U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF O-, INC.

DATE: MAR. 1, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a software development and service company, seeks to temporarily employ the Beneficiary as a software engineer under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) § 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 evidence of record does not establish that the Petitioner has specialty occupation work available for the Beneficiary, and thus, that the proffered position qualifies as a specialty occupation.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts the proffered position is a specialty occupation. Upon *de novo* review, we will dismiss the appeal.

I. SPECIALTY OCCUPATION

A. 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) states, in pertinent part, the following:

> *Specialty occupation* means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must meet one of the following criteria:

> *(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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Fed. Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets 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 proffered 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"). Applying this standard, USCIS regularly approves H-1B petitions for qualified individuals who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which Petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the individual, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires 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, as required by the Act.

We note that, as recognized by the court in *Defensor*, 201 F.3d at 387-88, where the work is to be performed for entities other than the Petitioner, evidence of the client companies' job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-88. 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.* at 384. 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.

B. The Proffered Position

The labor condition application (LCA) submitted to support the visa petition states that the proffered position is a software developer, applications, position, and that it corresponds to Standard Occupational Classification (SOC) code and title 15-1132, "Software Developers, Applications," from the Occupational Information Network (O*NET). The LCA further states that the proffered position is a Level I (entry) position.

In a letter dated March 25, 2015, the Petitioner explained that it "specializes in data projects and products while using the latest technology, architectural structures and databases to deliver

enterprise level applications to some of the largest insurance companies." The Petitioner stated that the Beneficiary, as a software developer, will be "responsible for the development of information systems by designing, developing and installing software solutions." The Petitioner also submitted a job description which the "job requires a minimum of a bachelors (or higher degree) in computer science, mathematics, or a related field."

In response to the request for evidence (RFE), the Petitioner stated that it has specialty occupation work available for the Beneficiary to provide his services on an in-house job. The Petitioner stated that "this job is strictly an in-house job and the worker is not sent out to work at other companies."

The Petitioner also submitted a breakdown of the percentage of time the Beneficiary will spend on each duty as follows: Technical decomposition of news features (30%); Architecting solutions (30%); Review code of other developers (10%); and, Writing Code (30%). The Petitioner also stated that an "advanced education is required" because the insurance software is complex since it requires the following:

- Calculate rates based on hundreds of factors
- Calculate commission for agents/brokers/managing general agencies using complex formulas
- Calculate Loss Ratio for insurance programs
- Handle thousands [of] agents/brokers/insurers company employees
- Handle hundreds of thousands [of] customers.

The Petitioner also submitted a copy of an organizational chart that is illegible. Although it appears that the Beneficiary's position is "New Software Engineer," it is impossible to read the supervisor titles, the department in which the proffered position will be placed, or the organizational structure of the company.

In another document, the Petitioner further explained its software products as follows:

> [The Petitioner] Software Corporation writes and distributes core software systems to the Property and Casualty insurance space. Our [redacted] suite of product include [redacted] (policy issuance and management system), [redacted] (CRM and Agency Management System), [redacted] (data warehouse and BI suite), [redacted] (payment processing and reconciliation), [redacted] (contact management solution), [redacted] (CRM and Lead Management Solution). We have over 25 customers in the US P&C market and are a leading provider of core applications to insurance carriers, general agencies and agencies in the US.

On appeal, the Petitioner provided more information as follows:[1]

35% of time - Technical decomposition of new features
Technical decomposition for [the Petitioner] sr. software engineers consists of:

- Analyzing user's needs
- Analyzing new feature requests and modification requests for already existing features from [the Petitioner's] sales team for products [the Petitioner] creates and sells
- Translating those needs and requests into technical language a less advanced group of software engineers would understand by creating "development items" in [the Petitioner's] development tracking software,
- Communicating with software engineers who are assigned to implement decomposed tasks when they have questions

25% of time - Architecting solutions
A person architecting a solution at [the Petitioner]:
-Recommends upgrades for the technologies we use
-Designs and maintains the overall architecture of our products
-Makes sure that the architecture of a product he or she is responsible for is scalable and reliable
-Verify that all the new feature added to the product fit the overall grand design
-Makes sure that the overall architecture does not prevent the product the architect is responsible for does not break compatibility with other products [the Petitioner] develops and sells by working with architects on other products
-Documents all architectural decisions made

5% of time - Review code of other developers
As a Sr. Engineer a coder reviewer at [the Petitioner]:
-Reviews code that is submitted by other developers to our source code repository and make sure that:
-The code is in compliance with architectural documents created by the architect
-The code adheres to the coding standards defined in a coding standard document created by the architect and team leads.

[1] In response to the RFE, the Petitioner provided a percentage breakdown for each duty that will be performed by the Beneficiary. However, on appeal, the percentage breakdown has changed and the Petitioner did not provide any explanation for the change between the two job descriptions. Furthermore, the job description submitted on appeal discusses a "senior" software engineer rather than the position of software engineer as provided on the Form I-129. "[I]t is incumbent upon the Petitioner to resolve the inconsistencies by independent objective evidence." *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the Petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92.

> 35% of time - Writing Code
> [The Petitioner] created very complex and rich in functionality applications for the insurance industry. There is enough work for our team leads and architects to work only on the 3 items above but in an effort to prevent those higher level software engineers and architects becoming just theoretical engineers [the Petitioner] requires software engineers to implement some of the features they decompose and architect.

On appeal, the Petitioner also submitted several "payment processing" contracts between the Petitioner and its clients. The Petitioner also submitted an opinion letter regarding the proffered position prepared by a professor at the

C. Analysis

For H-1B approval, the Petitioner must demonstrate a legitimate need for an employee exists and to substantiate that it has H-1B caliber work for the Beneficiary for the period of employment requested in the petition. It is incumbent upon the Petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent, to perform duties at a level that requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.

In this matter, the Petitioner indicated that the Beneficiary will be employed in-house as a software engineer. However, upon review of the record of proceedings, we find that the Petitioner did not provide sufficient, credible evidence to establish in-house employment for the Beneficiary for the validity of the requested H-1B employment period. Specifically, the Petitioner did not submit a job description to adequately convey the substantive work to be performed by the Beneficiary.

As reflected in the descriptions 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 be responsible for the "development of information systems by designing, developing and installing software solutions;" "designs and maintains the overall architecture of our products;" and is responsible for "analyzing new feature requests and modification requests for already existing features from [the Petitioner's] sales team for products [the Petitioner] creates and sells." 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.

Furthermore, in the RFE, the Director requested a more detailed job description, but the Petitioner provided only four general duties and the percentage breakdown for each duty. Only on appeal did the Petitioner provide more information regarding the job duties. The non-existence or other unavailability of required evidence creates a presumption of ineligibility." 8 C.F.R. § 103.2(b)(2)(i).

In addition, the Petitioner provided inconsistent job duties for the proffered position. On appeal, the Petitioner submitted an expanded job description but the percentage breakdown differs from the information submitted in response to the RFE. In addition, the job description submitted on appeal describes the position as "senior" software engineer, which has been changed from the job listed on the Form I-129 as software engineer. Moreover, the job description submitted on appeal indicates that as a "senior" software engineer, the Beneficiary will analyze and design and communicate with "software engineers who are assigned to implement decomposed tasks when they have questions" which appears that the Beneficiary will manage and supervise. However, the job duties also indicated that the Beneficiary will spend 35 percent of his time writing code. It is not clear if writing code is a job duty that is typical for a "senior" software engineer. The job description submitted on appeal is not consistent with the job duties submitted with the initial petition and in response to the RFE. On appeal, the Petitioner cannot offer a new position to the Beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, the associated job responsibilities, or the requirements of the position. The Petitioner must establish that the position offered to the Beneficiary when the petition was filed merits classification for the benefit sought. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See In re Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

The Petitioner has designated the proffered position as a Level I position on the LCA, indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. The Petitioner's designation of this position as a Level I, entry-level position undermines its claim on appeal that the position is for a "senior" software engineer.[2] "[I]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence." *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92.

We further note that the record of proceedings lacks documentation regarding the Petitioner's business activities and the actual work that the Beneficiary will perform to sufficiently substantiate the claim that the Petitioner has H-1B caliber work for the Beneficiary for the period of employment requested in the petition. For example, on appeal, the Petitioner submits several contracts between the Petitioner and clients for a payment processing service. However, none of the documentation explains how a software engineer would assist on these projects, and none of the documents specifically name the Beneficiary as personnel to assist with these projects. Thus, the Petitioner did

[2] The discrepancy in the job title of software engineer as listed on the Form I-129 and "senior" software engineer as submitted on appeal, may affect the validity of the LCA since the LCA was certified for a Level I position.

not provide documents to substantiate its ongoing projects for the H-1B validity period. "[G]oing on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings." *In re Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

As observed above, USCIS in this matter must review the actual duties the Beneficiary will be expected to perform to ascertain whether those duties require at least a baccalaureate degree in a specific specialty, or its equivalent, as required for classification as a specialty occupation. To accomplish that task in this matter, USCIS must analyze the actual duties in conjunction with the specific project(s) to which the Beneficiary will be assigned. To allow otherwise, results in generic descriptions of duties that, while they may appear (in some instances) to comprise the duties of a specialty occupation, are not related to any actual services the Beneficiary is expected to provide.

The Petitioner has not provided sufficient details regarding the nature and scope of the Beneficiary's employment or any substantive evidence regarding the actual work that the Beneficiary would perform. Without a meaningful job description, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. The tasks as described do not communicate (1) the actual work that the Beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty.

The Petitioner has not established the substantive nature of the work to be performed by the Beneficiary, which therefore precludes a finding that the proffered position satisfies 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 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.

On appeal, the Petitioner submits a letter from Associate Professor of Computer Applications and Information Systems at the stated that he was asked to evaluate the degree requirements expected for the professional position of software engineer for the Petitioner. concluded that the proffered position requires preparation at the Bachelor's Degree level in software engineering or a related area at a minimum.

We reviewed the opinion letter in its entirety; however, we find that the letter from is not persuasive in establishing the proffered position qualifies as a specialty occupation position. Specifically, provides a brief, general description of the Petitioner's business activities; however, he does not demonstrate or assert in-depth knowledge of the Petitioner's specific business

operations or how the duties of the position would actually be performed in the context of the Petitioner's business enterprise. For instance, there no evidence that he visited the Petitioners premises, observed the Petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job.

There is also no indication that the Petitioner advised that it characterized the proffered position as a low, entry-level software engineer position. In accordance with the relevant DOL explanatory information on wage levels, a Level I position is indicative that, relative to other positions falling under the occupational category, the Beneficiary is expected to only have a basic understanding of the occupation. The wage-rate indicates 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. It appears that would have found this information relevant for his opinion letter. Moreover, without this information, the Petitioner has not demonstrated that possessed the requisite information necessary to adequately assess the nature of the Petitioner's position and appropriately determine parallel positions based upon the job duties and responsibilities. We therefore consider this a significant omission.

In short, does not provide a substantive, analytical basis for his opinion and ultimate conclusion. His opinion does not relate his conclusion to specific, concrete aspects of this Petitioner's business operations to demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue. He has not provided sufficient facts that would support the assertion that the proffered position requires at least a bachelor's degree in a specific specialty (or its equivalent).

In summary, and for each and all of the reasons discussed above, the opinion letter rendered by is not sufficient to establish the proffered position qualifies as a specialty occupation. The conclusions reached by lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which he reached such conclusions. Further, the opinion is not in accord with other information in the record.

As such, neither findings nor his ultimate conclusions are worthy of deference, and his opinion letter is not sufficient to satisfy any criterion of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A). We may, in our discretion, use opinion statements submitted by the Petitioner as advisory. *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Id.*

As the Petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation.

II. EMPLOYER-EMPLOYEE RELATIONSHIP

Since the identified basis for denial is dispositive of the Petitioner's appeal, we need not address another ground of ineligibility we observe in the record of proceeding. Nevertheless, we will briefly note and summarize it here with the hope and intention that, if the Petitioner seeks again to employ the Beneficiary or another individual as an H-1B employee in the proffered position, it will submit sufficient independent objective evidence to address and overcome this additional ground in any future filing.

More specifically, the petition cannot be approved because the evidence does not demonstrate that the Petitioner qualifies as a United States employer having an employer-employee relationship with the Beneficiary. As detailed above, the record of proceeding lacks sufficient documentation evidencing what exactly the Beneficiary would do for the period of time requested or where exactly and for whom the Beneficiary would be providing his services. Given this specific lack of evidence, the Petitioner has not corroborated who has or will have actual control over the Beneficiary's work or duties, or the condition and scope of the Beneficiary's services. In other words, the Petitioner has not established whether it has made a *bona fide* offer of employment to the Beneficiary based on the evidence of record or that the Petitioner, or any other company which it may represent, will have and maintain the requisite employer-employee relationship with the Beneficiary for the duration of the requested employment period. *See* 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer" and requiring the Petitioner to engage the Beneficiary to work such that it will have and maintain an employer-employee relationship with respect to the sponsored H-1B nonimmigrant worker). Again and as previously discussed, there is insufficient evidence detailing where the Beneficiary will work, the specific projects to be performed by the Beneficiary, or for which company the Beneficiary will ultimately perform these services. Therefore, the petition cannot be approved for this additional reason.

III. CONCLUSION AND ORDER

As set forth above, we find the evidence of record insufficient to establish that the proffered position qualifies for classification as a specialty occupation. We also find the evidence of record insufficient to demonstrate that the Petitioner qualifies as a United States employer that will have an employer-employee relationship with the Beneficiary. Accordingly, the appeal will be dismissed.[3]

[3] As these issues preclude approval of the petition, we will not address any additional deficiencies we have identified on appeal.

We may deny an application or petition that does not comply with the technical requirements of the law even if the Director does not identify all of the grounds for denial in the initial decision. *See Spencer Enters., Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001); *see also Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015) (noting that we conduct appellate review on a *de novo* basis).

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of the enumerated grounds. *See Spencer Enters., Inc. v. United States*, 229 F. Supp. 2d at 1037; *see also BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1183 (D.C. Cir. 2003) ("When an agency offers multiple grounds for a decision, we will affirm the agency so long as any one of the grounds is valid, unless it is demonstrated that the agency would not have acted on that basis if the alternative grounds were unavailable.").

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the Petitioner's burden to establish 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) (citing *Matter of Brantigan*, 11 I&N Dec. 493, 495 (BIA 1966)). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of O-, Inc.*, ID# 16339 (AAO Mar. 1, 2016)