



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

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

MATTER OF M-S-, INC.

DATE: FEB. 22, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an information technology services firm, seeks to temporarily employ the Beneficiary as a “Database Administrator” under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) § 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 the Beneficiary is qualified to perform services in a specialty occupation.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred in concluding that the Beneficiary does not have the equivalent of a U.S. bachelor’s degree in a specific specialty that is directed related to the proffered position.

Upon *de novo* review, the matter will be remanded to the Director for action consistent with this decision.

I. SPECIALTY OCCUPATION

We have reviewed the entire record of proceedings, and find that the Director’s decision to deny the petition did not adequately address another, more fundamental issue: whether the proffered position qualifies as a specialty occupation. U.S. Citizenship and Immigration Services (USCIS) is required to follow long-standing legal standards and determine first, whether the proffered position qualifies as a specialty occupation, and second, whether the Beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed. *Cf. Matter of Michael Hertz Assocs.*, 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.

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.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor’s degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must meet one of the following criteria:

- (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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Fed. Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*,

21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets 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 proffered 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”). Applying this standard, USCIS regularly approves H-1B petitions for qualified individuals who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. USCIS must examine the ultimate employment of the individual, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position or an employer’s self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

B. Analysis

The Petitioner provided at least two different descriptions of the proffered position’s duties and percentages of time to be devoted to those duties. In its March 10, 2014, letter, the Petitioner stated that the Beneficiary would be “[w]orking through all phases of the software development life cycle, including analysis, design, implementation, testing.” The Petitioner further stated that the Beneficiary would “[a]nalyze and address reported defects in a timely manner, solutions to these problems could include code changes, data updates, or configuration modifications[.]” In the same letter, the Petitioner provided the following list of duties and percentages (verbatim, bullet points added for clarity):

- System Analysis 20%
- System Design 20%
- Database Programming 40%
- Quality Assurance 10%
- Implementation and Documentation 10%

In its March 31, 2014, support letter, the Petitioner provided the following list of duties and percentages (verbatim):

- Building, maintaining, administering and supporting databases are the primary job duties of database administrators. Keeping data secure by managing access, privileges and information migration. Responsible for installing and configuring database management software, translating database design and diagnosing database performance issues. – 33%
- Installing software upgrades, managing hardware upgrades and maintaining computer servers. Develop backup and recovery strategies, and monitor servers to ensure capacity is not exceeded. Occasionally devise network strategies, test systems and develop system standards[.] – 33%
- Evaluating new tools and technologies, analyzing user needs and presenting findings to management are additional job duties of database administrators. Schedule, plan and supervise new Database installation and testing. Provide users with training on new database software and systems[.] – 33%

Based on these inconsistent recitations of the duties and corresponding percentages of time to be spent on each duty, it is unclear exactly what the Beneficiary will be doing, if the visa petition were approved.

Further, it appears that the duties of the proffered position may change during the requested validity period. For example, in its support letter, when introducing the description of the duties therein, the Petitioner stated: “[The Beneficiary’s] duties depending on the assignment may include the following tasks” An employment agreement in the record states: “[The Beneficiary] shall serve as Database Administrator during the course of his employment with [the Petitioner] and have duties and responsibilities, as the IT-Manager of [the Petitioner] shall determine from time to time.” Further still, a document headed, “Right to Control,” states: “[The Petitioner] will retain the full right to assign additional duties to [the Beneficiary] at all times.”

Overall, the evidence of record is 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

(b)(6)

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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.

We also note that the Petitioner has inconsistently stated the educational requirements for the proffered position. In its March 10, 2014, letter, the Petitioner stated the following: “These duties and responsibilities are in line with [the Beneficiary’s] professional background and our minimum requirements for the Database Administrator position, which includes at least a Bachelor’s degree in Technology, or a closely related field.” Then, in its support letter, the Petitioner did not include “Technology” in its list of acceptable degrees. The Petitioner stated in the support letter, “We believe that these duties . . . require an advanced theoretical knowledge and practical expertise gained through either a Bachelor’s or a Master’s degree in Computer Science, Information Systems, Management Information Systems, Electrical/Electronics Engineering, Physics, or a closely related field”

In the instant case, it is unclear exactly what degree(s) the Petitioner requires for the proffered position and whether the list of degrees contained in the Petitioner’s support letter is sufficiently limited such that the proffered position should be regarded as requiring a degree “in a specific specialty.”¹

As a final matter, we note that the Petitioner stated on the Form I-129 that it then had eight employees. [REDACTED] signed that petition on March 31, 2014, and is identified as the Petitioner’s HR Manager. On that same date, [REDACTED] also identified as the Petitioner’s HR Manager, signed the labor condition application. Thus, the evidence submitted indicates that the Petitioner, with eight employees on March 31, 2014, then employed two HR Managers.

In a request for evidence dated January 4, 2016, we requested that the Petitioner provide, *inter alia*, a line-and-block organizational chart showing all of the Petitioner’s employees, including names, titles, and work locations. The Petitioner did not provide that requested evidence, which is material to the Beneficiary’s position in the Petitioner’s hierarchy and the duties he would actually perform.

For these reasons, the petition as currently constituted cannot be approved and this matter must be remanded to the Director for issuance of a new decision.

II. CONCLUSION

Absent a determination that the proffered position is a specialty occupation that requires at least a baccalaureate or higher degree in a specific specialty or its equivalent, it cannot be determined whether the Beneficiary possesses that degree or its equivalent.² As discussed, the evidence of

¹ The Petitioner’s website has a job posting for a database administrator position that states that the Petitioner requires a “Bachelor’s degree or equivalent in Computer Science or related field.” That job posting does not list the other fields that the Petitioner has listed in its letters to USCIS. [REDACTED]

[REDACTED] (last visited Feb. 17, 2016). The record contains no explanation of the discrepancy between the educational requirements of that position and the educational requirements of the position proffered in the instant case.

² We observe that one of the evaluations of the Beneficiary’s foreign education states that the Beneficiary’s education is

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record does not demonstrate that the proffered position is a specialty occupation. Consequently, the matter will be remanded to the Director for further review and issuance of a new decision in accordance with the applicable statutory and regulatory provisions. The Director may request any additional evidence considered pertinent to the new determination.

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

Cite as *Matter of M-S-, Inc.*, ID# 15542 (AAO Feb. 22, 2016)

equivalent to a U.S. bachelor's degree in mechanical engineering. We question whether such a degree is included in, or closely related to, the wide array of degrees the Petitioner asserts would qualify one for the proffered position.