [and] seeing what has been bought in the past/what is currently being bought.” This limited information, coupled with the Petitioner’s position descriptions suggests that the Beneficiary will be engaged in providing services in furtherance of a cloud-based marketing software application under development by the end-client, *not* in projects involving signal processing or digital communication, etc.¹⁴

The Director concluded in her denial that the Petitioner did not establish the Beneficiary will be employed in a position consistent with the “Electronics Engineers, Except Computer” occupational category designed in the LCA, and identified the “Computer Programmers” SOC 15-1131 occupation as one which encompasses many of the duties of the proffered position.¹⁵ We agree. We also conclude that the position similarly appears akin in large part to those of the “Software Quality Assurance Engineers and Testers” occupational sub-category corresponding to SOC code 15-1199.01.¹⁶ While the Petitioner submitted an LCA designating the “Electronics Engineers, Except Computer” occupational category for the proffered position, the Petitioner has not sufficiently established that its position duties and responsibilities are consistent with this occupational category. In other words, the Petitioner has not adequately explained how the predominant software testing

¹⁴ *Matter of Ho*, 19 I&N Dec. at 591-92.

¹⁵ According to O*NET individuals within this occupation:

Create, modify, and test the code, forms, and script that allow computer applications to run. Work from specifications drawn up by software developers or other individuals. May assist software developers by analyzing user needs and designing software solutions. May develop and write computer programs to store, locate, and retrieve specific documents, data, and information.

The O*NET summary report for “Computer Programmers,” may be viewed at <https://www.onetonline.org/link/summary/15-1131> (last visited July 17, 2020).

¹⁶ According to O*NET individuals within this occupation “[d]evelop and execute software test plans in order to identify software problems and their causes,” and perform tasks such as:

- Design test plans, scenarios, scripts, or procedures.
- Document software defects, using a bug tracking system, and report defects to software developers.
- Develop testing programs that address areas such as database impacts, software scenarios, regression testing, negative testing, error or bug retests, or usability.
- Document test procedures to ensure replicability and compliance with standards.
- Plan test schedules or strategies in accordance with project scope or delivery dates.
- Conduct software compatibility tests with programs, hardware, operating systems, or network environments. Test system modifications to prepare for implementation.
- Monitor bug resolution efforts and track successes.
- Review software documentation to ensure technical accuracy, compliance, or completeness, or to mitigate risks.
- Update automated test scripts to ensure currency.
- Monitor program performance to ensure efficient and problem-free operations.
- Identify program deviance from standards, and suggest modifications to ensure compliance.
- Develop or specify standards, methods, or procedures to determine product quality or release readiness.
- Design or develop automated testing tools.

The O*NET summary report for “Software Quality Assurance Engineers and Testers,” may be viewed at <https://www.onetonline.org/link/summary/15-1199.01> (last visited July 17, 2020).

functions of the proffered position are closely related to the O*NET tasks for the “Electronics Engineers, Except Computer” occupation.¹⁷ Therefore, we are unable to conclude that the proffered position properly falls within the “Electronics Engineers, Except Computer” occupational category corresponding to SOC code 17-2072, which raises additional questions regarding the substantive nature of the proffered position.¹⁸

When considered collectively, we conclude that the inconsistencies, discrepancies, unanswered questions, and lack of documentation in the record raise questions as to the actual, substantive nature of the proffered position.¹⁹ The Petitioner has not submitted consistent, probative evidence to adequately communicate (1) the actual work that the Beneficiary would perform, (2) the complexity, uniqueness, or specialization of the tasks, and (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. Accordingly, the Petitioner has not established that the proffered position is a specialty occupation.²⁰

III. CONCLUSION

In visa petition proceedings, it is the petitioner’s burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

¹⁷ The Petitioner must also resolve this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, Dec. 591-92.

¹⁸ These inconsistencies also raise significant questions as to whether the LCA corresponds to and supports the H-1B petition, as required, and appear to constitute an additional reason this petition cannot be approved. As the proffered position is not a specialty occupation we will not address these issues further, other than to advise the Petitioner that it should be prepared to address them in any future H-1B filings. 20 C.F.R. § 655.705(b).

¹⁹ *Matter of Chawathe*, 25 I&N Dec. at 376.

²⁰ As the lack of probative and consistent evidence in the record precludes a conclusion that the proffered position is a specialty occupation and is dispositive of the appeal, we will not further discuss the Petitioner’s assertions on appeal.