U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9088747

Date: JULY 2, 2020

Appeal of California Service Center Decision

Form I-129, Petition for Nonimmigrant Worker

The Petitioner 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 Director of the California Service Center denied the petition, concluding that the evidence of record does not establish that the proffered position qualifies as 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, 8 C.F.R. § 214.2(h)(4)(i)(A)(*1*) states that an H-1B classification may be granted to a foreign national

[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 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").

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).

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. *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.

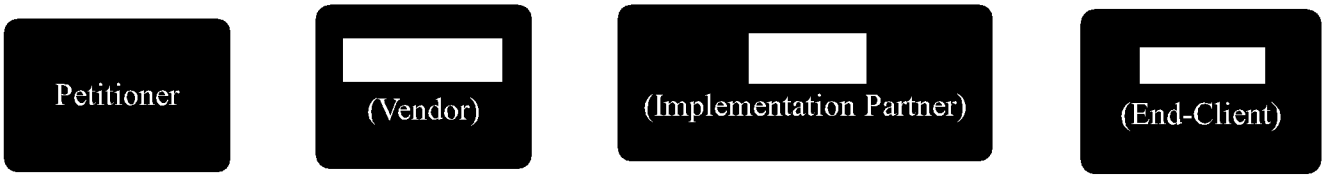
By regulation, the Director is charged with determining whether the petition involves a specialty occupation as defined in section 214(i)(1) of the Act. 8 C.F.R. § 214.2(h)(4)(i)(B)(*2*). The Director may request additional evidence in the course of making this determination. 8 C.F.R. § 103.2(b)(8). 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. PROFFERED POSITION

The Petitioner stated on the Form I-129, Petition for a Nonimmigrant Worker, and on the certified labor condition application (LCA),[2] that the Beneficiary would work as a software engineer for an end-client

[2] A petitioner submits the LCA to the U.S. Department of Labor (DOL) 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).

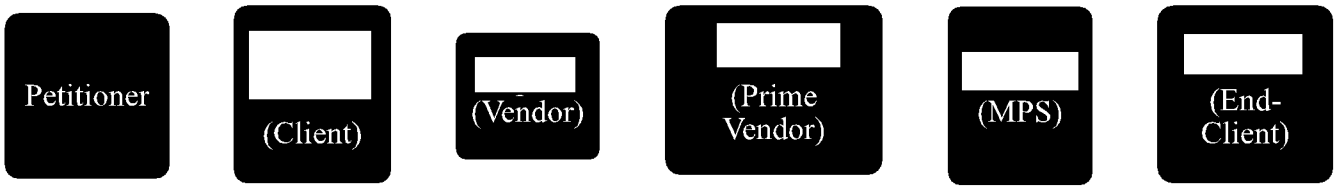
located in [redacted] California through agreements with a series of vendors. The Petitioner indicated the relationship with the end-client as follows:



The Petitioner submitted a Master Subcontractor Agreement between the Petitioner and its client. The scope of the agreement stated that the Petitioner will provide "programming, systems analysis, engineering, technical writing, or other specialized services as a Sub-Contractor directly to the [end-client] (as mentioned in Exhibit A)." The Petitioner also submitted a copy of Exhibit A, which was identified as a Purchase Order, indicating that the Beneficiary would serve as a "QA Automation Engineer" for [redacted][3] for a 24-month period beginning on March 4, 2019.

The Petitioner also submitted a letter from the claimed end-client, which stated that the Beneficiary was performing services at its location pursuant to its agreement with [redacted] It identified this agreement as "SOW# [redacted]" dated 03/28/2018. The Petitioner did not submit a copy of this agreement into the record.

In response to the Director's request for evidence (RFE), the Petitioner amended its claims regarding the contractual path of the Beneficiary's assignment by adding two new parties to the chain of agreements:



In support of this assertion, the Petitioner submitted numerous new documents. It submitted a Vendor Agreement between the client and the vendor, indicating that the client would provide information technology services to the vendor. According to a document entitled "Attachment," executed in August 2019, the Beneficiary would provide services to [redacted] beginning on June 1, 2019.

The Petitioner also submitted a Mutual Confidentiality and Nondisclosure Agreement between the vendor and [redacted] identified by the Petitioner as the Management Provider Services (MPS). This agreement appears to grant each party the right to use the other's confidential information "for the sole purpose of [redacted] Request for Proposal (Purpose)." No additional documentation regarding the nature of their relationship was submitted, and the relevance of this document is unclear.

In addition, the Petitioner submitted a redacted copy of a Managed Services Program Master Services Agreement (MSPMSA) between the prime vendor and the MPS. Though heavily redacted, the agreement indicated that the MPS will serve as the prime vendor's exclusive managed services

[3] It is unclear what role [redacted] plays in the claimed contractual path.

provider. An amendment to the MSPMSA was also submitted, which extended the term of the agreement to November 1, 2019.

The Petitioner also submitted letters from each of the parties which provide varying accounts of the terms of the Beneficiary's assignment and the duties to be performed pursuant to the assignment. A new letter from the end-client was also submitted, which was identical in structure to the letter previously submitted. However, the updated letter indicated that the Beneficiary's assignment was pursuant to an agreement identified as "[redacted]" dated 05/28/2019. The Petitioner did not submit a copy of this agreement into the record.

In denying the petition, the Director determined that the record contained insufficient evidence from the end-client to demonstrate that the Beneficiary would be performing services in a specialty occupation. On appeal, the Petitioner asserts that the Director's findings were erroneous, and submits new evidence for consideration.

III. ANALYSIS

Upon review of the record in its totality, we conclude that the Petitioner has not sufficiently established the services in a specialty occupation that the Beneficiary would perform during the requested period of employment, which precludes a determination of whether the proffered position qualifies as a specialty occupation under sections 101(a)(15)(H)(i)(b), 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(i)(A)(1), 8 C.F.R. § 214.2(h)(4)(ii) and (iii)(A).[4] Specifically, the record does not contain sufficient evidence to establish the services the Beneficiary will perform. Specifically, the record (1) does not describe the position's duties with sufficient detail; and (2) does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.

The record as constituted contains numerous discrepancies regarding the nature of the Beneficiary's assignment, and is confusing due to the number of parties involved in the contractual arrangement for her services. As outlined above, the Petitioner claims that the Beneficiary will perform services for the end-client through a series of agreement between four intermediary parties. The only contractual documentation that the Petitioner has directly entered into for the Beneficiary's services is with its direct client, [redacted], which indicates that the Beneficiary will perform services for [redacted] for a 24-month period commencing on March 4, 2019. In contrast, the two letters from the end-client indicate that the end-client will utilize the Beneficiary's services pursuant to agreements it has with the prime vendor, executed in March 2018 and May 2019, respectively. No explanation for this discrepancy was provided. Moreover, the role of [redacted] has not been defined, and adds further confusion with regard to the identity of the actual recipient of the Beneficiary's services. Finally, the role of the intermediary vendor and MPS, and their effect on the claimed contractual path, have likewise not been sufficiently defined. The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

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

On appeal, the Petitioner provides an abundance of new evidence pertaining to the claimed relationship between the prime vendor and the end-client. Specifically, the Petitioner submits a copy of a Software and Professional Services Agreement (SPSA) between the parties, as well as a copy of the [redacted]' agreement referred to in the end-client's second letter submitted in response to the RFE. We note, however, that the Director requested this type of material within the RFE, but the Petitioner did not submit it at that time. Multiple precedent decisions address whether newly submitted evidence on appeal will be considered. First, in *Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988), the Board of Immigration Appeals (BIA) determined that where a petitioner fails to timely and substantively respond to agency correspondence, the appellate body will not consider any evidence first offered on appeal as its review is limited to the record of proceeding before the district director.

Further, in *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988), the BIA held that if a petitioner was put on notice of an evidentiary requirement (by statute, regulation, form instructions, an RFE, notice of intent to deny, etc.) and was given a reasonable opportunity to provide the evidence, then any new evidence submitted on appeal pertaining to that requirement would not be considered, and the appeal would be adjudicated based on the evidentiary record before the director. *See also Matter of Jimenez*, 21 I&N Dec. 567, 570 n.2 (BIA 1996), which found that claims of eligibility presented for the first time on appeal are not properly before the appellate authority, and that the appellate body would not issue a determination on the new eligibility claims. Conversely, if the petitioner had not been put on notice of the deficiency or given a reasonable opportunity to address it before the denial, and on appeal the petitioner submits additional evidence addressing the deficiency, the record would generally be remanded to allow the director to initially consider and address the newly submitted evidence.[5]

For these reasons, except in exigent circumstances and at U.S. Citizenship and Immigration Services (USCIS) discretion, we will not consider evidence submitted for the first time on appeal if: (1) the affected party was put on notice of an evidentiary requirement; (2) the affected party was given a reasonable opportunity to provide the evidence; and (3) the evidence was reasonably available to the affected party at the time it was supposed to have been submitted.

The reason for filing an appeal is to provide an affected party with the means to remedy what it perceives as an erroneous conclusion of law or statement of fact within a decision in a previous proceeding.[6] An appeal is a request to a higher authority to review a decision and is an opportunity to illustrate how the Director's determinations were incorrect. The Petitioner should not make such a significant change to an element that serves as the underlying basis for eligibility at this stage of the process. A petitioner must establish eligibility at the time it files the nonimmigrant visa petition.[7] 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.[8]

Accordingly, a petitioner may not make material changes to a petition, to its claims, or to the evidence in an effort to make an apparently deficient petition conform to USCIS requirements.[9] Consequently, we will only consider the claims and evidence the Petitioner presented before the Director. If the Petitioner

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[5] *Soriano*, 19 I&N Dec. at 766.
[6] *See* 8 C.F.R. § 103.3(a)(1)(v).
[7] 8 C.F.R. § 103.2(b)(1), (12).
[8] *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978).
[9] *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998).

wished to address these newly offered issues and evidence, it should not start at the appellate stage, but before the initial reviewing authority. Therefore, to address this issue, the Petitioner should have either filed a motion to reopen before the Director, or presented the new material within a new petition filing.[10]

Even if we were to consider this newly-submitted evidence, the SPSA and accompanying work order '[redacted]' were both executed subsequent to the filing of the petition.[11] 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).

The record is devoid of sufficient documentation between the prime vendor and the end-client, and the parties in general, to understand the scope of services between the parties. The newly-submitted documentation on appeal is heavily redacted, and makes no reference to the Beneficiary, and would thus be of little probative value if we were to consider it. The documentation submitted prior to adjudication contained no similar agreements, and no documentation from the end-client was submitted to verify the claimed existence of an assignment for the Beneficiary. Absent supporting documentation such as contracts, detailed purchase orders or statements of work, or similar documentation, it is hard to determine the scope of services and the nature of the relationships between the parties. The Petitioner provided insufficient evidence towards substantiating that the petition was filed based on actual work that the Petitioner had secured for the Beneficiary for the end-client's location for the employment period sought in the petition, particularly given that the agreement to which the end-client refers was not executed until after the petition was filed.[12]

Finally, we note the submission of a new end-client letter on appeal, which for the first time provides a list of the duties to be performed by the Beneficiary. As noted above, however, the Petitioner was previously requested to provide such statements from the end-client in the RFE, but it declined to do so. Nevertheless, we note that brief statement of duties (a list consisting of six general software development tasks) is insufficient to establish the true nature of the proffered position. As recognized by the court in *Defensor*, where the work is to be performed for entities other than the Petitioner, evidence of the client's job requirements is critical. *Defensor*, 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.

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[10] *See Soriano*, 19 I&N Dec. at 766; *Obaigbena*, 19 I&N Dec. at 537. Further, matters that are raised for the first time on appeal will not normally be considered within the appellate proceedings. *McKenzie v. USCIS*, 761 F.3d 1149, 1154-55 (10th Cir. 2014) *cert. denied*, 135 S.Ct. 970 (2015). Such late-asserted claims, or evidence, are not contemporaneous and appear to be a direct response to an adverse aspect of the Director's decision. Without adequately presenting this issue before the Director, the Petitioner deprived the Director of the ability to sufficiently review the relevant factors. This is not a proper basis to raise these matters (or evidence) within the appeal.

[11] The Petitioner filed this petition on April 5, 2019. Both the SPSA and the work order were executed in May 2019, over a month after the petition was filed. Moreover, the Attachment to the Vendor Agreement between the Petitioner's client and the vendor, indicating that the client would provide information technology services to the vendor, was not executed until August 2019, and identified a start date of June 1, 2019, for the Beneficiary's assignment, approximately two months after the petition was filed.

[12] The Petitioner requested approval for the Beneficiary to work at the end-client location from October 1, 2019 until September 16, 2022.

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.

Here, the end-client's brief list of duties is vague. It does not identify any project upon which the Beneficiary would be assigned, and provides little insight on the nature of the Beneficiary's proposed assignment. Although the other entities in the contractual path provided lists of duties to be performed by the Beneficiary in their respective letters, we note that their assertions regarding the duties to be performed differ from the brief statement provided by the end-client. As noted previously, it is incumbent on the Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

Moreover, the end-client does not state the minimum qualifications for the position, such that we can determine whether the proffered position requires at least a bachelor's degree, or equivalent, in a specific specialty. The record as constituted does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.

Given the lack of detailed information from the end-client, and the inconsistent statements of duties provided by the various parties, we are unable to determine the substantive nature of the Beneficiary's work. Therefore, 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.

IV. 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.