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

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

MATTER OF M-, INC.

DATE: OCT. 4, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an IT services firm, seeks to continue to employ the Beneficiary as a “programmer analyst ([REDACTED] ETL Developer)” 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. The Director concluded that the Petitioner had not demonstrated that the proffered position qualifies as a specialty occupation position.

The matter is now before us on appeal. In its 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). 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. THE PROFFERED POSITION

In the H-1B petition, the Petitioner stated that the Beneficiary will serve as a “programmer analyst [REDACTED] ETL Developer).” The Petitioner provided the following description of the duties of the proffered position (note: errors in the original text have not been changed):

- Develop and document high level conceptual data process design for review by data analysts for writing ETL code and test plans;
- Provide development effort estimates based on available preliminary business requirements of the business;
- Review and understand data specifications and physical [sic] data models to write, extract, transform, and load (ETL) code and construct [sic] generic ETL process.
- Create design specifications for ETL processes coded for audit and maintainability purposes;
- Write ETL code with deadlines to deliver project on scheduled timelines;
- Write Unit test ETL code to ensure the code is free of errors;
- Document the results of unit testing prior to handing off ETL code to testing teams;
- Participate in regular technical peer review sessions to identify non-adherence to standards, design, and performance issues/improvements of ETL code;
- Follow the Enterprise informatics software development life cycle and adhere to ETL code standards and best practices in the department;

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- Develop schedule specifications to automate ETL jobs using [REDACTED] software; and
- Contribute to overall architecture in developing end to end system design for specific data warehouse applications.

The Petitioner stated that the proffered position requires a minimum of a bachelor's degree in computer science, information systems, engineering, or an IT related field, or the equivalent.

The Petitioner, which is located in [REDACTED] Georgia, states that the Beneficiary would work at [REDACTED] in [REDACTED] Illinois, where he would provide his services to [REDACTED] (end-client), pursuant to contracts between: (1) the Petitioner and [REDACTED] (first vendor); (2) the first vendor and [REDACTED] (second vendor); and (3) the second vendor and the end-client. The Petitioner's duty descriptions were confirmed in two letters from the end-client.

On the labor condition application (LCA) submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category "Software Developers, Applications" corresponding to the Standard Occupational Classification code 15-1132.¹

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.²

¹ The Petitioner classified the proffered position at a Level I wage (the lowest of four assignable wage levels). We will consider this selection in our analysis of the position. The "Prevailing Wage Determination Policy Guidance" issued by the DOL provides a description of the wage levels. A Level I wage rate is generally appropriate for positions for which the Petitioner expects the Beneficiary to have a basic understanding of the occupation. 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://flcdatcenter.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.*

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.

A. Lack of a Requirement for a Bachelor's Degree in a Specific Specialty, or the Equivalent

Initially, we observe that the Petitioner has never asserted that the proffered position requires a minimum of a bachelor's degree in a specific specialty or its equivalent. The Petitioner stated that a bachelor's degree or its equivalent in computer science, information systems, engineering, or an IT related field would be a sufficient educational qualification for the proffered position.

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. *See* section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Again, the Petitioner has represented that a bachelor's degree in computer science or engineering is acceptable. Here and as indicated above, the Petitioner, who bears the burden of proof in this proceeding, does not establish either (1) that the disciplines are closely related fields, or (2) that all fields of engineering are directly related to the duties and responsibilities of the proffered position.³ Absent this evidence, it cannot be found that normally the minimum requirement for entry into the particular position proffered in this matter is a bachelor's or higher degree in a specific specialty, or its equivalent, under the Petitioner's own standards.

As the evidence of record does not establish how these dissimilar fields of study form either a body of highly specialized knowledge or a specific specialty, or its equivalent, the Petitioner's assertion that the job duties of this particular position can be performed by an individual with a bachelor's degree in either of these fields suggests that the proffered position is not a specialty occupation. Therefore, absent probative evidence of a direct relationship between the claimed degrees required

³ The field of engineering is a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering.

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and the duties and responsibilities of the position, it cannot be found that the proffered position requires, at best, anything more than a general bachelor's degree. The petition must be denied on this basis alone.

B. Lack of a Meaningful Job Description

Nor does the record contain a meaningful job description that establishes the substantive nature of the work to be performed by the Beneficiary.

First, as reflected in the description of the position as quoted above, the proffered position has been described in terms of generalized and generic functions 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 “develop and document a high level conceptual data process design for review”; “provide development effort estimates”; “write ETL code within deadlines”; and “document the results of unit testing.” The Petitioner’s description is generalized and generic in that the Petitioner 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. The responsibilities for the proffered position contain 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.⁴

Second, the wage-level designated by the Petitioner on the LCA raises further questions regarding the accuracy and reliability of its description of the proffered position and its constituent duties. As noted, in designating the proffered position at a Level I wage rate, the Petitioner indicated that the proffered position is a comparatively low, entry-level position relative to others within the occupation and that the Beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment, that he will be closely supervised and his work closely monitored and reviewed for accuracy, and that he will receive specific instructions on required tasks and expected results.

However, several of the Petitioner’s assertions appear to directly conflict with that wage-level designation. For example, despite the Level I wage-level designation, the Petitioner stated that the Beneficiary would design and develop high-level conceptual data process designs, and the record contains multiple assertions regarding the complexity of the position and its constituent duties. Moreover, that the Beneficiary would be sent from the Petitioner’s base in suburban [REDACTED] to work

⁴ It must be noted that most of the duties attributed to the proffered position appear to have been copied, with at most minor amendments, from an online vacancy announcement for an ETL Developer position. See [REDACTED] (last visited Sept. 29, 2016). That the Petitioner submitted a duty description copied from another employer indicates that the description is not an accurate, in-depth description of the duties of the proffered position as they would be performed in the context of the Petitioner’s business operations.

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offsite for an end-client in suburban [REDACTED] implies a certain degree of independence. However, these assertions, both explicit or implicit, raise additional questions as to whether the proffered position is in fact a Level I, entry-level position as claimed, and in any event further calls into question the reliability of the Petitioner's job description.⁵ For this additional reason, we find the Petitioner's description of the job duties inadequate, and that the substantive nature of the duties of the proffered position have not been described with sufficient clarity and detail.

While the letters from the end-client listing the duties of the position are acknowledged, we note that because they track the duties provided by the Petitioner. In any event, they do not discuss the duties that the Beneficiary would perform in the context of the Petitioner's business operation (or that of the end-client). For this additional reason, we find the Petitioner's description of the job duties inadequate, and that the substantive nature of the duties of the proffered position have not been described with sufficient clarity and detail.

Finally, we note that although he is ostensibly performing his duties in Illinois pursuant to the H-1B petition, the Beneficiary's pay records provide a Minnesota address, and the Petitioner looks to have been withholding Minnesota State income tax from his pay. In that this appears to undermine the Petitioner's assertions regarding the Beneficiary's duty station, we find for this additional reason that the Petitioner's description of the job duties is inadequate, and that the substantive nature of the duties of the proffered position have not been described with sufficient clarity and detail.

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 one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it has not demonstrated that the proffered position is a specialty occupation. The petition must be denied on this basis alone.

C. Speculative Employment

Further, we observe that the period of employment requested in the H-1B petition extends from August 26, 2015, to August 30, 2017. A statement of work (SOW) executed between the Petitioner

⁵ It also raises questions as to whether the LCA corresponds to and supports the H-1B petition. However, because the H-1B petition is not otherwise approvable, we will not explore that issue at this time.

and the first vendor states that the first vendor would utilize the Beneficiary's services beginning on March 16, 2015, a date prior to the execution of the SOW. It further states that the work would continue for three months "with possible extensions." That document is evidence of available work through June 15, 2015, barely one month into the two-year period of requested employment.

A contract between the second vendor and the end-client was not provided. In a letter submitted in response to a request for evidence issued in this matter, the first vendor stated that it could not be provided because of a "Confidentiality and Non-disclosure" section of the agreement. Although that letter characterizes the agreement between the first vendor and the end-client as "long-term," it does not reveal the termination date.

Companies are generally permitted, of course, to keep sensitive information confidential. This does not, however, relieve the Petitioner of the need to demonstrate the existence of work for the Beneficiary to perform during the period of requested employment. The claim a document is confidential does not provide a blanket excuse for a petitioner not providing such a document if that document is material to the requested benefit. Although a petitioner may always refuse to submit confidential commercial information if it is deemed too sensitive, the Petitioner must also satisfy the burden of proof and runs the risk of a denial. *Cf. Matter of Marques*, 16 I&N Dec. 314 (BIA 1977) (holding the "respondent had every right to assert his claim under the Fifth Amendment [; however], in so doing he runs the risk that he may fail to carry his burden of persuasion with respect to his application.").

A letter from the end-client states that it has contracted for the Beneficiary to work at its location, but it does not reveal the beginning or end date of that arrangement. A second letter from the end-client states that the Beneficiary's "services are provided" to the second client "on October 15th 2015." It does not state that his services were provided before October 15, 2015, or that they would be provided on any subsequent date. Further, that letter is dated January 20, 2016. It is not persuasive evidence for the proposition that the Petitioner, when it submitted the H-1B petition on September 14, 2015, had any work available during the period of requested employment to which it could have assigned the Beneficiary.

The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978). In this case, the only persuasive evidence of non-speculative employment that the Petitioner had available to it when it filed the H-1B petition is the SOW showing work through June 15, 2015. Even if the H-1B petition were otherwise approvable, it could not be approved for any period after June 15, 2015.⁶ The petition cannot be approved for this additional reason.

⁶ 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:

D. Prior Approvals

We recognize that this is an extension petition. The Director's decision does not indicate whether she reviewed the prior approvals of the previous nonimmigrant petitions filed on behalf of the Beneficiary. If the previous nonimmigrant petitions were approved despite the same evidentiary deficiencies contained in the current record, those approvals would constitute material and gross error on the part of the Director. 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 International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be "absurd to suggest that [USCIS] or any agency must treat acknowledged errors as binding precedent." *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. See *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, we would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

IV. 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.⁷

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).

⁷ As this finding precludes approval of the petition we will not address any of the additional issues we have observed on

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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 M-, Inc.*, ID# 123256 (AAO Oct. 4, 2016)

appeal, except to note that the current record does not establish: (1) that the Petitioner would engage the Beneficiary in an employer-employee relationship; and (2) that the LCA corresponds to and supports the H-1B petition.