U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9434360

Date: JUNE 30, 2020

Appeal of Vermont Service Center Decision

Form I-129, Petition for Nonimmigrant Worker (H-1B)

The Petitioner, an information technology consulting firm, seeks to employ the Beneficiary temporarily as a "QA analyst" under the H-1B nonimmigrant classification for specialty occupations.[1] 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 Vermont Service Center Director denied the Form I-129, Petition for a Nonimmigrant Worker, concluding that the record did not establish that the proffered position qualified as a specialty occupation. The matter is now before us on appeal. The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence.[2] We review the questions in this matter *de novo*.[3] Upon *de novo* review, we will dismiss the appeal.

I. ANALYSIS

Upon review of the entire record, for the reasons set out below, we have determined that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation. The Director concluded that the Petitioner did not establish that the offered position qualifies as a specialty occupation. In her decision, the Director thoroughly discussed the Petitioner's failure to meet any of the four regulatory criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*)–(*4*). Upon consideration of the entire record, including the evidence submitted and arguments made on appeal, we adopt and affirm the Director's decision with the comments below.[4]

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[1] *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

[2] Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

[3] *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015).

[4] *See Matter of P. Singh, Attorney*, 26 I&N Dec. 623 (BIA 2015) (citing *Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994)); *see also Chen v. INS*, 87 F.3d 5, 7-8 (1st Cir. 1996) ("[I]f a reviewing tribunal decides that the facts and evaluative judgments prescinding from them have been adequately confronted and correctly resolved by a trial judge or hearing officer, then the tribunal is free simply to adopt those findings" provided the tribunal's order reflects individualized attention to the case).

We begin noting that the Petitioner would assign the Beneficiary to work at two client site locations performing work directly for those entities. As recognized by the court in *Defensor*, 201 F.3d 384, 387–88 (5th Cir. 2000), where the work is to be performed for entities other than a petitioner, evidence of the client companies' job requirements is critical. The scenario in *Defensor* has repeatedly been recognized by federal courts as appropriate in determining which entity should provide the requirements of an H-1B position and the actual duties a beneficiary would perform.[5]

As a central holding, the *Defensor* court determined that the former Immigration and Naturalization Service acted appropriately in interpreting the statute and the regulations as requiring petitioning companies to provide probative evidence that the outside entities where the Beneficiary would actually provide their services (i.e. clients) required candidates to possess a qualifying degree.[6] The *Defensor* court reasoned that the position requirements from the entity where the beneficiary would actually work—be it the required degree or the position's actual duties a candidate would perform—should serve as the more relevant characteristics we should consider under our specialty occupation determination. The court further concluded that absurd outcomes could result from granting greater credence to the position requirements as represented by the entity providing the employee, rather than to those from its clients where a beneficiary would perform the work.[7]

We conclude that the *Defensor* decision is particularly applicable to the present case. This is not a case where the Petitioner is assigning the Beneficiary to work solely in-house for an outside business that does not normally employ personnel in the type of work the foreign national would perform. As a result, the client likely possesses the knowledge of what duties the Beneficiary would engage in, and the requirements in which to perform those responsibilities. This is a scenario in which the duties and the qualifications to perform in the proffered position should originate from the entity for whom the Beneficiary would actually perform their work.[8] Consequently, the job requirements should have originated from the Petitioner's clients. The Petitioner provided one set of duties for the Beneficiary's work at both client worksites. The inference is that the Beneficiary would perform the exact same duties for both clients without any details pertaining to how they might even vary slightly based on the different client projects. In the absence of those indications from the Petitioner's clients, we conclude that the Petitioner has not sufficiently demonstrated the full spectrum of what the Beneficiary would perform within this petition. Nevertheless, we will address some appellate arguments below.

Regarding the Petitioner's appellate arguments under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), it states the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*) reflects that most of those within the Computer Systems Analysts occupation have a bachelor's degree in a computer-related field and that a bachelor's degree in a computer or information science field is common, although not always a requirement. Ultimately, the Petitioner states that the regulation does not mandate that all employers require a specialized degree.

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[5] *See Altimetrik Corp. v. USCIS*, No. 2:18-cv-11754, at *7 (E.D. Mich. Aug. 21, 2019); *Valorem Consulting Grp. v. USCIS*, No. 13-1209-CV-W-ODS, at *6 (W.D. Mo. Jan. 15, 2015); *KPK Techs. v. Cuccinelli*, No. 19-10342, 2019 WL 4416689, at *10 (E.D. Mich. Sep. 16, 2019); *Altimetrik Corp. v. Cissna*, No. 18-10116, at *11 (E.D. Mich. Dec. 17, 2018*); Sagarwala v. Cissna*, 387 F. Supp. 3d 56, 69 n.5 (D.D.C. 2019).

[6] *Defensor*, 201 F.3d at 388.

[7] *Id.*

[8] *Id.* at 387–88.

First, the *Handbook* states that "[m]ost computer systems analysts have a bachelor's degree in a computer-related field." The *Handbook* describes what most Computer Systems Analysts "have" and not what is "normally the minimum requirement for entry into the particular position." Additionally, it specifies that employers hire candidates who only have business or liberal arts degrees who have skills in related areas. Not all Computer Systems Analysts positions are the same and a portion of these positions may be performed by those without a bachelor's degree in a computer or information science field.

Juxtapose that information with other *Handbook* entries. For instance, the Materials Engineers profile indicates that entry-level jobs require a bachelor's degree, and it also states that those in this occupation must have a bachelor's degree in a specialized field.[9] Additionally, the profile for "How to Become a Microbiologist" states that a "bachelor's degree in microbiology or a closely related field is needed for entry-level microbiologist jobs."[10] Second, this criterion relates to "the particular position" in the petition and not the broader occupation as a whole as represented in the *Handbook*. Therefore, the Petitioner has not shown how its singular job should be construed as equivalent to the entire occupational field. Therefore, the Petitioner has not satisfied the first criterion's requirements relying on this resource.[11]

Regarding the Petitioner's appellate arguments under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*) it offers additional material relating to the nature of the other employers' business operations. However, that material is unnecessary. Despite the Petitioner's argument that the advertised positions closely mirror the job description in this petition, we observe that the positions within the advertisements are not sufficiently similar. The Petitioner submitted the present petition under the Computer Systems Analysts occupational classification whose focus is on improving an organization's efficiencies through an overall improved information technology infrastructure. However, each of the job advertisements from other employers were more related to software testing than they were to the occupational classification in this petition.

The Occupational Information Network (O*NET) contains an entry very similar to the responsibilities in the job advertisements, 15-1199.01 - Software Quality Assurance Engineers and Testers.[12] When we compare the responsibilities of Computer Systems Analysts and Software Quality Assurance Engineers and Testers, we find that these are two distinct occupations. We further observe duties within the petition that better align with the Software Developers, Applications occupational category than they do to the Computer Systems Analysts occupation. Were the Director to have made that determination, she could have concluded that the designated Level II wage rate on the labor condition application was not correct. This would serve as an additional basis to deny the petition.[13] As a result,

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[9] *Materials Engineers*, *Handbook* (June 17, 2020), https://www.bls.gov/ooh/architecture-and-engineering/materials-engineers.htm#tab-4.

[10] Microbiologists, *Handbook* (June 17, 2020), https://www.bls.gov/ooh/life-physical-and-social-science/microbiologists.htm#tab-4.

[11] *Cf. Innova Sols., Inc. v. Baran*, 399 F. Supp. 3d 1004, 1014 (N.D. Cal. 2019).

[12] See *Summary Report for: 15-1199.01 - Software Quality Assurance Engineers and Testers*, O*NET OnLine (June 17, 2020), https://www.onetonline.org/link/summary/15-1199.01.

[13] While DOL certifies the labor condition application (LCA), U.S. Citizenship and Immigration Services (USCIS) determines whether the LCA's attestations and content corresponds with and supports the H-1B petition. *See* 20 C.F.R. § 655.705(b) ("DHS determines whether the petition is supported by an LCA which corresponds with the petition . . . .").

the Petitioner has not demonstrated a qualifying "degree requirement is common to the industry in parallel positions . . . .," which is required under this regulatory provision.

Under the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*), the Petitioner must show that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position. The Director requested additional evidence in various forms, and ultimately decided that the record did not illustrate that the Petitioner normally required a degree or its equivalent for the position. We agree with the Petitioner's appellate statement that the law does not require any particular form of evidence to demonstrate eligibility under this criterion. However, as the Director noted, the Petitioner's statements and its own job posting were insufficient to preponderantly demonstrate the organizations normal degree requirements for this position.

First, the Petitioner's statements fall short of satisfying its burden of proof.[14] Second, a single job posting by itself does not establish an organization's normal hiring requirement. The Director requested material relating to the Petitioner's past hiring practices in addition to job postings to include evidence of the number of personnel the organization has recently employed in the position, pay records for those employees, and material illustrating the position prerequisites the organization mandated when it hired those personnel. On appeal the Petitioner not only fails to offer any additional material, but it also does not describe the manner in which the Director erred in her determination under this criterion. Such a failing is an insufficient basis to claim this criterion on appeal and we see no error in the Director's analysis.

Relating to the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*), the Petitioner takes issue that the Director did not afford any weight to an opinion letter it submitted from [redacted] a college professor. The Director determined that the Petitioner did not offer sufficient evidence that corroborated the professor's opinions relating to the type of the degree this position would require. As a result, the Director considered [redacted]s opinion letter to carry similar weight as the remaining evidence, rather than serving as sufficiently persuasive expert testimony.

Reviewing the content of [redacted]'s letter, we do not grant it the significant evidentiary value the Petitioner feels it should garner. [redacted] explained his credentials, the Petitioner's operations, and essentially repeated the duties the Petitioner provided. After reciting much of the proffered position's duties, [redacted] expressed a high level of importance that those functions serve within the Petitioner's operations.

See also Matter of Simeio Solutions, 26 I&N Dec. 542, 546 n.6 (AAO 2015). An employer "reaffirms its acceptance of all of the attestation obligations by submitting the LCA to [USCIS] in support of the Petition for Nonimmigrant Worker, Form I-129, for an H-1B nonimmigrant." 20 C.F.R. § 655.705. USCIS may consider DOL regulations when adjudicating H-1B petitions. *See Int'l Internship Programs v. Napolitano*, 853 F. Supp. 2d 86, 98 (D.D.C. 2012), *aff'd sub nom. Int'l Internship Program v. Napolitano*, 718 F.3d 986 (D.C. Cir. 2013). See DOL, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009) (DOL guidance), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_ Guidance_Revised_11_2009.pdf (establishing the process for determining the correct prevailing wage rate).

[14] The Petitioner's statements made without supporting documentation are of limited probative value and are insufficient to satisfy its burden of proof. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998).

Lacking from [redacted]'s letter is an explanation of why he concludes the duties require a particular degree with a specific concentration. He simply stated that such functions would require a bachelor's degree in computer science, information systems, mathematics, electronics engineering or a related subject. Notably, those are the precise degree fields the Petitioner required. Absent is the reasoning that led [redacted] to conclude the duties mandated a degree in the fields he specified. In other words, the opinion letter author provided his conclusion without sufficiently explaining his decision, which prevented the agency from being able to weigh and evaluate his methodology and reasoning.

This essentially constitutes conclusory assertions that the position qualifies as a specialty occupation. We are not required to accept cursory or primarily conclusory statements as demonstrating eligibility.[15] The lack of cogent analysis, and his repetition of the exact degree fields the Petitioner required strongly suggests that [redacted] was asked to confirm a preconceived notion as to the required degrees rather than to objectively assess the proffered position and opine on the minimum position requirements. This letter carries little probative value as it does not include specific analysis of the duties of the particular position that is the subject of this petition.[16]

We also note that in several instances [redacted] stated the only path to attaining the knowledge required for the position was through a bachelor's degree in the above specified disciplines plus three years of work experience. Within this conclusory and exclusionary statement, [redacted] rules out any other methods one could utilize to attain the requisite knowledge. However, the professor did not discuss why any other methods could not lead to a sufficiently similar knowledge-set. For instance, one could attain the requisite knowledge through attending software quality assurance bootcamps in combination with several years of experience building the necessary skills and familiarity to perform in the position.[17] Consequently, the professor did not account for obvious alternative explanations.[18] A lack of sufficiently considering alternatives is a basis that can adversely affect the evidentiary weight of such an opinion.[19] The Petitioner has failed to marshal argument or evidence beyond mere speculation to support the opinion author's conclusory statements, and thus cannot establish that the Director erred by finding that material insufficient.

Moreover, [redacted] stated "a candidate could not become an expert in quality assurance analysis without a complete level of proficiency commonly used in quality assurance analysis which is only

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[15] *Innova Sols., Inc. v. Baran*, 338 F. Supp. 3d 1009, 1023 (N.D. Cal. 2018); *1756, Inc. v. Att'y Gen*, 745 F. Supp. 9, 17 (D.D.C. 1990); *see also Glob. Fabricators, Inc. v. Holder*, 320 F. App'x 576, 580 (9th Cir. 2009) (holding this office's determination that "the conclusory averments of [the Petitioner's] own Human Resources and Safety Manager as to the complexity of the job, without some objective corroborating evidence or other indication of how the position [] differs from the industry-wide norm" was a reasonable conclusion.

[16] 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.* Here, the opinion presented does not offer a cogent analysis of the duties and why the duties require a bachelor's degree in a specific specialty. We hereby incorporate our discussion of [redacted]'s opinion into our discussion of the other 8 C.F.R. § 214.2(h)(4)(iii)(A) criteria.

[17] As noted, the *Handbook* makes specific provision for that type of career path: "Many analysts have liberal arts degrees and have gained programming or technical expertise elsewhere." *Computer Systems Analysts*, *Handbook* (June 17, 2020), https://www.bls.gov/ooh/computer-and-information-technology/computer-systems-analysts.htm#tab-4.

[18] *See Claar v. Burlington N.R.R.*, 29 F.3d 499, 502 (9th Cir. 1994).

[19] *See Ambrosini v. Labarraque*, 101 F.3d 129, 140 (D.C. Cir. 1996).

attained through proper and professional work experience." We note that the Petitioner characterized this position at a Level II prevailing wage rate on the LCA. [redacted] repeatedly indicated that to perform the position's duties, one would require a bachelor's degree in addition to at least three years of work experience. However, we note that [redacted] did not explain why he calculated at least three years of work experience, rather than more or less than that amount. It would appear that he formed this portion of his opinion from the Petitioner's position prerequisites as represented in its job advertisement for a "QA Analyst" rather than from applying his knowledge within the technology industry. This further reduces the value of his letter in these proceedings.

[redacted], as well as the Petitioner, attributes a high level of responsibility to the position in this petition. Were we to consider the combination of the Petitioner's job description and [redacted]'s accounts, the position in the petition would appear to closely align with the "Senior Consultant QA Analyst" job advertisement in which the Petitioner required "8+ years of IT experience."[20] An experience requirement of more than eight years for this occupation within the Job Zone 4 grouping in the O*NET would mandate an increase in the prevailing wage rate to a Level IV and would require a wage increase of more than $35,000.[21] This causes us to further question whether the Petitioner accurately represented the actual substantive nature of this position. What the law requires, and employers must demonstrate to USCIS, is the nature of the specialty occupation.[22]

Finally, [redacted] did not discuss the proffered position in the specific context of either of the Petitioner's clients' businesses, or the clients' projects upon which the Beneficiary would work. There is no indication that [redacted] possessed any knowledge of the proffered position beyond the Petitioner's job description prior to documenting his opinion regarding the proffered position (e.g., interviewed the client's managerial teams, observed either entity's employees about the nature of their work, or documented the knowledge that these workers apply on the job). His level of familiarity with the actual job duties as they would be performed in the context of the clients' projects has therefore not been substantiated.

It is not arbitrary or capricious to accord limited weight to opinion letters provided the agency considers them, which we have done here. It is unnecessary that the degree of the agency's weight accorded correlates with that of the Petitioner, provided the agency considers the content and grants an appropriate value.[23]

II. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered 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. The Petitioner has not met that burden here, and the petition will remain denied.

ORDER: The appeal is dismissed.

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[20] *Senior Consultant QA Analyst - Automation*, Careers (June 17, 2020), https://sdlcpartners.wd5.myworkdayjobs.com/en-US/SDLC/job/US-PA-Pittsburgh/Senior-Consultant-QA-Analyst---Automation_R000300.

[21] See the DOL guidance.

[22] *ITServe All., Inc. v. Cissna*, No. CV 18-2350 (RMC), 2020 WL 1150186, at *19 (D.D.C. Mar. 10, 2020).

[23] *Visinscaia v. Beers*, 4 F. Supp. 3d 126, at 134 (D.D.C. Dec. 16, 2013).