U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10792734

Date: SEPT. 28, 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 information technology management, seeks to temporarily employ the Beneficiary as a systems 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 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

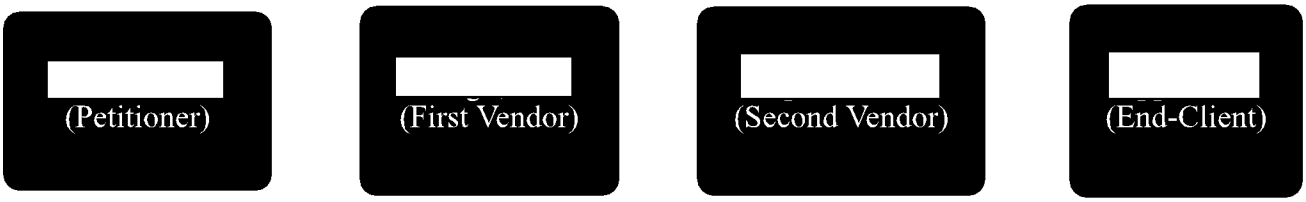
Upon review of the record in its totality, we conclude that the Petitioner has not sufficiently established the services in a specialty occupation that the Beneficiary would perform during the requested period of employment, which precludes a determination of whether the proffered position qualifies as a

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 asserts the Beneficiary will work for an end-client [via a first vendor and a second vendor]. 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 stated on the Form I-129, Petition for a Nonimmigrant Worker, and on the certified labor condition application (LCA), that the Beneficiary would work as a systems software engineer for an end-client located in [redacted]California, for the petition's entire employment period, October 2019 to August 2022.[3] The Petitioner indicated the relationship with the end-client as follows:



In support of the petition, the Petitioner submitted a contract agreement (CA) between the Petitioner and the first vendor. The agreement indicated that the Petitioner will provide personnel to the vendor or it's clients to work on projects. By the terms of its agreement, the document does not commit the Petitioner to any contract for any particular services during any period or at any location. In sum, the agreement has little probative weight towards establishing actual work to be performed by the Beneficiary for the end-client for any specific period or location. Furthermore, the agreement stated under section three, that the Petitioner "shall not have any direct communications or dealings of any type with Clients concerning Services provided hereunder and shall not promote [the Petitioner's] business interests in any communications and dealings hereunder with Clients." This statement in the CA undermines the Petitioner's claim that it retains the control of the Beneficiary's duties when working for the end-client.

The Petitioner submitted Exhibit A of the CA which consists of two purchase orders between the Petitioner and the first vendor. The most recent purchase order indicated that the Beneficiary would work for the end-client as a systems software engineer commencing on July 24, 2017 until September 1, 2019. Upon review of the purchase order, it did not provide any information regarding the scope of the project, the phase of the project, or the team supporting the project. The purchase order also did not describe the duties to be performed by the Beneficiary, and how such functions necessitate a bachelor's degree in a specialized field of knowledge.

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[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.

[3] 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).

The Petitioner also submitted the master staffing agency agreement between the first vendor and the second vendor.[4] The contract states that the second vendor will appoint the first vendor to "deploy personnel on temporary roles to perform temporary services for [the second vendor] or [second vendor's] clients." The agreement further stated that a statement of work will "set forth the work product to be produced by [the vendor]." Although the agreement indicates a working relationship between the first vendor and the second vendor, it does not provide any specific information regarding the Beneficiary's work with the end-client such as the project, the responsibilities, and/or the duration of the project. In addition, the Petitioner provided an unsigned, computer print-out of a work order between the first vendor and the second vendor. The work order provided a project code and a work location of [redacted] The work order neither names the Beneficiary, nor provides any specific information of the project the Beneficiary will work on for the end-client, or the duties to be performed while working at the end-client location.

It is further challenging to understand the project mission and goals without a contract or statement of work between the second vendor and the end-client. The Petitioner explained that these documents are confidential but the Petitioner did not provide sufficient evidence to determine the scope of the working relationship with the end-client, and understand the project's mission and duties and the role of the Beneficiary on that project. As evidence of the work with the end-client, the Petitioner submitted a letter from the end-client that confirms it has a working relationship with the second vendor, and that the Beneficiary is working at the end-client location. However, the end-client letter did not describe the project and provided three general "tasks associated with the services provided by Vendor." The general duties include, "requirements gathering;" "developing/coding;" and, "implementation/deployment." Again, the end-client letter did not provide any specific information of the project the Beneficiary will work on for the end-client, or the duties to be performed while working at the end-client location.

The Petitioner also submitted letters from the first and second vendors confirming that they have a working relationship with the Petitioner, and that the Beneficiary will provide services to the end-client. The letters are almost identical and provided ten job duties to be performed by the Beneficiary. On appeal, the Petitioner explained that the second vendor is "utilizing the Beneficiary's services and is therefore in a better position (than [the end-client]) to ascertain the scope and duration of the Beneficiary project at [the end-client]..." The second vendor provided duties, but it is unclear how these duties fall into the needs of the project for the end-client. Although the second vendor provided a general description of the Beneficiary's duties, it did not explain in detail the scope of the project, the number and type of resources needed for the particular project, a timeline, milestone tables, technical documentation, budget, or other evidence to establish the existence and ongoing nature of the project. Without consistent, probative evidence of the proposed duties detailed in the context of a specific project, the record does not communicate (1) the actual work that the Beneficiary will perform on a day-to-day basis; (2) the complexity, uniqueness and/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.

[4] On appeal, the Petitioner asserts that the second vendor is an implementation partner. However, the letter from the end-client names this company as a "vendor" rather than an implementation partner. Thus, we will utilize the title second vendor for this decision.

Without supporting documentation such as contracts, detailed purchase orders or statements of work, and detailed information of the project and the Beneficiary's role on the project, 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 Petitioner did not submit sufficient evidence such as contracts, budget allocation, or similar corroborating evidence that the project with the end-client will continue until August 2022 and will require the services of the Beneficiary as a systems software engineer for that entire period.[5] The documentation indicated inconsistent information regarding the duration of the project. For example, the purchase order between the Petitioner and the first vendor stated an end date of September 1, 2019 with "possible extensions;" the letters from the first and second vendors indicated an end date of August 25, 2022; the work order between the first and second vendors stated an end date of October 1, 2020; and, the letter from the end-client letter stated the anticipated project duration as two years but did not state when the project commenced. 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

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[5] 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).

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.