U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 8818871

Date: JUNE 17, 2020

Appeal of California Service Center Decision

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

The Petitioner, a company engaged in software development and QA testing, seeks to temporarily employ the Beneficiary as a software test automation 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 evidence of record does not establish that the proffered position qualifies as a specialty occupation. 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 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

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).

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. 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

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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").

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).[2]

The Petitioner, which is in [redacted] California, asserts the Beneficiary will work for an end-client located in [redacted] California. However, 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 Petitioner explained that the Beneficiary will work on a long-term project with [redacted] the end-client. The Petitioner submitted a Master Professional Services Agreement (MPSA) between the Petitioner and the end-client. The MPSA stated that the Petitioner is a "leading supplier of IT professional services and has been selected to provide IT professional services based on its response to the request for proposal from the [end-client]." Further, it stated that the end-client is "entering into this Agreement in express reliance on the experience, expertise, skills and abilities of [the Petitioner] in providing IT professional services as represented by [the Petitioner]." Thus, the agreement indicated that the Petitioner would provide personnel to the end-client to work on projects, but it does not commit the end-client or the Petitioner for any particular services during any period or at any location. In sum, the MPSA has little probative weight towards establishing actual work to be performed by the Beneficiary for the end-client for any specific period or location.

Under the "statement of work" (SOW) section of the MPSA, it stated that the "[d]etails with respect to the Services, Resources, and Deliverables to be provided by [the Petitioner] hereunder, and the Fees therefor, shall be described in one or more written statements of work referencing this Agreement, in the form expressly agreed to by the parties, signed by the Parties' Authorized Representatives." The Petitioner submitted with the initial filing several statements of work from the end-client that "provided evidence of the long-term and continuing nature of the relationship between the Petitioner and the client." On appeal, the Petitioner explained that in June 2018, the Petitioner and the end-client "decided to change the practice of issuing and extending the SOW with periodic Change Orders." Further, the Petitioner explained that it executed a "long-term SOW' with the end-client that is valid until June 2020. Upon review of this SOW, it stated that the Petitioner will "provide IT Services to development projects through mutually agreed best practices based on industry best practices." The SOW also outlines processes and procedures for this type of working relationship. The SOW did not provide any specific information regarding the duties to be performed by the Beneficiary, the scope of the project, the phase of the project, or the team supporting the project. The SOW provided general terms for the relationship between the Petitioner the end-client but did not provide sufficient information regarding the specific work to be performed by the Beneficiary when working at the end-client location.

The Petitioner also submitted an unsigned job order that stated the Petitioner will assist the end-client on a project entitled, "Managed Teams Job Order to support CDS, RAD projects." The job order also provided a brief description of the purpose of the project to support and augment the end-client's framework, and a brief description of the required services for this job order such as the Petitioner will

[2] 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.

"create, maintain and execute automation scripts and framework for [the end-client's] native mobile application, RWD application and NMS Web Services." It also stated that the Petitioner will "not provide software but only provisioning services." The job order did not provide sufficient information of the project such as the mission and scope of the project, the team members on the project, an explanation of how the responsibilities are delegated to the team members; the detailed timeline of the project; or the complexity and milestones of the project. In addition, the job order did not list the Beneficiary as a resource working on this project.

Further, the Petitioner submitted a task order for the specific work to be provided by the Beneficiary to the end-client. The task order is a one-page document that listed the Beneficiary and the service type as "MT Contracting Services" and the services as "Test Eng[redacted]," and the duration of the services from June 30, 2019 until February 1, 2020. Although the task order indicated that the Beneficiary will be providing services to the end-client, it is unclear from the record how the end-client's proposed generalized functions would translate into specific duties the Beneficiary would perform and how such functions necessitate a bachelor's degree in a specialized field of knowledge.

The Petitioner also submitted email correspondence between the Beneficiary and the end-client confirming that the Beneficiary is working on client site in the role of Software Test Automation Engineer. The email also stated that the end-client is not authorized to provide letters of support related to work or visa related immigration matters.

Without 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.

In addition, the record does not sufficiently establish the project's duration. The Petitioner stated in the support letter that it is anticipated that the Beneficiary's services would be required until September 2022. The SOW end date is June 1, 2020 but the Petitioner stated that the SOW will be extended for another 2-year duration. The task order has an end date of February 2020. It is not clear why the duration dates are not consistent. In addition, the Petitioner did not submit sufficient evidence such as contracts or similar corroborating evidence that the project with the end-client will continue until September 2022 and will require the services of the Beneficiary as a software test automation engineer for that entire period.[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

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 agency made clear long ago that speculative employment is not permitted in the H-1B program. *See, e.g.,* 63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998).

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.

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.

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).