U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10042425

Date: JULY 20, 2020

Appeal of California Service Center Decision

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

The Petitioner, a management consulting services firm, seeks to temporarily employ the Beneficiary 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 California Service Center Director denied the petition, concluding that the Petitioner had not established that the proffered position is a specialty occupation. On appeal, the Petitioner asserts that the Director erred and that the proffered position is a specialty occupation.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We review the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant as a foreign national "who is coming temporarily to the United States to perform *services . . . in a specialty occupation* described in section 214(i)(1) . . . " (emphasis added). Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), defines the term "specialty occupation" as an occupation that requires "theoretical and practical application of a body of highly specialized knowledge, and 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 section 214(i)(l) of the Act, but adds a non-exhaustive list of fields of endeavor. In addition, 8 C.F.R. § 214.2(h)(4)(iii)(A) provides that the proffered position must meet one of four criteria to qualify as a specialty occupation position.[1] Lastly,

[1] 8 C.F.R. § 214.2(h)(4)(iii)(A) must be read with the statutory and regulatory definitions of a specialty occupation under section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). We construe the term "degree" to mean not just any

8 C.F.R. § 214.2(h)(4)(i)(A)(*1*) states that an H-1B classification may be granted to a foreign national who "*will perform services in a specialty occupation . . .* " (emphasis added).

Accordingly, to determine whether the Beneficiary will be employed in a specialty occupation, we look to the record to ascertain the services the Beneficiary will perform and whether such services require the theoretical and practical application of a body of highly specialized knowledge attained through at least a bachelor's degree or higher in a specific specialty or its equivalent. Without sufficient evidence regarding the duties the Beneficiary will perform, we are unable to determine whether the Beneficiary will be employed in an occupation that meets the statutory and regulatory definitions of a specialty occupation and a position that also satisfies at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). The services the Beneficiary will perform in the position determine: (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. 8 C.F.R. § 214.2(h)(4)(iii)(A).

By regulation, the Director is charged with determining whether the petition involves a specialty occupation as defined in section 214(i)(1) of the Act. 8 C.F.R. § 214.2(h)(4)(i)(B)(*2*). The Director may request additional evidence in the course of making this determination. 8 C.F.R. § 103.2(b)(8). In addition, a petitioner must establish eligibility at the time of filing the petition and must continue to be eligible through adjudication. 8 C.F.R. § 103.2(b)(1).

II. ANALYSIS

Based on a lack of sufficient evidence, we conclude that the Petitioner has not established the substantive nature of the position, which precludes a determination that the proffered position qualifies as a specialty occupation under at least one of the four regulatory criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*)-(*4*).

The Petitioner, located in California, initially sought to employ the Beneficiary as a "senior technical consultant" offsite for M-, an end-client location, which is also located in California. It designated the proffered position under the occupational category "Software Developers, Applications" corresponding to the Standard Occupational Classification (SOC) code 15-1132, at a Level II wage on the labor condition application (LCA)[2] submitted in support of the H-1B petition. The LCA identified two work locations: the end-client's offices, and the Petitioner's offices as the Beneficiary's work locations.

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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").

[2] A petitioner submits the LCA to the U.S. Department of Labor to demonstrate that it will pay an H-1B worker the higher of either the prevailing wage for the occupational classification in the area of employment or the actual wage paid by the employer to other employees with similar duties, experience, and qualifications. Section 212(n)(1) of the Act; 20 C.F.R. § 655.731(a).

In response to the Director's request for evidence (RFE) the Petitioner indicated that the Beneficiary's services were no longer required by the original end-client, but stated the Petitioner "still requires [the Beneficiary's] services. [He] will be working out of the [Petitioner's offices] (which was listed in the LCA), doing the same job duties, for a new end-client [C-S-]," as follows:

> [The Beneficiary] will be working on the development of [the end-client's] E-commerce system which includes creating various applications and platform and integrating the previous system over to the new system.

The end-client's partially redacted 2015 services agreement with the Petitioner indicates that the end-client will pay fees for the services provided by the Petitioner "as set forth in the applicable Statement of Work [SOW] or purchase order." The redacted portions of the agreement fall in large part under the section of the agreement which addresses the services the Petitioner will provide. In that section all of the text is redacted except for one sentence which states: "[The Petitioner] will provide the Services to [the end-client] in accordance with the terms and conditions of the agreement."[3] While the Petitioner has shown that the end-client entered into an agreement with the Petitioner 2015 to provide services pursuant to purchase orders, or similar documentation, the submitted agreement without more is insufficient to demonstrate the nature of the in-house projects to which the Beneficiary will be assigned.[4]

The Petitioner also relies on articles about the end-client's E-commerce efforts to establish the nature of the Beneficiary's in-house work assignment, asserting that this material details "the type of advances [the end-client] is implementing; illustrating the availability of on-going work." However, the Petitioner's reliance on this material as a means to establish that the Beneficiary will be employed in a specialty-occupation capacity on end-client projects is misplaced. While the articles show that the end-client is engaged in developing and enhancing its E-commerce website, the material is insufficient to demonstrate the Petitioner's general role in these undertakings, or the nature of the Beneficiary's specific in-house assignments for the end-client, if any. For instance, the end-client's May 2016 article notes:

> In-house developers [] began building [the end-client's website] in late 2014, and the new [website] launched in late 2015. Since the new site launched, online sales at [the website] have grown 28%, average order value increased 52% and there was also a 92% decrease in the amount of time the site was down for maintenance.

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[3] In light of the redacted omissions, we conclude the Petitioner's submission of select sections of the end-client's agreement with the Petitioner diminishes its evidentiary value, as it deprives us of the remaining portions that may reveal information either advantageous or detrimental to the petitioning organization's claims, and therefore, is of little probative value. It is the Petitioner's burden to prove by a preponderance of evidence that it is qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. at 376. In evaluating the evidence, eligibility is to be determined not by the quantity of evidence alone but by its quality. *Id.*

[4] Although a petitioner is not required by existing regulation to submit contracts or legal agreements between the petitioner and third parties to establish an employer-employee relationship, "the petitioner must demonstrate eligibility for the benefit sought" and "if a petitioner provides contracts or legal agreements, [an] officer is not precluded from evaluating that evidence in the adjudication of other eligibility criteria." USCIS Policy Memorandum PM-602-0114, *Rescission of Policy Memoranda* at 3 (June 17, 2020), http://www.uscis.gov/legal-resources/policy-memoranda.

While the articles do describe some of the information technology projects that the end-client is engaged in, they do not mention the Petitioner, or even generally discuss the involvement of outside vendors in its project development efforts. Therefore, the articles do not substantiate the Petitioner's assertions regarding the Beneficiary's proposed work on in-house projects for the end-client.

We acknowledge the Petitioner initially provided a position description and indicated its education requirements for the proffered position. However, 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. 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.

First, the present scenario is analogous to that of the *Defensor* decision, as one in which the duties the Beneficiary would actually perform and the qualifications to perform them should originate from the end-client.[5] The material from the end-client should sufficiently convey the functions the Beneficiary would actually perform within the context of the end-client's information technology projects.

On the issue of the offered position's duties, the Petitioner provided a set of duties initially, and restated those functions when it responded to the Director's request for evidence (RFE). However, also within the RFE response, the Petitioner provided a letter from the end-client. It appears that the duties within the end-client letter actually originated with the Petitioner. The duties within the end-client letter are identical to those the Petitioner offered more than 8 months earlier at the time of filing the petition, including formatting, verb tense, and capitalizations. Notably, at the time of filing the Petitioner stated its intent to place the Beneficiary with M-, the original end-client, and *not* with C-S-, the end-client who presented the instant letter. As a general concept, when a petitioner has provided material from different entities, but the language and structure contained within is notably similar, the trier of fact may treat those similarities as a basis for questioning a petitioner's claims.[6] When affidavits contain such similarities, it is reasonable to infer that the petitioner who submitted the strikingly similar documents is the actual source from where the similarities derive.[7] Furthermore, the author of the end-client letter stated "[the Petitioner] has confirmed that these services include those of [the Beneficiary], who will be working as a Sr. Technical Consultant [from the Petitioner's location] supporting the project." Though the bulleted list that was identical to the one the Petitioner offered; the author did not express any particular level of surety. As a result, the Petitioner has furnished a weak form of evidence that lacks sufficient probative value to satisfy its burden of proof. *Matter of Chawathe*, 25 I&N Dec. at 376.

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[5] It is important to note that within the reference to the *Defensor* decision, we are not correlating the Petitioner's business model as a simple token employer. However, it is apparent based on the Petitioner's own assertions that the Beneficiary would provide services to the end-client through "working on the development of [the end-client's] E-commerce system," not to the Petitioner.

[6] *See Matter of R-K-K-*, 26 I&N Dec. 658, 665 (BIA 2015); *Surinder Singh v. Board of Immigration Appeals*, 438 F.3d 145, 148 (2d Cir. 2006); *Wang v. Lynch*, 824 F.3d 587, 592 (6th Cir. 2016); *Dehonzai v. Holder*, 650 F.3d 1, 8 (1st Cir. 2011).

[7] *See Mei Chai Ye v. U.S. Dept. of Justice*, 489 F.3d 517, 519 (2d Cir. 2007).

Given the unique similarities between the duties the Petitioner supplied and the order in which it presented the evidence, we conclude that the petitioning organization has not established, by a preponderance of the evidence that the duties originated from the end-client. *Id.* We conclude that the Petitioner has not demonstrated the duties contained within its own and the end-client's correspondence are the end-client's actual requirements. As recognized in *Defensor*, 201 F.3d at 387-88, when the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The Petitioner must resolve this ambiguity in the record with independent, objective evidence pointing to where the truth lies.[8]

Because someone other than the author of the end-client letter appears to have drafted a portion of that correspondence, we ascribe it with diminished probative value. In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality.[9] While we are unable to determine the original source of the proposed duties, it remains the Petitioner's burden to establish the duties are the requirements actually imposed by the entity using the Beneficiary's services.[10] Here, the Petitioner has not offered sufficiently probative evidence on that matter.

Notwithstanding the above evidentiary shortcoming, the duties presented are overly generalized, which undermines the Petitioner's claims that the position's duties are specialized and complex. For example, it is unclear what theoretical and practical application of a body of highly specialized knowledge is required to "organize and write documents on collaboration tools like Confluence," "work with software engineering team to map-out interactions between the UI and back-end," "implement security in APIs using Oauth2, Secure Token, or similar," and "develop new features to be consumed by different systems." From the indeterminate nature of the duties, it is not self-evident that they are qualifying under the H-1B program.[11] Without more, it would be difficult to conclude that such duties are so specialized and complex, or that the duties comprise a position that is so complex or unique, that one must attain a bachelor's degree in a specific specialty in order to perform them. Here, the general and jargon-laden statements in the record in conjunction with the lack of description and material about the nature of the projects and initiatives to which the Beneficiary will be assigned do not provide sufficient insight into the Beneficiary's duties.[12]

The Petitioner also provides a position evaluation from [redacted] In his letter, the professor describes the credentials that he asserts qualify him to opine upon the nature of the proffered position, quotes in full the Petitioner's proposed duties for the Beneficiary, reiterates the Petitioner's

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[8] *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1998).
[9] *Matter of Chawathe*, 25 I&N Dec. at 376.
[10] *Defensor*, 201 F.3d at 387-88.
[11] The Petitioner also included within its job duty listing various desired employee attributes that reflect the knowledge and skills that a person might need to perform work, not the actual job duties to be performed, such as "demonstrate expertise and add value input throughout the development lifecycle by providing inputs whenever required," which adds little to our understanding of the substantive nature of the position.
[12] *Cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm'r 1988) (indicating USCIS must evaluate the actual tasks, demands, and duties to determine whether a petitioner has established the position realistically requires the specialized knowledge—both theoretical and applied—which is almost exclusively obtained at the baccalaureate level). A broad and generalized presentation of a position's responsibilities prevents USCIS from making such a determination. *See Sagarwala*, 387 F. Supp. 3d at 68.

degree requirements for the position (a bachelor's degree in computer science, computer applications, information technology, or a related field). We carefully evaluated the professor's assertions in support of the instant petition but, for the following reasons, determined his letter is not persuasive.

First, the professor does not discuss the Petitioner's business operations in any meaningful detail. Though he recites verbatim the duties of the proffered position, he does not discuss them within the context in which they will actually be performed. In particular, the absence of any substantive discussion of the duties specific to the end-client's projects raises doubts about his level of familiarity with the proffered position and also undermines his conclusion regarding the degree requirement for the position. Simply labeling the duties as "complex" and "specialized" without explaining why such duties require highly specialized knowledge and attainment of at least a bachelor's degree in a specific specialty does not suffice. Here, the professor's failure to discuss the specific proffered position in the context of the software development projects that require the Beneficiary's services raises further questions regarding the evidentiary value of the opinions. His omission of the end-client project and the duties and responsibilities of the Beneficiary as they relate to that project render his opinions questionable. His opinions thus do not demonstrate a sound factual basis for the conclusion about the educational requirements for the particular position here at issue.

Moreover, the professor asserts a general industry educational standard for information technology positions without referencing any supporting authority or any empirical basis for the pronouncement. He cites to the *IS 2013 Curriculum Guidelines for Undergraduate Degree Programs in Information Systems,* published by the Association for Computing Machinery (ACM), and asserts that academic programs in information systems and related fields model their curricula to "impart "major" knowledge areas."[13] Other than referring to the ACM's Curriculum Guidelines, he does not discuss relevant research, studies, or authoritative publications he utilized as part of his review and foundation for his opinion. Rather than offering a cogent analysis of the duties and a comprehensible explanation of why the duties require the aforementioned degree requirements, the professor's evaluation creates further ambiguity in the record.

In summary, the opinion letter rendered by the professor is not sufficient to establish the proffered position as a specialty occupation. His conclusions reached lack the requisite specificity and detail and are not supported by independent, objective evidence demonstrating the manner in which he reached such conclusions. It is also important to note that it appears as though the professor used a template with conclusory findings and generic analysis to support the Petitioner's particular position as a specialty occupation. The lack of cogent analysis strongly suggests that the professor was asked to confirm a preconceived notion as to the required degrees, not objectively assess the proffered position and opine on the minimum bachelor's degree required, if any.[14] While we will review the opinion presented, it has little probative value as it does not include sufficient substantive analysis of the duties of the particular position that is the subject of this petition.

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[13] These guidelines used for potential curriculums are far too broad to establish that a particular position requires a body of highly specialized knowledge resulting from study at a bachelor's-degree level in a specific specialty, or its equivalent, in order to perform the duties of the position. Neither the Petitioner nor the professor provides a comprehensible analysis of the relevance of such guidelines, if any, to establish the particular position proffered here is a specialty occupation.

[14] Service records show that this same template with the same language, organization, and similar conclusory statements regarding different occupations and also without supporting analysis has been submitted on behalf of other petitioners. These similarities suggest that the author of the opinion was asked to confirm preconceived notions.

We may, in our discretion, use advisory opinion statements submitted as expert testimony. 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. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). As a reasonable exercise of our discretion we discount the advisory opinion letters as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For the sake of brevity, we will not address other deficiencies within the professor's analyses of the proffered position.

For the reasons discussed, we conclude that the Petitioner has not established the actual, substantive nature of the proffered position.[15] The Petitioner has not submitted consistent, probative evidence to adequately communicate (1) the actual work that the Beneficiary would perform, (2) the complexity, uniqueness, or specialization of the tasks, and (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. Accordingly, the Petitioner has not established that the proffered position is a specialty occupation.[16]

III. CONCLUSION

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. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

[15] *Matter of Chawathe*, 25 I&N Dec. at 376.

[16] As the lack of probative and consistent evidence in the record precludes a conclusion that the proffered position is a specialty occupation and is dispositive of the appeal, we will not further discuss the Petitioner's assertions on appeal.