



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

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

MATTER OF C- CORP.

DATE: MAR. 2, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an information technology company, seeks to temporarily employ the Beneficiary as an "applications performance 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, California Service Center, denied the petition, concluding that the Petitioner did not demonstrate that the proffered position is a specialty occupation.

On appeal, the Petitioner submits additional evidence and asserts that the evidence of record satisfies all evidentiary requirements.

Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) largely restates this statutory definition, but adds a non-exhaustive list of fields of endeavor. In addition, the regulations provide that the proffered position must meet one of the following criteria to qualify as a specialty occupation:

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- (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” 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).

II. PROFFERED POSITION

The Petitioner seeks to employ the Beneficiary at its location in [REDACTED] California, from October 1, 2016, to October 1, 2019. In its support letter, the Petitioner provided the following description for the proffered position:

- Performing Proactive SQL tuning to avoid performance issues
- Performing system health check on complete technology stack
- Troubleshooting Oracle Workflow performance issues
- Analyze individual concurrent programs, custom codes for performance improvement
- Work with AWR and ASH data to analyze performance & provide recommendations
- Perform various Database Upgrades and Oracle Applications Upgrade
- Administer & troubleshoot Oracle RAC 11g
- Work on Oracle Exadata Database & Oracle Dataguard 11g
- Migrate non-ASM instance to ASM instance
- Automate day-to-day tasks such as cloning, monitoring alerts, etc.
- Work with Virtual Private Database (VPD) Policy
- Install, configure and manage Enterprise Manager Cloud Control 12c
- Perform table column reordering to improve Demantra Engine
- Install, Configure Apex and developing Apex applications

- Install, administer and configure Oracle WebLogic 11g/12c & Oracle SOA Suite 11g

The Petitioner subsequently provided the following additional duties:

- Evaluate and analyze technical designs and provide recommendations and feedback.
- Design and implement system and application architectures.
- Analyze, diagnose and identify the root cause of Applications performance issues. Prototype and implement necessary changes in order to resolve the performance issues.
- Recommend, design and develop techniques which will improve performance, ease of use, manageability.
- Conduct performance testing and evaluate the test results. Identify concerns as well as points of contention from the benchmark as well as present a summary of the benchmark analysis to developers, performance engineers, and architects.
- Work well independently as well as part of a team on assigned tasks, generating and implementing creative solutions which will improve customer implementations. Collaborate with others including sharing experiences and technology.

The Petitioner also stated that the proffered position requires “a Bachelor’s degree in Computer Science, Computer Engineering, or equivalent.”

III. 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, 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.¹

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

¹ 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.

In this matter, the Petitioner indicated that the Beneficiary will be employed in-house as an “applications performance engineer.” However, we find that the Petitioner did not provide sufficient, credible evidence to establish in-house employment for the Beneficiary for the validity of the requested H-1B employment period. Specifically, the Petitioner did not submit a job description that adequately conveys the substantive work to be performed by the Beneficiary. The job description in the record describes the proffered position in generalized and generic terms that do not convey sufficient substantive information to establish the relative complexity, uniqueness, and/or specialization of the proffered position or its duties.

For example, the Petitioner stated that the Beneficiary will “evaluate and analyze technical designs and provide recommendations and feedback,” “design and implement system and application architectures,” “recommend, design and develop techniques which will improve performance, ease of use, manageability,” and “work well independently as well as part of a team on assign tasks.” The record of proceedings does not contain a more detailed description explaining what particular duties the Beneficiary will perform on a day-to-day basis. Nor is there a detailed explanation regarding the demands, level of responsibilities, complexity, or requirements necessary for the performance of these duties (e.g., explain what specific systems and applications are involved, and what body of knowledge is required to perform the duties). The Petitioner’s description is generalized and generic and does not convey the substantive nature of the work that the Beneficiary would actually perform, or any particular body of highly specialized knowledge that would have to be theoretically and practically applied to perform it.

On appeal, the Petitioner submitted statement of work (SOW) executed with other companies as evidence of availability of in-house work. However, they also contain generalized and generic terms regarding the scope of the work and services, and do not sufficiently delineate the nature of the work the Beneficiary will perform. For example, the SOW with Pella states that some of the tasks include “periodic checks and be reactive to systems generated alerts,” “review patches and code promotions,” and “diagnose and resolve production technical issues.”² The SOW also contains generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance.

The Petitioner’s attestations made on the labor condition application (LCA) raise further questions regarding the reliability of the job description.³ Specifically, we observe that the Petitioner submitted an LCA certified for a Level II wage. According to guidance issued by the Department of

² Further, the SOW states that the Petitioner will assign “one senior applications performance tuning engineer” and one “senior Oracle DBA,” but it is not clear if those positions are similar or same as the proffered position. Since the SOW does not name the Beneficiary, it is not clear if the Beneficiary will be working on this project.

³ The Petitioner is required to submit a certified LCA to USCIS 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 experience and qualifications who are performing the same services. *See Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 545-546 (AAO 2015).

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Labor (DOL) regarding wage-level designations, a Level II wage is appropriate for a position whose in which the individual would perform only “moderately complex tasks that require limited judgment.” U.S. Dep’t of Labor, Emp’t & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://flcdatcenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf.

The Petitioner, however, has made many assertions that seem to conflict with this characterization of the position. For example, we observe that when it filed the H-1B petition (and when it submitted the LCA to DOL for certification), the Petitioner referred to the proffered position as an “applications performance engineer.” However, in response to the Director’s request for additional evidence (RFE), the Petitioner described the proffered position as a “senior applications performance engineer.” Further, the Petitioner claimed that the position requires “expertise with Oracle Applications,” “proven debugging and diagnostic skills,” strong leadership skills and the ability to work independently. The Petitioner also stated that such an individual would need to possess at least 5 years of work experience as a “senior” performance engineer. However, a requirement of 5 years of experience at a “senior” level suggests that more would be expected of the Beneficiary than merely performing “moderately complex tasks that require limited judgment.” The Petitioner’s designation of the proffered position as a Level II position thus undermines the reliability of the job description.

The record of proceedings also lacks documentation regarding the Petitioner’s business activities and the actual work that the Beneficiary will perform to sufficiently substantiate the claim that the Petitioner has H-1B caliber work for the Beneficiary for the period of employment requested in the petition. Specifically, the Petitioner has maintained throughout the application process that the Beneficiary would work at its office in [REDACTED] California. As mentioned, as evidence that it has work for the Beneficiary to perform, the Petitioner submitted SOWs it had executed with other companies for projects to be completed on February 13, 2017; February 28, 2017; and April 30, 2017. In other words, the Petitioner has submitted no evidence of any work for the Beneficiary to perform beyond April 30, 2017. However, the Petitioner has requested that the Beneficiary be granted H-1B status through October 1, 2019. Further, the Petitioner’s offer letter states that it “may modify job titles, salaries and benefits from time to time as it deems necessary.”

We find that the Petitioner has not established that this petition was filed for non-speculative work for the Beneficiary, for the entire period requested, that existed as of the time of the petition’s filing. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the Petitioner or Beneficiary becomes eligible under a new set of facts. *Michelin Tire Corp.*, 17 I&N Dec. at 248, 249 (Reg’l Comm’r 1978).⁴

⁴ 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:

As observed above, we must review the actual duties the Beneficiary will be expected to perform to ascertain whether those duties require at least a baccalaureate degree in a specific specialty, or its equivalent, as required for classification as a specialty occupation. To accomplish that task in this matter, we must analyze the actual duties in conjunction with the specific project(s) to which the Beneficiary will be assigned. To allow otherwise, results in generic descriptions of duties that, while they may appear (in some instances) to comprise the duties of a specialty occupation, are not related to any actual services the Beneficiary is expected to provide. The Petitioner has not provided sufficient details regarding the nature and scope of the Beneficiary's employment or any substantive evidence regarding the actual work that the Beneficiary would perform.

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 any 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.

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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IV. 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of C- Corp.*, ID# 163897 (AAO Mar. 2, 2017)