U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF L-H- LLC

DATE: MAY 10, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a hotel, seeks to temporarily employ the Beneficiary as a "hotel manager" 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, Vermont Service Center, denied the petition. The Director concluded that the Petitioner did not establish (1) that the proffered position qualifies as a specialty occupation; and (2) that the Beneficiary is qualified to perform services in a specialty occupation in accordance with the applicable statutory and regulatory provisions.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Director erred in finding that (1) the proffered position is not a specialty occupation; and (2) that the Beneficiary does not possess the equivalent of a U.S. bachelor's degree in a field related to the duties of the position.

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

I. LAW

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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;
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> (*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;
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> (*3*) The employer normally requires a degree or its equivalent for the position; or
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> (*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). U.S. Citizenship and Immigration Services (USCIS) has 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

In the H-1B petition, the Petitioner stated that the Beneficiary will serve as a "hotel manager."[1] In the letter of support, the Petitioner provided the Beneficiary's job duties in the proffered position. In

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[1] On the Form I-129, the Petitioner stated that the Beneficiary would work at its corporate office in Pennsylvania. However, in the labor condition application (LCA), the Petitioner stated that the Beneficiary's place of employment would be at Pennsylvania In response to the RFE, the Petitioner stated that the Beneficiary would work at both locations. It must be noted that the instructions to the LCA (ETA Form 9035 & 9035E) states the following:

> It is important for the employer to define the place of intended employment with as much geographic specificity as possible. The place of employment address listed . . . must be a physical location and cannot be a P.O. Box. The employer may use this section to identify up to three (3) physical locations and corresponding prevailing wages covering each location where work will be performed and the electronic system will accept up to 3 physical locations and prevailing wage information.

Thus, the instructions require that the employer list the place of intended employment "with as much geographic specificity as possible" and, further notes that the employer may identify up to three physical locations, including street address, city, county, state, and zip code, where work will be performed. Additionally, the U.S. Department of Labor

response to the Director's request for evidence (RFE), the Petitioner changed the job title to "general manager" and expanded the Beneficiary's job duties. Specifically, the Petitioner provided the following job duties for the position (verbatim):

> With the assistant of who will continue to supervise the staff and deal with day to day work assignments and resolve minor problems, reporting to the general manager as well as the assistance of our accountant the general manager will perform a full range of managerial duties. He will be responsible for reviewing and approving personnel hires, make final decisions on compensation and promotion, set policy on salaries and benefits and insure compliance with payroll tax reporting and local, state and federal labor laws and regulations. He will also set service standards for our hotel in compliance with the standards of [the Petitioner] and assure that the enterprise meets all performance and reporting requirement under the franchise agreement. He will review and negotiate contract proposals from vendors of services including utilities such as telephone, Internet, cable and satellite television, and choose among providers based on cost and quality of their services.
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> He will arrange for the maintenance of adequate property, casualty and liability insurance based on amount of coverage, rating of the insurer and terms of the insurance contracts proposed which he will review and evaluate.
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> He will review and approve contracts for services such as linen, pool maintenance and carting, food and beverage supply for the restaurant and bar facilities. He will review and approve contracts for banquet and conference services. When major repairs or replacements of equipment or renovation of facilities are required he will solicit and review bids, choose architects and/or interior designers and construction contractors, negotiate such contracts and monitor the progress of such work as well as arrange and negotiate financing for same.
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> With the assistance of he will develop budgets , financial projections, cost control systems and set room rates and implement promotions and public relations efforts to maximize occupancy and receipts. He will maintain relations with our banks and other sources of financing and assure that proper reporting of income, assets and liabilities are made as may be required by creditors or [the Petitioner]. He will review all reports required by tax or other authorities and assure that all taxes are paid and all regulations are complied with.

(DOL) regulations state that "[e]ach LCA *shall state . . . [t]he places of intended employment.*" 20 C.F.R. § 655.730(c)(4) (emphasis added).

Further, with certain limited exceptions, the applicable DOL regulations define the term "place of employment" as the worksite or physical location where the work actually is performed by the H-1B nonimmigrant. *See* 20 C.F.R. § 655.715.

On appeal, the Petitioner states that the position requires a bachelor's degree in hotel or hospitality management, or its 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 satisfies any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, qualifies as a specialty occupation.[2] Specifically, the record (1) provides inconsistent information regarding the position[3]; and (2) does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.[4]

A. First Criterion

We now turn to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position. To inform this inquiry, we recognize DOL's *Occupational Outlook Handbook* (*Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.[5]

On the LCA submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category "Lodging Managers" corresponding to the Standard Occupational Classification code 11-9081 at a Level II wage rate.[6]

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[2] Although some aspects of the regulatory criteria may overlap, we will address each of the criteria individually.

[3] The purpose of an RFE is to provide a petitioner with an opportunity to clarify whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to an RFE, the Petitioner cannot materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. Rather, the Petitioner must establish that the position offered to the Beneficiary when the petition was filed merits classification for the benefit sought. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). If significant changes are made, the Petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. Here, in response to the RFE, the Petitioner changed the Beneficiary's job title and expanded the Beneficiary's job duties, adding such items as: (1) developing budgets, financial projections, and cost control systems; (2) implementing promotions and public relations efforts; (3) maintaining relations with banks and other sources of financing and assuring that proper reporting of income, assets, and liabilities are made; and (4) reviewing all reports required by tax or other authorities.

[4] The Petitioner submitted documentation to support the H-1B petition, including evidence regarding the proffered position. While we may not discuss every document submitted, we have reviewed and considered each one.

[5] All of our references are to the 2016-2017 edition of the *Handbook*, which may be accessed at the Internet site http://www.bls.gov/ooh/. We do not, however, maintain that the *Handbook* is the exclusive source of relevant information. That is, the occupational category designated by the Petitioner is considered as an aspect in establishing the general tasks and responsibilities of a proffered position, and USCIS regularly reviews the *Handbook* on the duties and educational requirements of the wide variety of occupations that it addresses. To satisfy the first criterion, however, the burden of proof remains on the Petitioner to submit sufficient evidence to support a finding that its particular position would normally have a minimum, specialty degree requirement, or its equivalent, for entry.

[6] The "Prevailing Wage Determination Policy Guidance" issued by the DOL provides a description of the wage levels.

According to DOL guidance, a Level II wage rate is appropriate for a position that involves moderately complex tasks that require limited judgment. An indication that a Level II would be appropriate is when the proffered position requires the years of education and/or experience that are described in the Occupational Information Network (O*NET) Job Zones. The occupational category "Lodging Managers," has been assigned an O*NET Job Zone 3, which groups it among occupations for which medium preparation is needed. More specifically, most occupations in this zone "require training in vocational schools, related on-the-job experience, or an associate's degree." *See* O*NET OnLine Help Center, at http://www.onetonline.org/help/ online/zones, for a discussion of Job Zone 3. Therefore, the designation of the proffered position at a Level II on the LCA suggests that the Petitioner's requirements for the proffered position would equate to training in a vocational school, related on-the-job experience, or an associate's degree.

Turning to the *Handbook*, we note that the chapter on "Lodging Managers" begins by stating that a high school diploma or equivalent is the typical entry-level education for these positions.[7] The subchapter entitled "How to Become a Lodging Manager" further clarifies: "Many applicants can qualify as a lodging manager by having a high school diploma and several years of experience working in a hotel." *Id.* While the *Handbook* states that "most large, full-service hotels require applicants to have a bachelor's degree," it further clarifies that "[a]t hotels that provide fewer services, candidates with an associate's degree or certificate in hotel, restaurant, or hospitality management may qualify for a job as a lodging manager." *Id.* It also reports: "Most full-service hotel chains prefer candidates with a degree in hospitality or hotel management." *Id.*

The *Handbook* does not support the Petitioner's assertion that a bachelor's degree in hotel or hospitality management is required for entry into this occupation. Rather, the *Handbook* states that a high school diploma, an associate's degree, a certificate, or a baccalaureate may be sufficient for entry into lodging manager positions.

In response to the RFE, the Petitioner submitted printouts from the websites work.chron.com and learn.org regarding lodging managers. However, similar to the *Handbook*, the printouts report that a high school diploma, an associate's degree, a certificate, or a baccalaureate may be sufficient for entry.

The *Handbook* does not indicate that there are any degree requirements for these jobs. Moreover, the Petitioner has not provided documentation from another probative source to substantiate its

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U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf. A prevailing wage determination starts with an entry level wage and progresses to a higher wage level after considering the experience, education, and skill requirements of the Petitioner's job opportunity. *Id.* The Petitioner classified the proffered position at a Level II wage. We will consider this selection in our analysis of the position.

[7] For additional information regarding the occupational category "Lodging Managers," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., Lodging Managers, http://www.bls.gov/ooh/management/print/lodging-managers.htm (last visited May 2, 2016).

assertion regarding the minimum requirement for entry into this particular position. Thus, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

B. Second Criterion

The second criterion presents two, alternative prongs: "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[.]" 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*) (emphasis added). The first prong casts its gaze upon the common industry practice, while the alternative prong narrows its focus to the Petitioner's specific position.

1. First Prong

To satisfy this first prong of the second criterion, the Petitioner must establish that the "degree requirement" (i.e., a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent) is common to the industry in parallel positions among similar organizations.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As previously discussed, the Petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports a requirement for at least a bachelor's degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter. Also, there are no submissions from the industry's professional association indicating that it has made a degree a minimum entry requirement. Furthermore, the Petitioner did not submit any letters or affidavits from similar firms or individuals in the Petitioner's industry attesting that such firms "routinely employ and recruit only degreed individuals."

In support of the assertion that the proffered position is a specialty occupation under this criterion of the regulations, the Petitioner submitted documentation regarding H-1B petitions filed by two other employers. Notably, the documentation does not indicate the total number of employees currently or in the past employed in the positions by these employers. Accordingly, it cannot be determined how representative the documentation for one individual at each place of employment is of the employers' actual hiring practices.[8]

[8] We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g.*, *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988). If the previous nonimmigrant petitions were approved based on the same description of duties and

Furthermore, the documentation does not provide the job duties and day-to-day responsibilities of these individuals. For instance, the documentation does not include evidence regarding the complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Accordingly, it is unclear whether these individuals' duties and responsibilities are the same as the proffered position.

Without more, the Petitioner has not provided sufficient evidence to establish that a bachelor's degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations. Thus, the Petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

2. Second Prong

We will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), which is satisfied if the Petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

In support of its assertion that the proffered position qualifies as a specialty occupation, the Petitioner described the proffered position and its business operations. In response to the RFE and on appeal, the Petitioner asserts that the proffered position includes complex responsibilities and duties. However, the Petitioner has not sufficiently developed relative complexity or uniqueness as an aspect of the proffered position. Again, it appears that the Petitioner expects the Beneficiary to perform moderately complex tasks that require limited exercise of judgment (by its selection of a Level II wage on the LCA) compared to other positions within the same occupation.[9] The description of the duties provided by the Petitioner does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them and does not refute the *Handbook's* statement that a high school diploma is sufficient.

Accordingly, the Petitioner has not submitted sufficient evidence to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

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assertions that are contained in the current record, they would constitute material and gross error on the part of the Director. It would be "absurd to suggest that [USCIS] or any agency must treat acknowledged errors as binding precedent." *Sussex Eng'g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987).

[9] Nevertheless, a low wage-designation does not preclude a proffered position from classification as a specialty occupation, just as a high wage-designation does not definitively establish such a classification. In certain occupations (e.g., doctors or lawyers), a Level II position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty, or its equivalent. That is, a position's wage-level designation may be a relevant factor but is not itself conclusive evidence that a proffered position meets the requirements of section 214(i)(1) of the Act.

C. Third Criterion

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position.

On appeal, the Petitioner states that it "is not claiming that it has met this particular criterion because the specific position is new." Therefore, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*).

D. Fourth Criterion

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

The Petitioner claims that the nature of the specific duties of the position in the context of its business operations is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent. However, relative specialization and complexity have not been sufficiently developed by the Petitioner as an aspect of the proffered position. Although the Petitioner asserts that the position requires expertise in human resource management, business administration, accounting, marketing, government regulation and compliance and public relations and business contracts, the Petitioner does not establish how this required "expertise" elevates the proffered position to a specialty occupation. In addition, the Petitioner claims that these areas of expertise are areas that are studied in degree programs in hotel and hospitality management. However, the Petitioner has not offered sufficient evidence to support its assertion that it has satisfied this criterion of the regulations. We reiterate our earlier comments and findings regarding the implications of the position's Level II wage designation on the LCA.

In addition, the Petitioner claims that the Beneficiary is well qualified for the position, and references his qualifications. However, the test to establish a position as a specialty occupation is not the education or experience of a proposed beneficiary, but whether the position itself requires at least a bachelor's degree in a specific specialty, or its equivalent. The Petitioner has not demonstrated in the record that its proffered position is one with duties sufficiently specialized and complex to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

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.

IV. BENEFICIARY'S QUALIFICATIONS

The Director concluded that the Beneficiary would not be qualified to perform the duties of the proffered position if the job had been determined to be a specialty occupation. However, a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the proffered position does not require a baccalaureate or higher degree in a specific specialty, or its equivalent. Therefore, we need not and will not address the Beneficiary's qualifications further.

V. 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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of L-H- LLC*, ID# 16393 (AAO May 10, 2016)