U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10189919

Date: SEPT. 28, 2020

Appeal of California Service Center Decision

Form I-129, Petition for a Nonimmigrant Worker

The Petitioner, an information technology 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) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director of the California Service Center denied the petition, concluding that the Petitioner did not establish that the proffered position qualifies as a specialty occupation, and did not establish the Beneficiary will perform services in a specialty occupation for the requested period of employment. On appeal, the Petitioner asserts that the Director erred in the decision.

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 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), defines the term "specialty occupation" as an occupation that requires:

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) largely restates this statutory definition, but adds a non-exhaustive list of fields of endeavor. In addition, the regulations provide that the proffered position must meet one of the following criteria to qualify as a specialty occupation:

> (*1*) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
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> (*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;
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> (*3*) The employer normally requires a degree or its equivalent for the position; or
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> (*4*) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. § 214.2(h)(4)(iii)(A). We construe the term "degree" 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").

II. ANALYSIS

The Petitioner identified the proffered position on the Form I-129, Petition for a Nonimmigrant Worker, as a software engineer. On the labor condition application (LCA) submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category "Software Developers, Applications" corresponding to the Standard Occupational Classification (SOC) code 15-1132.[1]

To establish eligibility, the Petitioner must establish that the proffered position qualifies as a specialty occupation, demonstrate that a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the Beneficiary for the duration of the employment period requested in the petition.[2]

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

[1] The Petitioner is required to submit a certified LCA to demonstrate that it will pay an H-1B worker the higher of either the prevailing wage for the occupational classification in the "area of employment" or the actual wage paid by the employer to other employees with similar duties, experience and qualifications who are performing the same services. *See* Section 212(n)(1) of the Act; 20 C.F.R. § 655.731(a).

[2] The Petitioner submitted documentation to support the H-1B petition, including evidence regarding the proffered position and its business operations. While we may not discuss every document submitted, we have reviewed and considered each one.

H-1B employment period. Specifically, the Petitioner did not provide sufficient documentation of the projects in which the Beneficiary will be part of and his duties on these specific projects to adequately convey the substantive work to be performed by the Beneficiary.

The Petitioner explained that the Beneficiary will work in-house and will work on "all aspects of the services provided to Petitioner's clients." The Petitioner's core product is [redacted] a "highly scalable [redacted]," that "helps tenants to build workflows without needing any technical expertise through the help of various triggers and connectors available as part of our services." Further, the Beneficiary is assigned to "developing functionality in [redacted] The Petitioner did not explain if this software is still in the development phases or completed. Although the Petitioner indicated that it develops software, it did not provide enough corroborating evidence of this activity such as a business plan for software development, or a project outline, or information regarding the budget and personnel needed to develop the new software.

In addition, the Petitioner explained that the Beneficiary will work in-house but on projects for clients. The Petitioner submitted projects and agreements for two clients but as noted by the Director, some agreements were expired while others were signed after the current petition was filed. United States Citizenship and Immigration Services (USCIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the Petitioner or Beneficiary becomes eligible under a new set of facts. *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 Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). In other words, eligibility for the benefit sought must be assessed and weighed based on the facts as they existed at the time the instant petition was filed and not based on what were merely speculative facts not then in existence. As such, the Petitioner has not sufficiently established that the petition was filed for non-speculative specialty occupation work for the Beneficiary that existed as of the time of the petition's filing.[3]

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[3] The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

> Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30,419, 30,419-20 (proposed June 4, 1998) (to be codified at 8 C.F.R. pt. 214). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

On appeal, the Petitioner explains that although some contracts are expired, the relationship between the two parties is ongoing as evidenced by enclosed invoices of new work. Upon review of the invoices submitted on appeal, several of the invoices are for monthly subscription fees for the use of [redacted] However, this continued working relationship with these clients does not indicate that the Beneficiary is working with these clients. The documentation does not provide evidence of the Beneficiary's duties and assignments with the clients since the invoices mostly indicate payment of a subscription fee. Further, since the clients are paying a subscription fee, it appears that the Petitioner's product is completed, and it is not clear the role of the Beneficiary as the software engineer for a finished product. It is of course possible that the Beneficiary is assisting the clients in utilizing the software system but the documentation does not provide sufficient information of the Beneficiary's assignment with the clients. While the invoices show that the Petitioner is selling a product, it is not clear if the Beneficiary will work on these projects as the Beneficiary is not listed in any of the documentation.

The Petitioner has not provided sufficient details regarding the nature and scope of the Beneficiary's employment or substantive evidence regarding the actual work that the Beneficiary would perform. 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. Because the Petitioner has not established the substantive nature of the Beneficiary's work, we are unable to evaluate whether 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.

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.

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.