



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

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

MATTER OF T- CORP.

DATE: SEPT. 27, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a software development firm, seeks to temporarily employ the Beneficiary as a “data modeler” 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 asserts that it has satisfied 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 a letter submitted with the H-1B visa petition, the Petitioner described the duties of the proffered position as follows (note: errors in the original text have not been changed):

MAJOR RESPONSIBILITIES AND JOB DUTIES

In this position, [the Beneficiary] will be responsible for numerous duties. The essential functions of the job include, but are not limited to the following (may perform other functions that may be assigned)

- Work on forward and reverse engineering processes, Identify the Data Elements (in the source systems), Dimensions, Facts and Measure for new enhancement of reports;
- Review and approve Relational and dimensional Models created by other Data Modelers;
- Create and maintain the Data Model repository as per company standards;
- Migrate data from Databases like Oracle, Teradata, and DB2 to Parallel data Warehouse;
- Reverse Engineer existing databases into PDW specific models;

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- Create Dimensional Logical Data Model & Physical Data Model from Scratch;
- Generate DDL scripts for implementing Data Modeling changes;
- Create and maintain CDM/LDM/PDM using 3NF modeling techniques;
- Conduct data profiling assessment that help design a better solution and reduce project risk by quickly identifying and addressing potential data issues;
- Process improvement, normalization/de-normalization, data extraction, data cleansing, data manipulation;

In that letter the Petitioner also stated:

In order to successfully discharge the duties and to complete the job requirements in suitable manner, a Data Modeler must have theoretical and practical application [*sic*] of a body of highly specialized knowledge in the field of Computer Science/Engineering/IT/Mathematics, and requires a bachelor's degree or higher in the related field.

In a letter submitted in response to a request for evidence (RFE), the Petitioner identified the following additional duties:

- Create business definition for each data concept as identified in the model
- Reverse engineered [*sic*] existing data models;
- Create Data Quality validation template's [*sic*] to help reviewing logical and conceptual data models[.]

In another letter submitted in response to the RFE, the Petitioner included the following additional duty:

- Create business rules indicating how entities relate to each other represented through relationship between data concepts.

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, there are discrepancies in the record that cast doubt on whether the Petitioner has accurately described its in-house projects and the Beneficiary's participation in them.

The Petitioner has asserted that the Beneficiary will perform the duties described as a data modeler on its [REDACTED] project, and its [REDACTED] project. In support of its assertion, the Petitioner submitted project charters for both projects. The

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project charters, among other things, list the personnel required for the projects. However, the project charters do not indicate that either projects require the proffered position; a data modeler. The project charters also do not require a database administrator, which is the occupational category that the Petitioner designated for the proffered position on the labor condition application (LCA).

Further, the Petitioner provides inconsistent information regarding the required personnel for the projects in its response to the RFE. As to the [REDACTED] project, the Petitioner states, "Number of Employees Working on it: 2." It then follows by listing four workers, including the Beneficiary, immediately contradicting its claim that only two employees are working on the project. It further states that the project requires, five additional personnel; which includes a resource manager/financial analyst, an ASP.NET/software developer, a business analyst, a programmer analyst, and a computer system analyst. Notably, this varies from the project charter, which lists a project sponsor, a business analyst, an IT project lead, a lead software developer, a build and release engineer, four software developers, and two software QA analysts.

Similarly, as to the [REDACTED] project, the Petitioner again states in its response to the RFE, "Number of Employees Working on it: 2." It then lists four workers as the project's project manager, and software developers, and lists the Beneficiary as its data modeler.¹ It further states that the project requires, in addition, a resource manager/financial analyst, an ASP.NET/software developer, a business analyst, a programmer analyst, and a computer system analyst. However, the project charter for that project also does not indicate that the project will require the same resources.

Moreover, the project charter for the [REDACTED] indicates that \$500,000 is budgeted for the project, which, as noted, will require at least 10 different positions in addition to "the newly formed [REDACTED] team."² The amount budgeted appears inadequate to recompense the number of people required – including a whole new team of [REDACTED] – for the anticipated length of this project.³ Likewise, the project charter for the [REDACTED] reflects a budget of \$200,000, which also appears inadequate to recompense at least six resources needed for the project.⁴ We have further reason to doubt the reliability of the Petitioner's financial projections, especially considering that the Petitioner listed a net annual income of only \$32,500 on the H-1B petition (filed in April 2015), and reported a business income loss of -\$30,774

¹ Again, the Petitioner states that two workers are assigned to that project and immediately afterward to identify four workers, including the Beneficiary, contradicting its own statement.

² The project charter makes clear that this auditing team does not yet exist, as the Petitioner "is planning to offer [REDACTED] through this "new team of [REDACTED]"

³ As will be explained *infra*, there are also discrepancies regarding the expected length of the project.

⁴ This project charter lists the required resources as including an unspecified number of "software developers." The Petitioner does not further identify how many software developers will be assigned to this particular project.

We recognize the possibility that the same personnel would work on both the [REDACTED] and [REDACTED] projects. Even if this were the case, however, the Petitioner has not sufficiently documented that it has the means to support both projects projected to have a total budget of \$700,000.

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in its 2014 federal tax return. We therefore find inadequate evidence to corroborate the claimed scope of these two projects and, accordingly, the Petitioner's need for the Beneficiary's services in the manner asserted.⁵

In addition, the Petitioner's RFE response indicates that both projects will begin in early 2015 and will end in 18-24 months. But the project charter for the [REDACTED] states that the "estimated project duration is 24-36 months." The project charter for the [REDACTED] states that "total effort for the development is 18-24 months," yet states elsewhere that the total number of days needed to complete the project is 395 days. The Petitioner has not resolved these inconsistencies.

Further, although the Petitioner previously indicated that the Beneficiary would work on the Petitioner's in-house projects, it suggested in its RFE response that it might assign the Beneficiary to work elsewhere. In its RFE response, the Petitioner stated: "[The Petitioner's] workers are mostly IT consultants . . . who are currently working at client projects in various locations. Further, the Petitioner is hiring employees who can work on the in-house projects and, when required to be placed on the client's projects." The terms of his possible reassignment to other companies' projects at their locations and the duties he would perform there are unknown to us.

Considering overall the Petitioner's inconsistent and unsupported statements regarding critical aspects of the projects, such as their funding, required resources, and timelines, the Petitioner has not established that it has sufficient specialty occupation work available for the Beneficiary for the entire validity period requested. We note that the Petitioner is requesting a validity date through September 9, 2018, and thus, has not adequately explained and documented how it will utilize the Beneficiary's services for the entire validity period requested.⁶

⁵ The Project Charters indicate that \$150,000 will come from a business loan, while another \$100,000 will be loaned from the Petitioner's owner's spouse. The Petitioner did not submit objective evidence of these claimed loans.

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:

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

Doubt cast on any aspect of the Petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). It is incumbent upon the Petitioner to resolve any inconsistencies in the record with independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 591-592.

Further, we find that 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.⁷

Specifically, many of the duties the Petitioner attributed to the proffered position appear to have been copied, with minimal editing, from the Beneficiary's résumé. That résumé includes the following duties, *inter alia*, in the following order (note: errors in the original have not been changed):

- Reverse engineered the reports and identified the Data Elements (in the source systems), Dimensions, Facts and Measures required for new enhancement of reports.
- Involved in reviewing and approving Relational & dimensional Models created by other Data Modelers.
- Created and maintained the Data Model repository as per company standards.
- Reverse Engineered existing databases into PDW specific Data models.
- Created Dimensional Logical Data Model & Physical Data Model from Scratch.
- Generated DDL scripts for implementing Data Modeling changes.
- Created and maintained CDM/LDM/PDM using 3NF modeling techniques.
- Conducted data profiling assessment that helped design a better solution and reduce project risk by quickly identifying and addressing potential data issues.

The similarity between those duties and the duties the Petitioner attributes to the proffered position suggests that the Petitioner, rather than providing a detailed list of the duties the Beneficiary would perform in the proffered position in the context of its own business operations and on a project that is underway, has copied from the list of duties the Beneficiary claims to have previously performed for other employers on other projects. The actual duties the Beneficiary would perform, therefore, are not clear.

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 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.

Even assuming, *arguendo*, that these job duties were not copied from the Beneficiary's résumé and are otherwise relevant to the proffered position, we still find them insufficient to convey the substantive nature of the work to be performed. The job duties are overly broad and the Petitioner did not adequately explain why those duties would require a minimum of a bachelor's degree in a specific specialty or its equivalent. For example, the Petitioner states that the Beneficiary would "work on forward and reverse engineering processes" and "identify Data Elements (in the source systems), Dimensions, Facts and Measure for new enhancement of reports." However, the Petitioner did not otherwise elaborate on the specific tasks, methodologies, and applications of knowledge that would be required in furtherance of these overarching duties.

In addition, 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. On the LCA, the Petitioner characterized the proffered position as a wage Level I database administrator position. The wage levels are defined in the Department of Labor's (DOL) "Prevailing Wage Determination Policy Guidance," which describes a Level I wage rate as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

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 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.

However, some of the Petitioner's assertions conflict with that wage-level designation. For example, despite the Level I wage-level designation, the Petitioner stated, in response to the RFE, that the position is complex and that the Beneficiary would, "Review and approve Relational and dimensional Models created by other Data Modelers." This appears inconsistent with the Level I

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designation as an entry-level employee who is expected to perform routine tasks and whose work is closely supervised and reviewed for accuracy. This raises additional questions regarding the reliability of the Petitioner's duty description.

Yet further, the Petitioner asserted that the essential duties of the proffered position are not limited to those described, but that the Beneficiary may perform other duties that have not been described. We are unable to determine whether those other additional duties would be specialty occupation duties.

For all of these reasons, the Petitioner has not established the substantive nature of the proffered position. 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 qualifies as a specialty occupation. The appeal will be dismissed on this basis.

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; *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 T- Corp.*, ID# 123533 (AAO Sept. 27, 2016)