U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-, INC.

DATE: SEPT. 22, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a computer company, seeks to temporarily employ the Beneficiary as a "computer programmer analyst" 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 of the California Service Center denied the Form I-129, Petition for a Nonimmigrant Worker, and we dismissed a subsequent appeal, concluding that the record did not establish that the proffered position qualified as a specialty occupation.

On motion, the Petitioner submits additional evidence and asserts the new evidence demonstrates eligibility. We will deny the motion.

I. LEGAL FRAMEWORK

A motion to reopen must provide new facts, be supported by affidavits or other documentation, and seeks a new determination based on the updated material. 8 C.F.R. § 103.5(a)(2). However, any new facts must relate to eligibility at the time the Petitioner filed the petition. *See* 8 C.F.R. § 103.2(b)(1), (12); *see also Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978).

Regarding the nonimmigrant classification requirements, 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 offered 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). We have consistently interpreted 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

The issue within this motion is whether the proffered position qualifies as a specialty occupation. In denying the petition, the Director found that the Petitioner's evidence was insufficient to meet the regulatory requirements. In dismissing the Petitioner's appeal, we analyzed the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*)-(*4*), which governs positions that qualify as a specialty occupation, and found the Petitioner had not satisfied the regulation.[1] For the reasons discussed below, we find the Petitioner has not overcome our findings within the appellate dismissal through its new evidence in the motion to reopen.

On motion, the Petitioner asserts that the evidence is now sufficient to demonstrate the proffered position qualifies as a specialty occupation. As new evidence, the Petitioner offers a new opinion letter pertaining to the position's duties, additional job announcements from other employers, and materials relating to the petitioning organization's hiring practices for the proffered position.

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[1] *See Matter of A-, Inc.* ID# 353742 (AAO June 15, 2017).

A. Opinion Letter

The Petitioner asserts a letter from [redacted] demonstrates that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). [redacted] based his opinion on his education and his experience working in the academic setting and in the information technology industry.

[redacted] analyzes the Petitioner's duties of the proffered position and opines that the position requires a bachelor's degree in computer science, computer information systems, or a related field of engineering. [redacted] concludes that "the position of Computer Programmer Analyst is advanced, complex, and professional in nature."

Upon review of the opinion letter, we find that [redacted] characterization of the proffered position as being "advanced, complex, and professional in nature" requiring a bachelor's degree in computer science, computer information systems, or a related field in engineering appears inconsistent with the Petitioner's designation of the position as a Level I, entry-level position. It is unclear if [redacted] was informed of the Petitioner's attestation on the LCA that the proffered position was a Level I wage position. The omission of any discussion of the entry wage designation diminishes the evidentiary value of this opinion as the opinion does not appear to be based on a complete understanding of the proffered position.

Moreover, the record does not include evidence that [redacted] has published, conducted research, run surveys, or engaged in any enterprise, pursuit, or employment - academic or otherwise regarding the minimum education requirements for the performance of the duties of the proffered position. While he may have anecdotal information regarding recruitment by employers for students who study computer science and computer information systems, the record does not include any relevant research, studies, surveys, or other authoritative publications as part of his review and/or as a foundation for his opinion.

For the reasons discussed, we find that [redacted] opinion letter lends little probative value to the matter here. *Matter of Caron Int'l*, 19 I&N Dec. 791, 795 (Comm'r 1988) (The service is not required to accept or may give less weight to an advisory opinion when it is "not in accord with other information or is in any way questionable.").

B. Job Announcements

Accompanying the appeal, the Petitioner provided seven job announcements from other employers. We determined that based on the submitted material, it was not possible to conclude that the positions in the announcements were parallel to the proffered position in their duties and responsibilities. Within this motion to reopen, the Petitioner offers additional job announcements

from nine different employers.[2] The Petitioner's arguments within this motion to reopen are that we "should consider the job postings as evidence that companies of all sizes require a Bachelor's in computer science, information systems, or engineering as common industry standard for entry in the position of a computer programmer analyst." However, the size of the comparable organizations was only one element within our appellate decision. We also noted other factors including, for example, the type of organizations within the announcements, the specific field of study the other employers required for qualifying candidates, as well as the mandatory amount of qualifying experience.

Although the Petitioner provides announcements for organizations that employ between one and fifty personnel in the information technology industry, some of the announcements appear to be for more senior positions than the proffered position. For example, the postings from [redacted] and [redacted] require a master's degree for the positions. However, the Petitioner indicated that the proffered position is an entry-level position (on the LCA).

Furthermore, some of the postings do not include the duties and responsibilities for the advertised positions. Thus, it is not possible to determine important aspects of the jobs, such as the day-to-day responsibilities, complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Therefore, the Petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to 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.[3] Thus, the Petitioner has not satisfied the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

C. Petitioner's Other Employees

Previously, the Petitioner provided evidence relating to five comparable employees, to include Forms W-2, Wage and Tax Statement, paystubs, an organizational chart, and attainment of

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[2] The Petitioner did not provide any independent evidence of how representative the job postings are of the particular advertising employers' recruiting history for the type of job advertised. As the advertisements are only solicitations for hire, they are not evidence of the actual hiring practices of these employers.

[3] It must be noted that even if all of the job postings indicated that a requirement of a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the Petitioner has not demonstrated what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

bachelor's degrees or higher in computer science, engineering, or information science. Our decision on the appeal noted inconsistent job titles and the number of computer programmer analysts differed in the organizational chart. Furthermore, the Petitioner's project plan listed positions needed on the project discussed in the petition for computer analysts, quality assurance analysts, and software engineers, but only software engineers contained a requirement for a degree in computer science. In the motion to reopen, the Petitioner argues that the new evidence demonstrates eligibility.

Within the petition, the Petitioner indicated it would compensate the Beneficiary with a $65,000 yearly wage for full-time work. In the Petitioner's response to the Director's request for evidence, the 2015 Forms W-2 relating to five of its employees reflected the following approximate annual wages: $33,009; $43,218; $91,639; $91,641; and $128,107. With the present motion, the Petitioner offers paystubs for the nine employees it claims are comparable to the proffered position, as well as the job description and duties for each of the nine employees. Although the Petitioner did not offer evidence of the annual salaries, the paystubs calculated on an annual basis range from approximately $88,842 to $130,000. The Petitioner did not provide an explanation for the variances in the wages. Without more, the evidence strongly suggests that these individuals are employed in different positions than the proffered position.

Moreover, the Petitioner stated in the Form I-129 that it was established in 2006 (over nine years prior to the filing of the H-1B petition); however, the Petitioner did not provide the total number of people it has employed in the proffered position. Consequently, it cannot be determined how representative the Petitioner's claim regarding the listed personnel is of its normal recruiting and hiring practices. The Petitioner has not persuasively established that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the position. Without more, the documentation does not establish that the Petitioner satisfied the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*).

III. CONCLUSION

Upon review of the record, we conclude that the Petitioner has not demonstrated that we should reopen the proceedings.

ORDER: The motion to reopen is denied.

Cite as *Matter of A-, Inc.*, ID# 786498 (AAO Sept. 22, 2017)