U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-USA, INC.

DATE: AUG. 30, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a software development company, seeks to temporarily employ the Beneficiary as a "programmer analyst" under the H-1B nonimmigrant classification. *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 petition, concluding that the evidence of record was insufficient to establish that the proffered position is a specialty occupation.

On appeal, the Petitioner asserts that it satisfies three of the specialty-occupation criteria: 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), (*2*) (first prong), and (*4*).

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

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.

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;

(*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). We construe 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").

As recognized by the court in *Defensor v. Meissner*, 201 F.3d 384, 387-88 (5th Cir. 2000), where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The court held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

II. PROFFERED POSITION

On the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner, located in Pennsylvania, states that the Beneficiary will work offsite. The initial record included an itinerary for the Beneficiary showing that she will work in the offices of P-, a client located in Iowa, throughout the requested employment period. The Petitioner initially provided a broad overview of the duties of the proffered position and asserted that the "job requirements are, at a minimum, a [b]achelor's degree or the equivalent thereof, in computer science or a related field plus two years of work experience." The initial record also included a letter signed on behalf of the client which confirmed that the Beneficiary will be assigned to work at their offices in Iowa as a programmer analyst. The letter-writer incorporated the position description initially provided by the Petitioner, but did not identify the specific academic or experience requirements necessary to perform the duties of the proposed position.

In response to the Director's request for evidence (RFE), the Petitioner resubmitted the position description, along with the relative percentage of time that the Beneficiary will devote to each duty, as follows (verbatim):

Time %	Duties/Responsibilities
50%	Participate in development in
10%	Understanding requirements and working on design solutions.
10%	Developing the module as per client requirements.
20%	Working on stories and defects in agile life cycle.
10%	Carry out code reviews for code.

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.[1]

A. Minimum Requirements

As a preliminary matter, the Petitioner's own ambiguous observations regarding the varied general requirements for the proffered position suggest that the position is not a specialty occupation. We observe the Petitioner's initially specified minimum requirements to perform the duties of the proffered position, i.e., "a [b]achelor's degree or the equivalent thereof, in computer science or a related field plus two years of work experience." In contrast, the Petitioner also stated that:

> For systems analysts or even database administrator positions, many employers seek applicants who have a bachelor's degree in computer science, information science, computer information systems, or data processing. Regardless of college major, employers generally look for people who are familiar with programming languages and have broad knowledge of and experience with computer systems and technologies. Other degrees are acceptable in those circumstances when the programmer analyst position requires the application of knowledge from a specific field. There is no universally accepted way to prepare for a job as a computer professional because employer's preferences depend on the work to be done.

The Petitioner acknowledges that the "employer's preferences [for the minimum requirements of the position] depend on the work to be done." In this case, it is the client who will determine the work that needs to be done on its projects, and it is the client that will ultimately be utilizing the Beneficiary's services. However, the client has not specifically identified the scope and nature of

[1] 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.

the projects that the Beneficiary will be working on, nor has it specified its minimum requirements for the proffered position.

The Petitioner did not provide adequate contractual evidence to demonstrate the specific minimum requirements for the Beneficiary's proposed position at the client site. In response to the RFE, the Petitioner submitted a copy of its June 2008 service agreement with the client. The agreement mainly calls for the Petitioner's creation and operation of the at a location in India, and at the client's (unspecified) location in the United States. The agreement further states that:

> [The client engages the Petitioner] to perform design, development, improvement, enhancement and support services for certain products (the 'Products'), which will be specified on a Statement of Work prepared by the parties hereunder. A 'Statement of Work' or 'SOW' shall mean a statement signed by each parties hereto, in the form of Exhibit G attached hereto, specifying the design, development, and/or support services to be performed by [the Petitioner] hereunder, including any and all technical, functional and performance specifications designated by [the client] for the Products. A separate [SOW] shall be prepared for each separate project to be performed by [the Petitioner] hereunder.
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> . . . .
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> Selection of [Petitioner] Resources. [The Petitioner] warrants that it will only assign those resources and consultants to perform the Services who are fit, qualified and competent to perform such Services, and if an agreed [SOW] requires a specific competency or level of experience, that the resources and consultants shall have that specific competency or level of experience. [The Petitioner] and [the client] shall mutually agree upon a resource selection process. Further, [the client] shall have the right to veto any new resources joining the and shall be actively involved in the HR evaluation of resources.

Though specifically requested by the Director in her RFE, the Petitioner has not provided copies of the executed SOWs for the project that the Beneficiary is to be assigned to. The limited material in the record does not identify the "specific competency or level of experience" or other minimum requirements for the proffered position (or for any other staffing positions on the client's project).

The ambiguous information regarding the minimum requirements to perform the duties of the proffered position at the client location raises questions about whether the proffered position meets the statutory and regulatory definition of a specialty occupation, i.e., whether the Beneficiary's proposed position and overall level of responsibility require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation. Section 214(i)(l) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). *See Defensor*, 201 F.3d at 387-88.

Moreover, for the reasons discussed below, we determine that the proffered position (as largely described by the Petitioner) does not qualify for classification as a specialty occupation under one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

B. First Criterion

We turn first 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 the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.[2]

On the labor condition application (LCA)[3] submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category "Computer Systems Analysts" corresponding to the Standard Occupational Classification code 15-1121.

The *Handbook* subchapter entitled "How to Become a Computer Systems Analyst" states, in pertinent part: "A bachelor's degree in a computer or information science field is common, although not always a requirement. Some firms hire analysts with business or liberal arts degrees who have skills in information technology or computer programming." Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook,* Computer Systems Analysts, https://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm# tab-4 (last visited Aug. 16, 2018). The *Handbook* also states: "Although many computer systems analysts have technical degrees, such a degree is not always a requirement. Many analysts have liberal arts degrees and have gained programming or technical expertise elsewhere." *Id.*

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for these positions. As cited above, the *Handbook* begins by stating that a bachelor's degree in a computer-related field is "not always a requirement." *Id.* The *Handbook* continues by stating that there is a wide range of degrees that are acceptable for positions in this occupation, including general-purpose degrees in business and liberal arts. As discussed above, we interpret the term "degree" to mean a degree *in a specific specialty* that is directly related to the proposed position. *See Royal Siam Corp.*, 484 F.3d at 147. Since there must be a close correlation between the required specialized studies and the position, a requirement of general and wide-ranging degrees in business and liberal arts strongly suggests that a computer systems analyst position is not categorically a specialty occupation. *See id. Cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm'r 1988).

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[2] We do not maintain that the *Handbook* is the exclusive source of relevant information.

[3] The Petitioner is required to submit a certified LCA 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 experience and qualifications who are performing the same services. *See Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 545-546 (AAO 2015).

Also according to the *Handbook*, many systems analysts have liberal arts degrees and have gained programming or technical expertise elsewhere. It further reports that many analysts have technical degrees. But the *Handbook* does not specify the amount of programming or technical expertise required, or the degree level for these technical degrees (e.g., associate's degrees). Thus, the *Handbook* does not support the claim that the occupational category of "Computer Systems Analysts" is one for which normally the minimum requirement for entry is a baccalaureate degree (or higher) in a specific specialty, or its equivalent.

On appeal, the Petitioner cites to *Next Generation Tech., Inc. v. Johnson*, (S.D.N.Y. Sept. 29, 2017) as relevant here. This case arises out of a different jurisdiction than the instant matter.[4] Nevertheless, even if we considered the logic underlying the matter, we find this case unpersuasive.

First, the court in *Next Generation Tech., Inc.* discussed our reading of the *Handbook's* discussion of the entry requirements for positions located within the different and separate occupational category of "Computer Programmers," rather than the "Computer Systems Analysts" category designated by the Petitioner in the LCA relating to this case. As noted above, the *Handbook* states that some firms hire computer programmer analysts with general-purpose business or liberal arts degrees, which we find problematic. The same problematic language is not found in the (now outdated) *Handbook* chapter for "Computer Programmers" discussed in *Next Generation Tech., Inc.*

Moreover, the court in *Next Generation Tech., Inc.* relied in part on a U.S. Citizenship and Immigration (USCIS) policy memorandum regarding "Computer Programmers" indicating generally preferential treatment toward computer programmers, and "especially" toward companies in that particular petitioner's industry. However, USCIS rescinded the policy memorandum cited by the court in *Next Generation Tech. Inc.*[5] Thus, we do not find *Next Generation Tech. Inc.* particularly helpful or relevant to the facts of this case.

The Petitioner has not provided other documentation to substantiate its 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*).

C. Second Criterion – First Prong

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

[4] 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 K-S-*, 20 I&N Dec. at 719-20. 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.*

[5] *See* USCIS Policy Memorandum PM-602-0142, *Rescission of the December 22, 2000 "Guidance memo on H1B computer related positions"* (Mar. 31, 2017), https://www.uscis.gov/sites/default/files/files/nativedocuments/PM-6002-0142-H-1BComputerRelatedPositionsRecission.pdf.

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 Petitioner does not claim eligibility under the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). Therefore, we will only discuss eligibility under the first alternative prong, which can be satisfied if the Petitioner establishes 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 discussed above, the Petitioner has not established that its proffered position is one for which the *Handbook*, or another authoritative source, reports an industry-wide requirement for at least a bachelor's degree in a specific specialty or its equivalent. We incorporate by reference our previous discussion on the matter.

Under this prong, the Petitioner submits letters from the heads of human resources at two companies. One writer states that, in her experience, the minimum educational requirement for a systems analyst position in the IT industry is a bachelor's degree in computer science, information technology, computer engineering, electronic engineering, electrical engineering, and software engineering. However, this statement is at odds with the *Handbook,* which we consider an authoritative source, as the *Handbook* indicates that a bachelor's degree in various other fields is acceptable for entry into the occupation. The other letter states that "it has been recognized for many years that [computer-related] Bachelor's degrees are typical, accepted degrees for Systems Analyst positions," and further, that such degrees "are an excellent educational preparation." At most, these statements, consistent with the *Handbook*, indicate that computer-related bachelor's degrees may be preferable, *but are not required.*

The Petitioner has not provided other documentation as evidence under this prong. Therefore, the Petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

D. 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. The Petitioner does not assert, nor does the record demonstrate, eligibility under this criterion.

E. 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.

In the instant case, relative specialization and complexity have not been sufficiently developed by the Petitioner as an aspect of the proffered position. We agree with the Director that the proffered job descriptions are generic in nature and do not provide detail as to the specialized and complex nature of the duties. The record includes the client's broad overview of the Beneficiary's proposed duties. This general description is insufficient to substantiate that the work is H-1B caliber work and thus eligible for H-1B approval. The job description does not communicate the actual work that the Beneficiary will perform on a day-to-day basis and the correlation between that work and a need for a particular education level of highly specialized knowledge in a specific specialty. Although the duties described fall generally within a computer systems analyst position, they do not give a sense of the Beneficiary's day-to-day duties. Several of the duties are very vague, such as "Participate in development in [redacted] and "Understanding requirements and working on design solutions." These descriptions convey generic functions of the occupation and do not relate specific duties to the client's project. The record lacks sufficient evidence of how the Beneficiary's proposed duties correspond to the expectations of the client and how her responsibilities fit within any project team.

On a more basic level, the record does not contain a detailed description of the actual project to which the Beneficiary will be assigned. Again, the [redacted] agreement calls for the Petitioner's creation and operation of the [redacted] at a location in [redacted] India, and expressly provides that all of the Petitioner's work under the agreement will be specified in SOWs executed by both parties. The record does not contain any SOWs. Neither the [redacted] agreement nor the client's letter clarifies what the Petitioner's "design, development, improvement, enhancement and support services for certain products" will consist of, particularly as the [redacted] agreement has been ongoing since 2008 (and no updated contractual documentation has been submitted).

Without a more detailed description of the proposed duties and explanations of what the Beneficiary will be required to do on a daily basis for the client, we cannot conclude that the work requires a bachelor's degree in a specific discipline, or its equivalent. Absent this evidence, the Petitioner cannot demonstrate that the specific duties – as performed for the end-client – are 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, as required under this criterion.

For all the reasons discussed above, the evidence of record does not satisfy the fourth or any other criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). As the Petitioner has not satisfied any criterion at

8 C.F.R. § 214.2(h)(4)(iii)(A), it has not demonstrated that the proffered position qualifies as a specialty occupation.[6]

IV. PAYMENT OF REQUIRED WAGE, FEES, AND COSTS

In addition, the Petitioner has not established that it is in full compliance with the applicable statutory and regulatory provisions regarding payment of the required wage, fees, and costs.

The Petitioner's offer letter to the Beneficiary states, in pertinent part (verbatim):

> 5. Relocation. Should there be any relocation to or from a Customer site, reasonable and documented relocation expenses will be reimbursed as per the Company's policy.
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> . . . .
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> 7. Notice of Termination. . . . In the event that you breach the termination notice or other provision(s) of this agreement or that your employment is terminated voluntarily or for cause prior to the completion of twelve months of employment or within six months to your customer site, you agree to pay the Company, as liquidated damages and not as a penalty, a further sum of $5,000 (Five Thousand Dollars.) You acknowledge that liquidated damages in such amount is reasonable under the circumstances in light of the fact that significant damages and expenses will be suffered or incurred by the Company and in lieu of the difficulty and further expense of proving the exact amount thereof. You authorize the Company to deduct and withhold the amount of such payment from any compensation or other amounts otherwise owed or payable to you upon the termination of your employment. In this Agreement, the work "termination" includes, but is not limited to, resignation, dismissal, incapacity, and any other form by which your employment with the Company ceases.
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> . . . .
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> 8. Repayment of Relocation Expenses (applicable only when relocation expenses are paid by the company). In the event you resign, or your employment is terminated for cause, within six months of the effective date of your employment, you also agree to repay any travel and relocation expenses incurred by the Company in connection with

[6] The Director also found 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.

> your initial employment. In the event you resign, or your employment is terminated for cause, within six months of any relocation to or from a Customer site for which the Company paid relocation expenses to you, you also agree to repay those relocation expenses to the Company. In either event, you authorize the Company to deduct and withhold the amount of such payment from any compensation or other amounts otherwise owed or payable to you upon the termination of your employment.

The Petitioner signed, under penalty of perjury, the Form I-129, H Classification Supplement, thereby certifying that it: agrees to and will abide by the terms of the LCA for the duration of the Beneficiary's authorized period of stay for H-1B employment; it understands that it cannot charge the Beneficiary the additional fees mandated by the American Competitiveness and Workforce Improvement Act (ACWIA) and that any other required reimbursement will be considered an offset against wages and benefits paid relative to the LCA; and that it will be liable for the reasonable costs of return transportation of the Beneficiary abroad if he is dismissed from employment before the end of the period of authorized stay. In addition, when filing and signing the LCA, the Petitioner declared that it would comply with the statements as set forth in the cover pages of the LCA and the DOL regulations at 20 C.F.R. § 655, Subparts H and I. The Petitioner also signed the Form I-129 petition under the penalty of perjury, certifying that the information supplied to USCIS on the petition and supporting evidence was true and correct.

Pursuant to the terms of the Petitioner's offer letter, if the Beneficiary's employment is terminated, she is obligated to repay the Petitioner an unspecified amount for "travel or relocation expenses" in connection with her employment, in addition to $5,000 in liquidated damages to reimburse the Petitioner for unspecified "significant damages and expenses." As noted in the Petitioner's offer letter, the Beneficiary may also be required to repay reasonable relocation expenses if her employment is terminated within a certain time.

However, under the H-1B program, the Petitioner is prohibited from making deductions from an H-1B employee's wages with regard to recouping a business expense of the employer, which includes transportation costs where such transportation is an incident of, and necessary to, the employment; living expenses when the employee is traveling on the employer's business; attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer (e.g., preparation and filing of LCA and H-1B petition). *See* section 101(a)(15)(H)(i)(b) of the Act; 20 C.F.R. § 655.731(c)(9)(iii).

The Petitioner is also prohibited from requiring an H-1B employee to pay a penalty for ceasing employment with the Petitioner prior to a contracted date. *See* section 101(a)(15)(H)(i)(b) of the Act; 20 C.F.R. § 655.731(c)(10)(i). The Petitioner's offer letter imposes conditions that violate statutory and regulatory provisions related to the Petitioner's payment of the required wage, the ACWIA fee, and reasonable costs of return transportation. *See generally* 20 C.F.R. § 655.731(a), (b), (c).

V. CONCLUSION

The Petitioner has not established that the proffered position is a specialty occupation, and that it will comply with its obligations regarding payment of the required wage, fees, and costs.

ORDER: The appeal is dismissed.

Cite as *Matter of N-USA, Inc.*, ID# 1384517 (AAO Aug. 30, 2018)