U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-N-

DATE: OCT. 22, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a technology consultancy company, seeks to temporarily employ the Beneficiary as an "software developer" under the H-1B nonimmigrant classification for specialty occupations. 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 of the California Service Center denied the petition, concluding that the proffered position does not qualify as a specialty occupation.

On appeal, the Petitioner submits a brief and additional evidence, and asserts that the Director's decision was erroneous.

Upon *de novo* review, we will dismiss the appeal.[1]

I. LEGAL FRAMEWORK

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.

[1] We follow the preponderance of the evidence standard as specified in *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).

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;
>
> (*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). We construe the term "degree" 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. 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, we are unable to determine the substantive nature of the work that the Beneficiary will perform, which precludes a finding that the proffered position satisfies any criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).[2]

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. In this matter, the Petitioner indicated that the Beneficiary will be employed in-house as a software developer. However, the Petitioner did not provide sufficient, credible evidence to establish the nature and availability of this claimed in-house employment.

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

The Petitioner claims to be a "young and growing technology consultancy," staffed by individuals who "enjoy building software and solving problems" for clients, which include large multinational companies and local start-up companies. The Petitioner further claimed that it performs "a variety of services, including: "operations" – the design and management of large-scale systems, "dev" - custom application development with open-source tools on diverse platforms, "big data" pipelines and platforms, and architecting for systems' security, stability, and scalability."

Regarding the proffered position, the Petitioner claimed that the Beneficiary will be employed in-house performing the services described above. In response to the Director's request for evidence (RFE), the Petitioner provided a more detailed overview of her duties, as follows:

- Refactoring and expanding client automation code (cookbooks)[3] to meet updated technical environment updates (25%)
  - Updating all tx_apps cookbooks to use chruby
  - Updating tx_rubys ruby version
- Automation of the client's AWS infrastructure build process (10%)
- Network redesign and implementation for client cloud environments (10%)
- Upgrade and significant redesign of client's server configuration management system (10%)
- Refactoring (and sometimes completely new implementations) of client applications' build processes to take advantage of the new configuration management platform (15%)
- Database migrations to Aurora storage architecture (5%)
- Design and implementation of a "self-healing monitoring/alerting/programmatic-rebuild system for client's elastic map-reduce clusters (5%)
- Monitoring system enhancements (5%)
- Migration of database instances into virtual private cloud(s) (5%)
- General database administration (5%)
- Peer code review (5%)

The Petitioner further stated that the Beneficiary is currently working on a project for its client, Company T-, and that she is part of a three-person team that is analyzing, architecting, and implementing cloud-operations solutions. The Petitioner submitted a master services agreement (MSA) and statement of work (SOW) in support of this claimed contractual relationship with Company T-,[4] which indicated that the duties to be performed pursuant to this agreement were as follows:

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[3] The Petitioner explained that a "cookbook" is a collection of ruby code and template files used to describe configuration actions taken during execution and system-build by a "Chef-managed" system. It further explained that "Chef" is a configuration and automation system for servers' software.

[4] The record indicates that the MSA and SOW were executed in 2010 between the Petitioner and a predecessor company of Company T-.

- Unix system administration
- MySQL database administration
- Hardware installation, configuration, replacement, and general support
- Production site incident responses and debugging
- General server (and service) monitoring (and configuration of automatic monitoring systems)
- Application architecture and scalability advice and planning

On appeal, the Petitioner submitted a letter from Company T-, stating that the Petitioner's employees, including the Beneficiary, provide technical solutions including cloud computing, systems integration, configuration management, devops strategies, automation tools, and software development pursuant to a vendor services agreement, and anticipates work for the Beneficiary to continue through at least June 2019. The record, however, does not include a copy of this vendor services agreement or any other contemporaneous documentation describing the nature of the Petitioner's relationship with Company T-, and the duties of the Beneficiary pursuant to that relationship.

The 2010 MSA and SOW from the predecessor of Company T is not sufficient to establish the nature of the duties of the proffered position or that there is sufficient specialty occupation work available for the Beneficiary. The duties contained in that SOW differ from the list of duties provided by the Petitioner in its response to the RFE, and the duties provided in response to the RFE also do not align with the overview of duties contained in Company T-'s letter submitted on appeal. Moreover, the duties provided by the Petitioner in response to the RFE also indicate that the Beneficiary's duties, according to the Petitioner, are based primarily on client requirements.

As recognized in *Defensor v. Meissner*, 201 F.3d 384, 387-8 (5th Cir. 2000), it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location in order to properly ascertain the minimum educational requirements necessary to perform those duties. In other words, as the nurses in that case would provide services to the end-client hospitals and not to the petitioning staffing company, the Petitioner-provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination. *See id.* The record, however, is devoid of a clear statement from Company T-, the entity the Petitioner claims will benefit from the Beneficiary's services, identifying the services to be provided, requirements for the Beneficiary to provide those services, a description of the duties the Beneficiary must perform, and/or the duration of services requested. Without relevant documentary evidence establishing the terms and conditions of this client project, and/or any other additional client projects, we are unable to determine if the Beneficiary would perform duties that would qualify as a specialty occupation for the duration of the employment period requested.[5]

[5] The agency made clear long ago that speculative employment is not permitted in the H-1B program. *See, e.g.*, 63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998).

Finally, on the certified labor condition application (LCA)[6] submitted in support of the petition, the Petitioner classified the proffered position under the occupational classification of "Software Developers, Applications," corresponding to Standard Occupational Classification (SOC) Code 15-1132. According to the Occupational Information Network (O*NET) OnLine's Summary Report for "15-1132.00 – Software Developers, Applications," software developers typically develop, create, and modify software, develop software solutions, and design or customize software.[7] None of the duties identified in the record, however, specifically identify software development or related tasks as being included in the proposed duties of the Beneficiary. The vague descriptions of the duties of the position shed little light on the actual tasks the Beneficiary will perform, and raise the question of whether the proffered position is truly that of a software developer.[8]

The Petitioner's initial description of duties, and the duties outlined in the various documentation submitted from Company T-, were vague and provide only a general overview of the responsibilities of the proffered position. Providing generic job duties for a proffered position is generally insufficient to establish H-1B eligibility. *Cf. Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990) (Specifics are an important indication of the nature of the Beneficiary's duties, otherwise meeting the requirements would simply be a matter of providing a job title or reiterating the regulations.) While this type of description may be appropriate when defining the range of duties that may be performed within an occupational category, without information describing the Beneficiary's specific tasks, the generic description does not establish the substantive nature of the proffered position's duties or demonstrate that performing such duties would require the theoretical and practical application of highly specialized knowledge and attainment of at least a bachelor's degree in a specific specialty or its equivalent. Although the Petitioner provides a more detailed discussion of the Beneficiary's duties in response to the RFE, where it claims she will produce "cookbooks" using the "Chef" system, these duties were not corroborated or confirmed by Company T-, the claimed entity to which she would be providing services, or any other client of the Petitioner.

Therefore, upon review of the totality of the record, we cannot ascertain the Beneficiary's assignment for the validity period requested, her actual day-to-day duties, and whether those duties comprise specialty occupation work. Although the Petitioner claims to have sufficient specialty occupation work for the Beneficiary through June 2019, the Petitioner has not supplemented the record with evidence supporting this statement. We conclude that the Petitioner has not established the substantive nature of the work to be performed by the Beneficiary, which therefore precludes a

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[6] A petitioner submits the LCA to DOL 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 duties, experience, and qualifications. Section 212(n)(1) of the Act; 20 C.F.R. § 655.731(a).

[7] *See* http://www.onetonline.org/link/summary/15-1132.00 (last visited Oct. 19, 2018).

[8] The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the Beneficiary. Without more specific evidence outlining the associated job duties, or more specific details outlining the in-house project upon which the Beneficiary will work and its associated duties, we cannot determine whether the submitted LCA corresponds with the petition.

determination that the proffered position satisfies any of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). 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 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. As the Petitioner has not demonstrated eligibility under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), it has not demonstrated the proffered position as a specialty occupation.

III. MINIMAL EDUCATIONAL REQUIREMENTS

We note an additional issue regarding the educational requirements of the position. Company T-, the intended end-user of the Beneficiary's services, does not state its minimum educational requirements for the proffered positon. The Petitioner, however, indicated that the minimum requirement for the proffered position is a bachelor's degree in computer science, engineering, or science with experience in computer programming languages. The issue is that 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. Therefore, besides a degree in electrical engineering, it is not readily apparent that a general degree in engineering or one of its other sub-specialties, such as chemical engineering or nuclear engineering, is closely related to computer science or that engineering or any and all engineering specialties are directly related to the duties and responsibilities of the particular position proffered in this matter.

We note that the Petitioner cites *Residential Finance Corp. v. USCIS,* 839 F. Supp. 2d 985 (S.D. Ohio 2012), and *Raj and Co. v. USCIS*, 85 F. Supp. 3d 1241, 1246 (W.D. Wash. 2015) for the proposition that the Beneficiary's knowledge is what is relevant, and not the title of the degree.

We agree that "[t]he knowledge and not the title of the degree is what is important." 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).

The Petitioner has not met its burden to establish that the particular position offered in this matter requires a bachelor's or higher degree in a specific specialty, or its equivalent, that is directly related to the duties described. Upon review, it appears that the Petitioner misinterprets *Raj* and *Residential Finance* and confuses the issue of a beneficiary's qualifications with the issue of a proffered position's qualifications as a specialty occupation.[9] For the aforementioned reasons, however, the Petitioner has not met its burden to establish that the particular position offered in this matter requires a bachelor's or higher degree in a specific specialty, or its equivalent, directly related to its duties in order to perform those tasks.

In addition, the Petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in *Raj* and *Residential Finance*. We also note that, in contrast to the broad precedential authority of the case law of a United States circuit court, we are not bound to follow the published decision of a United States district court in matters arising even within the same district. *See Matter of K-S-*, 20 I&N Dec. 715, 719-20 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law. *Id.*

IV. CONCLUSION

The Petitioner has not established that the proffered position qualifies as a specialty occupation.

ORDER: The appeal is dismissed.

Cite as *Matter of M-N-*, ID# 1627039 (AAO Oct. 22, 2018)

[9] The test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself qualifies as a specialty occupation. Thus, whether or not the Beneficiary in this case has completed a specialized course of study directly related to the proffered position is irrelevant to the issue of whether the proffered position qualifies as a specialty occupation, i.e., whether the duties of the proffered position require the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent. Section 214(i)(l) of the Act; 8 C.F.R. § 214.2(h)(4)(ii).