U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9098154

Date: JUNE 30, 2020

Appeal of California Service Center Decision

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

The Petitioner, a technical staffing firm, seeks to employ the Beneficiary temporarily 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 California Service Center Director denied the Form I-129, Petition for a Nonimmigrant Worker, for multiple reasons to include the Petitioner's failure to establish the substantive nature of the work the Beneficiary would perform. 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. SPECIALTY OCCUPATION

A. 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

[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).

proffered position must meet one of four criteria to qualify as a specialty occupation position.[4] Lastly, 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 one; (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 two; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion two; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion three; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion four.[5]

Further, 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.[6] 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.

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.[7] The Director may request additional evidence in the course of making this determination.[8] In addition, a petitioner must establish eligibility at the time of filing the petition and must continue to be eligible through adjudication.[9]

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[4] 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 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").

[5] 8 C.F.R. § 214.2(h)(4)(iii)(A).

[6] *Id.*

[7] 8 C.F.R. § 214.2(h)(4)(i)(B)(*2*).

[8] 8 C.F.R. § 103.2(b)(8).

[9] 8 C.F.R. § 103.2(b)(1).

B. Proffered Position

The Petitioner, located in Texas, seeks to employ the Beneficiary as a power BI/Tableau developer offsite for [redacted] (end-client) in Florida through contractual agreements involving multiple mid-vendors. Based on a lack of sufficient evidence, we conclude that the Petitioner has not sufficiently established the services in a specialty occupation that the Beneficiary would perform as requested. That outcome precludes a determination of whether 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*).

As a central holding, the *Defensor* court discussed above determined that the agency 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. end-clients) required candidates to possess a qualifying degree.[10] 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.

Further, the *Defensor* court concluded that absurd outcomes could result from garnering greater credence to the position requirements provided by an outsourcing agency, rather than to the clients where a beneficiary would perform the work.[11] 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.[12] In this matter, the record does not contain sufficient probative documentation on this issue from (or endorsed by) the end-client, the company that will actually be utilizing the Beneficiary's services, regarding the specific duties to be performed by the Beneficiary or the education required to perform those duties.

The context of the current scenario is not simply a business arrangement to provide services. Instead, the Petitioner has entered into such a relationship while simultaneously intending to assign H-1B personnel to perform the work. Inherent with employing foreign nationals are additional burdens a U.S. employer must satisfy when compared to hiring U.S. workers. A petitioner's burden of proof comprises both the initial burden of production, as well as the ultimate burden of persuasion.[13] First, a petitioner must satisfy the burden of production. As the term suggests, this burden requires a filing party to produce evidence in the form of documents, testimony, etc. Here, the Petitioner has not fully satisfied its burden of production. For instance, absent from the record is material from the end-client

[10] *Defensor*, 201 F.3d at 388.
[11] *Id.*
[12] *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).
[13] *Matter of Y-B-*, 21 I&N Dec. 1136, 1142 n.3 (BIA 1998); also see the definition of burden of proof from Black's Law Dictionary (11th ed. 2019) (reflecting the burden of proof includes both the burden of persuasion and the burden of production).

that aligns with the *Defensor* decision. As a result, it has not produced sufficient evidence to corroborate its testimonial claims.

Second, a petitioner must satisfy the burden of persuasion, meaning they must establish the degree to which the other evidence in the record should persuade or convince U.S. Citizenship and Immigration Services (USCIS) that the requisite eligibility parameters have been met (i.e., the obligation to persuade the trier of fact of the truth of a proposition).[14] Without probative material from (or endorsed by) the end-client, the Petitioner's and vendors' statements are not sufficient to demonstrate the actual work the Beneficiary would perform while assigned to the end-client worksite. In this case, whether a petitioner is able to show the end-client's actual position requirements is the determinant of whether they have met the preponderance of the evidence standard of proof.

With this standard in mind, a petitioner's prediction of the end-client's actual position requirements and job duties without sufficient supporting evidence, appears to be notional and falls short of satisfying the standard of proof. Materially relevant statements made without supporting documentation are of limited probative value and are insufficient to satisfy a petitioner's burden.[15] This is particularly important in a case such as this where the true nature of the proffered position appears dependent entirely upon outside clients to establish it.

If a petitioner is unable to establish the actual work a beneficiary will perform for a client and their prerequisites to perform them, we cannot determine whether the proffered position is a specialty occupation.[16] Within the petition, the Petitioner committed to assign the Beneficiary to specific work, at the end-client's location, for a particular timeframe. In the same manner that the Petitioner committed to compensate the Beneficiary at a particular wage in addition to multiple other factors it attested to, the organization must preponderantly demonstrate that all its essential commitments are more likely than not to occur (i.e., that the Beneficiary will perform duties that align with the end-client's actual position requirements). In other words, the Petitioner guaranteed USCIS that it would meet a set of parameters, and it is their duty to ensure their case gets to that preponderant apex.

Part of a petitioner's burden in the H-1B context is to demonstrate the actual duties a beneficiary will perform while deployed to an end-client worksite, by a preponderance of the evidence. The most relevant method is to provide material directly from the entity where the work will take place, which is the entity that possesses the greatest knowledge and understanding of how a foreign national's contributions will factor into its business model and its projects.[17] An absence of such material can create inexorable fissures in the evidence, while also undermining a petitioner's eligibility claims. The scenario in the present case is one in which the Petitioner presented no duties or position requirements

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[14] *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 274 (1994).
[15] *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998).
[16] We 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, we review the 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.
[17] *See Defensor*, 201 F.3d at 387-88.

from (or endorsed by) the end-client. Despite the Petitioner's statement within its request for evidence (RFE) response that the end-client letter at Exhibit 10 "explicitly confirms that the position requires a Bachelor's degree in a related field," we observe no such indication within that letter. This does not sufficiently inform USCIS of the substantive nature of the duties to be performed, and any particular academic requirements for the proffered position.[18]

What is not clear, is how the Petitioner—acting as a staffing agency that is situated three entities removed from the end-client, located more than 1,100 miles away, and with no apparent direct involvement with the ongoing work—would have sufficient insight into the breadth and progress of the project between the vendor and the end-client, that the petitioning organization could ascertain the detailed activities necessary to adequately complete the project. The Petitioner provided a set of duties and position qualifications within the initial filing, and expanded upon those within its response to the Director's RFE. However, similar to the *Defensor* case, the duties, education details, and experience requirements the Petitioner provided are much less probative to our analysis than these same elements from the end-client. At best, these Petitioner-provided details appear to be anticipated or notional.

Furthermore, even though the Petitioner provided letters from the vendors, these entities are not the organization where the Beneficiary would perform the work. When such statements are made without supporting documentation, they are of limited probative value and do not carry the weight to satisfy the Petitioner's burden of proof.[19] Additionally, the affidavits from the Beneficiary's coworkers also fall short of meeting the Petitioner's burden, as they are not a sufficient substitute for the end-client's position requirements. Although we grant these affidavits some evidentiary value, it is unnecessary that the degree of the agency's weight accorded to a petitioner's evidence correlates with that of the petitioning organization, provided the agency considers the content and grants an appropriate value.[20]

On the issue of the authority associated with the signatory on the end-client letter, the Petitioner states the signatory of the letter has offered their job title, address, and other contact information for verification purposes. The Petitioner further states that without a site visit and other evidence contradicting the authority of the signatory, USCIS cannot doubt the authority and knowledge of the signatory, and the Director failed to grant proper weight to the end-client letter. Although other shortcomings make it unnecessary to address this issue, we observe that the Petitioner only offered statements but no additional material from the end-client relating to the signatory's authority to represent the end-client company. The Petitioner has presented insufficient evidence to demonstrate the actual functions the Beneficiary would perform while assigned to the end-client's location.

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[18] We observe that the author of an opinion letter, professo[redacted] did not discuss the proffered position at the end-client. The absence of any substantive discussion of the duties specific to the end-client's business or its project raises doubts about his level of familiarity with the proffered position and also undermines his conclusion regarding the degree requirement of the position. 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.*

[19] *Soffici*, 22 I&N Dec. at 165.

[20] *Visinscaia v. Beers*, 4 F. Supp. 3d 126, at 134 (D.D.C. Dec. 16, 2013) (concluding that USCIS' decision to give little weight to uncorroborated assertions from professionals in the field was not arbitrary and capricious).

The Director's decision directly discussed the *Defensor* decision and how the end-client letter didn't conform to that decision. However, the Petitioner did not address that shortcoming within the appeal. This failure to address the issues attendant to the *Defensor* decision are dispositive of and adverse to the Petitioner's remaining claims within the appeal. Stated differently, because the Petitioner did not address all of the independent grounds within the Director's decision, we decline to analyze their eligibility under the remaining issues.[21] The Petitioner abandoned its claims surrounding the *Defensor* decision.[22]

Given the lack of information from the end-client, the Petitioner has not sufficiently established the substantive nature of the work that the Beneficiary will perform. This 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 heavily factors into each of these regulatory criteria.[23]

II. BENEFICIARY QUALIFICATIONS

Even if the above issues relating to *Defensor* were not present, we would also question whether the Beneficiary would meet the Petitioner's own requirements to qualify for the offered position considering the H-1B regulatory framework. The Beneficiary earned a foreign bachelor's of technology degree in mechanical engineering as well as a U.S. master's of engineering management. The Petitioner indicated that it required a bachelor's degree in computer science, information science, information technology, or a closely related field.

We find several shortcomings with [redacted]'s opinion letter in which he equated the Beneficiary's education and experience to the Petitioner's exact degree requirements. First, the Petitioner did not establish that [redacted] was "an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience."[24] The letter from [redacted] of [redacted] University's Registrar's office, only reflected that [redacted] provided associated support to the Program Director. From the language within [redacted]'s letter, it appears that [redacted] only makes recommendations for the granting of credit, rather than indicating that the professor actually possesses the authority to grant the requisite credit himself. As a result, the Petitioner has not offered probative evidence that the Beneficiary qualified for the offered position based on its own stated requirements.

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[21] *See Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible); *Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009) (generally finding that a waived ground of ineligibility may form the sole basis for a dismissed appeal).

[22] *See Matter of Zhang*, 27 I&N Dec. 569 n.2 (BIA 2019) (finding that an issue not appealed is deemed as abandoned); *Matter of Valdez*, 27 I&N Dec. 496, 496 n.1 (BIA 2018); *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012); *Matter of J-Y-C-*, 24 I&N Dec. 260, 261 n.1 (BIA 2007); *Matter of Cervantes*, 22 I&N Dec. 560, 561 n.1 (BIA 1999) *Matter of Edwards,* 20 I&N Dec. 191, 196-97 n.4 (BIA 1990). *See also Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n.2 (11th Cir. 2005).

[23] 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.

[24] *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*).

Next, within [redacted]'s letter, he concluded that the Beneficiary's computer-related courses he attended within his two collegiate-level degrees, combined with his work experience amounted to an equivalent of a United States bachelor's degree in mechanical engineering with a major in computer science.[25] The professor relied on the standard of substituting three years of work experience for each year of college-level training a foreign national lacks under 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) (three-for-one). This regulation requires that the Beneficiary's training and/or work experience satisfies all of the following:

1. The theoretical and practical application of specialized knowledge required by the specialty occupation;
2. That the foreign national's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and
3. That the foreign national has recognition of expertise in the specialty, which is demonstrated through one of five possible methods.[26]

Within his assessment, the professor combined the Beneficiary's education with his three years of employment experience in computer information systems to conclude these elements are equivalent to the Petitioner's degree requirements.

The professor indicated that he based the Beneficiary's qualifying work experience on reference letters from the foreign worker's current and former employers. The regulation equating three years of experience for one year of college contains the elements listed above in order to qualify. However, the professor did not explain how each of the reference letters satisfied all of the three-for-one requirements at 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*). We further note that [redacted] included within his experiential calculations approximately six months of the Beneficiary's time working for the petitioning company that occurred after the petition's filing date, which is not permissible. A petitioner must establish eligibility at the time it files the nonimmigrant visa petition.[27] USCIS may not approve a visa petition at a future date after a petitioner or a beneficiary becomes eligible under a new set of facts.[28]

Consequently, even if the Petitioner demonstrated the substantive nature of the work the Beneficiary would perform, the petition would remain denied as the organization has not demonstrated that the Beneficiary is qualified to occupy the position.

III. 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 a 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.

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[25] We further note that neither the Petitioner nor [redacted] have sufficiently explained the manner in which a mechanical engineering degree sufficiently relays the concepts one would require in order to perform the duties of the proffered position.

[26] *Id.*

[27] 8 C.F.R. § 103.2(b)(1), (12).

[28] *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978) (finding that nonimmigrant eligibility criteria must be met at the time a petitioner files the petition).

ORDER: The appeal is dismissed.