



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

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

In Re: 8914992

Date: JUNE 17, 2020

Appeal of California Service Center Decision

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

The Petitioner, a software development and services company, seeks to temporarily employ the Beneficiary as a “software engineer” under the H-1B nonimmigrant classification for specialty occupations.<sup>1</sup> 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 record did not establish that the Beneficiary would perform services in a specialty occupation.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence.<sup>2</sup> We review the questions in this matter *de novo*.<sup>3</sup> 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.<sup>4</sup> Lastly,

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<sup>1</sup> Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

<sup>2</sup> Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

<sup>3</sup> See *Matter of Christo’s Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015).

<sup>4</sup> 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 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”).

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).

Further, as recognized by the court in *Defensor v. Meissner*, 201 F.3d 384, 387-88 (5th Cir. 2000), 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.

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

Upon review of the record in its totality, we conclude that the Petitioner has not sufficiently established the services in a specialty occupation that the Beneficiary would perform during the requested period of employment due to material inconsistencies contained within the record and a lack of specificity in the duties to be performed. This precludes a determination of whether the proffered position qualifies as a specialty occupation under sections 101(a)(15)(H)(i)(b), 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(i)(A)(1), 8 C.F.R. § 214.2(h)(4)(ii) and (iii)(A).<sup>5</sup>

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<sup>5</sup> The Petitioner submitted documentation to support the H-1B petition, including evidence regarding the proffered position and its business operations. Although we may not discuss every document submitted, we have reviewed and considered each one.

The Petitioner, which is located in [redacted] California, will outsource the Beneficiary to work as a “software engineer” for an end-client in [redacted] California. The Petitioner initially stated that its minimum qualification for the proffered position is a bachelor’s degree in “computer science, computer applications, computer information systems, management information systems, engineering, math, physics, a relative analytic or scientific discipline, or the equivalent thereof.” In a subsequent iteration in response to the Director’s request for evidence (RFE), the Petitioner shortened its requirement to a bachelor’s degree in computer science, which is also the minimum qualification claimed in an end-client letter. The Petitioner did not acknowledge or explain the truncated requirements, but again articulated its original requirements in other areas of the RFE response.

Additional inconsistencies arise when examining the level of education required. For each job duty, the Petitioner listed the names of the Beneficiary’s academic courses and relevant work experience in order to establish the Beneficiary’s qualifications for that particular duty and the overall position. A majority of the courses listed as qualifying the Beneficiary to perform the duties are master’s degree courses.<sup>6</sup> This suggests that the Petitioner may require additional education and experience beyond a bachelor’s degree program.<sup>7</sup> While the Petitioner states that it requires a bachelor’s degree, the continued reference to master’s degree courses demonstrates that the Petitioner has not clearly defined its position. The inconsistent information prevents us from properly ascertaining the educational requirements for the position and therefore whether the position qualifies as a specialty occupation.

The Director’s RFE notified the Petitioner that the qualifying fields were disparate and that the Petitioner needed to establish how each of the qualifying fields related directly to the position’s duties. In response, the Petitioner explained that each of the fields has a “deep technical foundational core, requiring analytical and logical thinking, algorithm development, and problem solving.” This explanation is insufficient to establish how each of the qualifying fields relates to the position duties. Analytical and logical thinking, as well as problem solving, are overly broad connectors that may apply to many areas of academic study, including law or psychology, for instance. Furthermore, the Petitioner has not established how the duties of the position involve algorithm development. The Petitioner does not offer additional explanations concerning how the qualifying fields relate to the position duties.<sup>8</sup> The absence of information and analysis in this regard inhibits our understanding of the substantive nature of the position.

A crucial aspect of this matter is whether the duties of the proffered position are described in such a way that we may discern the actual, substantive nature of the position. The Director notified the

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<sup>6</sup> The Petitioner also refers to courses undertaken by the Beneficiary in a foreign degree program. The Petitioner did not submit an academic equivalency evaluation to support a finding that these courses are equivalent to any U.S. courses in a specific specialty.

<sup>7</sup> A petitioner submits the LCA to DOL 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). The Petitioner has pledged to pay the Beneficiary a Level I wage. Requiring additional education or experience also indicates that a Level I wage may be inappropriate. As such, questions arise as to whether the certified labor condition application (LCA) corresponds to and supports the petition as required.

<sup>8</sup> We acknowledge the letter from [redacted] of [redacted] University. His letter contains information on academic studies in computer science, computer engineering, and engineering design only and does not address the other qualifying fields.

Petitioner that its initial duty descriptions were insufficient to establish the position as a specialty occupation. In its RFE response, the Petitioner provided the same duties with additional bullets below each duty. However, even considering the additional bullets, the information is inadequate to determine the substantive nature of the position. The Petitioner's descriptions contain vague and general information. One example is the duty to "[w]ork with QA engineers to test features functionality and deliver optimized features in production, work with product manager to sign off functionality for production deployment." The Petitioner provides little information on what features are being tested, how they might be optimized, or what level of involvement "work with" entails. The Petitioner provides no context for this work in terms of the end-client's business or any specific project. Therefore, we do have information concerning what these features do or how they are used. As such, we cannot ascertain what the Beneficiary's activities are or whether this work requires specialized knowledge.

In addition to the above, the Petitioner lists one of the duties as "[d]esign and implement various e-commerce improvement solutions into existing environments and designing & developing eCommerce software web applications." However, this duty focuses on an outcome or result, rather than the process undertaken to produce such an outcome or result. In its RFE response, the Petitioner adds that this duty will involve design and development of technical designs for an e-commerce platform software application. Such a circular description does not meaningfully convey the duties of the position apart from its overall outcome.

As stated, in its RFE response, the Petitioner provided additional bullets under each main duty. These bullets are relatively meaningless as they restate the same duty without adding clarity or insight into the duty itself. For instance, the duty to "[p]articipate in design sessions and code reviews of the code being built" has bullet points of "[p]erform code review before merge to version control system (GIT) and also provide comments if required some change to code" and "[p]erform peer code review, by providing valuable inputs to the other team members." Here, the Petitioner simply restates the duty of code review in several ways but does not provide additional insight into the purpose of the coding, whether the code review would require specialized knowledge, or how the coding fits into the context of the end-client's business or project.

The duty of "establishing processes and procedures to ensure OOAD standards are followed" contains a bullet adding that the Beneficiary will "[p]rovide software development process for new features or enhancements and be sure that follow Object Oriented design patterns." Again, the Petitioner uses the duty itself to describe the tasks within the duty, which provides little additional information into what the duty involves. Likewise, in describing the initial duty of "[i]nvolved in overall system's support" the Petitioner's RFE response adds the bullet of "[i]nvolve in support activities," which neither conveys the Beneficiary's level of involvement nor what solutions might be offered. Though these are just a few examples, the majority of the Petitioner's descriptions follow a circular pattern of using the duty itself to describe the tasks within the duty.

In addition to these circular descriptions, the Petitioner provides inconsistent information concerning the amount of time spent on a particular duty. In its various lists of duties, the Petitioner provides sixteen main duties in the same order, each with a percentage of time assigned to the duty. As stated, in its RFE response, the Petitioner added bullets to each of these main duties. Many of the bullets and duties appear more than once and as such, it is impossible to determine how much time will be spent

on a particular duty. We note, for example, that code review duties appear under the fifth, seventh, tenth, and fourteenth main duty, each with their own percentage of time. As described, we cannot discern how much of the Beneficiary's time will be spent on code review.

Similarly, the Petitioner appears to recycle bullets such that it is not apparent why a different percentage of time and a different duty would be associated with the same description. To illustrate, the bullet "[u]nderstand the latest technology stack used for development . . . considering various aspects like time interaction, performance, quality, security etc. for software applications. This also requires knowledge of various Software System Design patterns, Programming Design patterns and Object-Oriented Design Patterns" appears under the third and thirteenth main duty. The Petitioner provided no explanation as to why such a description would appear under different duties which involve different percentages of time.

We note that the Petitioner claims to be the Beneficiary's employer and that it will supervise the Beneficiary's work. However, the apparent inability of the Petitioner to provide clear and consistent duty descriptions or examples of specific projects assigned to the Beneficiary undermines this assertion and suggests that the Petitioner is not aware of the Beneficiary's daily work. Though the Petitioner states that it will have bi-weekly project status meetings on the project-related work assigned, that it "will provide specific instructions on required tasks and expected results," and that it "will closely monitor and review the performance of the beneficiary's assignment," it has not explained the particulars of how it will do this.

We note the perfunctory communication methods including phone calls, emails, chats, and quarterly client reviews and feedback. However, this information does not address whether the Beneficiary and Petitioner communicate beyond just the Beneficiary's self-reported status. While the Petitioner and the Beneficiary may use after-action time sheets to communicate tasks that were already performed, we see little information that addresses how the Petitioner obtains the client- and project-centric knowledge required to oversee the Beneficiary's daily work as it claims it will do. From the information provided, it cannot be adequately understood how the Petitioner would be aware of what future tasks to assign the Beneficiary based on the results required by the client. Further, none of the Petitioner's information precludes the client from primarily assigning the Beneficiary work and placing the Petitioner as secondary in this regard. Therefore, we question whether the position exists as described and whether the Petitioner will employ the Beneficiary under the terms it claims. These apparent discrepancies and unanswered questions surrounding the relationship between the Petitioner and the Beneficiary raise significant questions as to the actual, substantive nature of the proffered position.

We reviewed the job postings submitted for our consideration of an industry standard. While the Petitioner contends that these positions are parallel to the proffered position, all seven advertised positions require experience beyond a bachelor's degree. Six of the seven postings appear to advertise far more senior roles than the proffered position, as evidenced by requirements for a bachelor's degree along with a range of between three to five years of additional experience. If these are parallel positions as claimed, then the Petitioner has not resolved how payment of a Level I wage to the Beneficiary correlates to the experience the position requires. The Petitioner has identified its particular position as

a wage Level I position on the certified LCA.<sup>9</sup> A Level I wage for a Job Zone Four occupation with an SVP 7 < 8 rating is for a position that may require up to two years of experience. Any required additional experience would require a corresponding increase in the wage level.<sup>10</sup> If alternatively, the positions are not parallel, but rather represent a different or more specialized position than the proffered position, then the postings have no relevance in this matter. In either instance, these postings suggest that the LCA may be inconsistent with the Petitioner's claims and the evidence within the record, which further obfuscates the substantive nature of the position.

Lastly, we turn to the opinion letter offered by [redacted] an Assistant Professor in the Electrical and Computer Engineering Department of [redacted] University. Initially we note that the first paragraph of [redacted]' letter indicates that he renders an opinion concerning the accuracy of the Petitioner's assessment of the position and its minimum qualifications. This suggests that he was asked to confirm preconceived notions on the nature of the position rather than offer an objective and independent analysis. [redacted]' letter contains a list of his qualifications; the documents he reviewed to write the letter; an overview of the position; information copied from O\*NET in verbatim; a repetition of the duties and education requirements as articulated by the Petitioner; a list of courses in [redacted] University's computer engineering and computer science program; a chart summarizing the aforementioned job postings from other employers; an extensive quotation from a webpage concerning engineering design study; an assessment of the Beneficiary's qualifications; and a conclusion. The letter presents information in lists or verbatim quotes and contains little to no independently generated analysis or synthesis of the information.

To illustrate, [redacted] identifies where the knowledge to perform the duties could be obtained, but not why the knowledge is required, or why the knowledge cannot be obtained apart from a degree in one of the qualifying fields. The letter contains a heading rhetorically asking why the proffered position is a specialty occupation. In answering his own question, the first sentence under the heading states that the "position of Software Engineer requires specialized technical knowledge of [rote list of areas]." Notably, this statement contains a significant underlying assumption: that the position requires specialized knowledge. To add any value to this matter, [redacted] analysis must flesh out his fundamental presupposition that the position requires specialized knowledge before discussing which areas of knowledge or explaining where the knowledge could be obtained.

As the foregoing demonstrates, the opinion presented does not offer a cogent analysis of the duties and why the duties require a bachelor's degree in a specific specialty. Accordingly, this letter does not lend clarity to the position such that we may ascertain its substantive nature.<sup>11</sup>

The Petitioner has not established the substantive nature of the work that the Beneficiary will perform due to material inconsistencies contained within the record and a lack of specificity in the duties to be

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<sup>9</sup> One of the employers offers a salary that would be the equivalent of a Level IV wage for the occupational category and the relevant geographical location.

<sup>10</sup> A requirement of more than two years and up to three years requires a one level increase; more than three years and up to four years of experience requires a corresponding two-level increase in wage level; and a requirement for more than four years of experience requires a corresponding three-level increase in wage level.

<sup>11</sup> We may, in our discretion, use opinion statements submitted by the Petitioner as advisory. *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Id.*

performed. The failure to establish the substantive nature of the position precludes us from determining whether it satisfies any of the regulatory specialty-occupation criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1)-(4).

### III. 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.

The appeal will be dismissed for the above stated reasons. In visa petition proceedings, it is a 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.