U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9097841

Date: JUNE 30, 2020

Appeal of California Service Center Decision

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

The Petitioner, an accounting and consulting firm, seeks to employ the Beneficiary temporarily as a "data analytics and automation manager" 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, concluding that the record did not establish that the proffered position qualified as a specialty occupation. 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. 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.[4] Lastly,

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[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).

[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*

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 Petitioner's education requirements, 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).

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.[5] The Director may request additional evidence in the course of making this determination.[6] In addition, a petitioner must establish eligibility at the time of filing the petition and must continue to be eligible through adjudication.[7]

II. ANALYSIS

The Petitioner initially provided the position's description and expanded on those duties in response to the Director's request for evidence (RFE). For the sake of brevity, we will not quote the most recent version; however, we note that we have closely reviewed and considered the duties. For the reasons discussed below, we have determined that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation.[8] Specifically, we conclude that the record does not establish that the job duties require an educational background, or its equivalent, corresponding with a specialty occupation.[9]

A. Petitioner's Degree Requirement

Throughout these proceedings, the Petitioner has maintained that the proffered position requires "at least a bachelor's degree in a relevant field, or the equivalent," without any further detail or guidance regarding what it would consider as "a relevant field." We cannot intuit the breadth of the disciplines the Petitioner would, or would not, consider to be sufficiently related.

Within the RFE response, the Petitioner offered a list of 36 duties within a bulleted list and stated those duties are so complex and specialized that they require the application of a specific body of specialized knowledge that included a vast range of concepts one might encounter in numerous information technology fields. Those fields spanned the spectrum ranging from programming languages,

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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)(i)(B)(*2*).

[6] 8 C.F.R. § 103.2(b)(8).

[7] 8 C.F.R. § 103.2(b)(1).

[8] Although some aspects of the regulatory criteria may overlap, we will address each of the criteria individually.

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

networking, databases, and quantitative topics. On appeal, the Petitioner refers to that spectrum as a "massive body of specialized knowledge." Most importantly, those information technology concepts are only tied to 3 or 4 of those 36 bulleted duties in any discernable way. Consequently, it did not establish that its position prerequisites were sufficiently associated with the position's duties. Additionally, the Petitioner's "massive body of specialized knowledge" appears as if it would encompass almost any job within the information technology industry as it is so extensive.

For example, if we were to presume that the Petitioner meant that it would accept any computer-related field, this is a broad category that covers numerous and various specialties, including video game design, cartography, and computer service and maintenance. This should not be interpreted that we expect the Petitioner to accept a single discipline. It is not readily apparent that every computer-related degree would be directly related to the duties and responsibilities of the proffered position. Without more, the petition is not approvable based upon the Petitioner's own stated minimum education requirements. Nevertheless, we will address the remaining regulatory framework below.

B. First Criterion

We now turn to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position. To inform this inquiry, we recognize U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*) as a resource on the duties and educational requirements of the wide variety of occupations that it addresses.[10] The Petitioner submitted the required DOL ETA Form 9035 & 9035E, Labor Condition Application for Nonimmigrant Workers with this petition, where it classified the proffered position under the occupational title "Information Technology Project Managers," corresponding to the standard occupational classificational code 15-1199.09.

We note that the Director discussed the shortcomings of two resources under this criterion: (1) the *Handbook* under the Computer Occupations, All Other profile, and (2) the Occupational Information Network (O*NET) report for Information Technology Project Managers. Upon consideration of the entire record, including the evidence submitted and arguments made on appeal, we adopt and affirm the Director's determination under this criterion with the comments below.[11] Although we agree with the Petitioner that the website relating to the *Handbook* may reflect that the typical entry-level

[10] We do not maintain that the *Handbook* is the exclusive source of relevant information. That is, the occupational category designated by the Petitioner is considered as an aspect in establishing the general tasks and responsibilities of a proffered position, and we regularly review the *Handbook* on the duties and educational requirements of the wide variety of occupations that it addresses. Nevertheless, to satisfy the first criterion, the burden of proof remains on the Petitioner to submit sufficient evidence to support a determination that its particular position would normally have a minimum, specialty degree requirement, or its equivalent, for entry at any level; be it at the entry level (Level I), or at the fully competent level (Level IV). "[T]he choice of what reference materials to consult is quintessentially within an agency's discretion . . . ." *Royal Siam Corp.*, 484 F.3d at 146.

[11] *See Matter of P. Singh, Attorney*, 26 I&N Dec. 623 (BIA 2015) (citing *Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994)); *see also Chen v. INS*, 87 F.3d 5, 7-8 (1st Cir. 1996) ("[I]f a reviewing tribunal decides that the facts and evaluative judgments prescinding from them have been adequately confronted and correctly resolved by a trial judge or hearing officer, then the tribunal is free simply to adopt those findings" provided the tribunal's order reflects individualized attention to the case).

education is a bachelor's degree, it does not indicate any type of discipline for that degree.[12] A requirement for a bachelor's degree alone is not sufficient. As noted above, we have consistently interpreted 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.[13]

Additionally, Petitioner's counsel attempts to attribute findings to the Director's decision that she did not make. For instance the appeal brief states the Director's assertion that based on the lack of specific information within the *Handbook* and O*NET relating to a bachelor's degree requirement in a specific specialty (or its equivalent), that the agency was requiring the Petitioner to demonstrate the degree be in "a single field of study." Counsel then cites to two district court cases in support of its position.

However, the Director neither stated nor implied that the Petitioner must show a degree requirement in "a single field of study." Instead, the Director noted the Petitioner's failure to demonstrate that any of its cited resources showed that this particular position required a bachelor's degree or higher in a specific specialty, or its equivalent. The Director's allowance for an equivalent directly rebuts the Petitioner's arguments that she somehow mandated that the degree be in "a single field of study." Additionally, the Director discussed how the district court decisions the Petitioner relies on were not relative and the Petitioner does not explain how the Director erred in that analysis.

Petitioner's counsel also states within the appeal that "there is no requirement in law, regulation or policy requiring petitioners to 'demonstrate that a bachelor's degree in any specific specialty is required;' rather, the regulation asks the petitioner to establish whether 'a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position . . . ." Counsel's position ignores long-standing implementation, which, as indicated above, a requirement for a bachelor's degree alone is not sufficient. Instead, we have consistently interpreted 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.[14]

Counsel's statement further ignores other regulatory requirements that describe the process of qualifying under the H-1B program to include more than satisfying one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). The regulation also requires a petitioner to demonstrate that a petition "involves a specialty occupation as defined in section 214(i)(1) of the Act."[15] This statutory definition states: "the term 'specialty occupation' means. . . attainment of a bachelor's or higher degree *in the specific specialty* (or its equivalent) . . . " (emphasis added). Counsel may not bifurcate the regulation to support a lesser standard.[16] Therefore, U.S. Citizenship and Immigration Services (USCIS) did not impose novel substantive or evidentiary requirements beyond those within the implementing regulation.

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[12] *Data for Occupations Not Covered in Detail*, U.S. Bureau of Labor Statistics (June 2, 2020), https://www.bls.gov/ooh/about/data-for-occupations-not-covered-in-detail.htm#Computer%20and%20mathematical%20occupations.

[13] *See Royal Siam Corp.*, 484 F.3d at 147; *Defensor*, 201 F.3d at 387.

[14] *Id.*

[15] 8 C.F.R. § 214.2(h)(4)(i)(B)(*2*); *see also* 8 C.F.R. § 214.2(h)(1)(ii)(B)(*1*).

[16] In construing a statute or regulation "we attempt to give full effect to all words contained within that statute or regulation, thereby rendering superfluous as little of the statutory or regulatory language as possible." *Sullivan v. McDonald*, 815 F.3d 786, 790 (Fed. Cir. 2016) (quoting *Glover v. West,* 185 F.3d 1328, 1332 (Fed.Cir.1999)).

The Petitioner has not provided documentation from a probative source to substantiate its assertion regarding the minimum requirement for entry into this particular position. Therefore, it has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

C. Second Criterion

Throughout the proceedings, the Petitioner has not claimed to qualify under this criterion, and it has not offered evidence to apply to the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

D. Fourth Criterion

As the Petitioner organized its appellate arguments out of sequential order, we discuss the fourth criterion here. The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

Within the proceedings before the Director, the Petitioner relied on its job description initially offered as well as a letter from [redacted], the organization's managing director. The Director concluded that the Petitioner's presentation: (1) did not adequately explain why the duties were sufficiently complex and would require someone with a qualifying degree; (2) lacked information relating to the specific tasks, methodologies, and applications of knowledge the duties would require; and (3) was overly general and lacked sufficient detail to show that the nature of the duties were so specialized and complex that they would satisfy this criterion's requirements. On appeal, the Petitioner continues to rely on [redacted]s letter and asserts that the Director did not properly consider its contents. Therefore, we will discuss [redacted]s letter here.

As previously noted, [redacted] listed 36 bulleted duties and she grouped them into 9 categories, then summarized that those duties are so complex and specialized that they require the application of a "massive body of specialized knowledge." What is not apparent from [redacted]s letter, or from the remainder of the record, is how the majority of the bulleted duties are associated with the large body of specialized knowledge she provided. Of the 36 duties [redacted] provided, at best 4 appear sufficiently related to the lengthy list of specialized knowledge within her letter; approximately 11 percent. The Petitioner must demonstrate how its acceptable fields of study are directly related to the duties and responsibilities of the particular position. Otherwise, an employer could "ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement."[17] As a result, this H-1B petition is not approvable because there is only an attenuated connection between the position's duties and the claimed specialized degree requirements.

Furthermore, on appeal the Petitioner requests that [redacted]'s letter be treated as expert testimony. Expert opinions, as well as other statements or opinions, should provide more than a list of the duties accompanied by a simple conclusory statement that those functions require a particular degree and

[17] *Royal Siam Corp.*, 484 F.3d at 147.

discipline. For such material to serve as probative evidence, petitioners should ensure the author of the opinion provides an explanation regarding their statements that might allow us to draw a sufficient nexus to a particular curriculum. That explanation is absent from [redacted]'s correspondence, as she provided the duties then transitioned directly to her statement that those functions "are so complex and specialized that" they require "at least a bachelor's degree in a relevant field, or the equivalent."

Ms. Tiernan did not qualify her declarations with sufficiently detailed analysis and the conclusion the Petitioner requests us to draw from her opinion is not self-evident. We are not required to accept cursory or primarily conclusory statements as demonstrating eligibility.[18] Consequently, whether we treat [redacted]'s letter as correspondence from the Petitioner or as expert testimony, it does not stand as sufficiently probative evidence that satisfies the Petitioner's burden of proof under this criterion.

Although the Petitioner asserts that the nature of the specific duties is specialized and complex, the record lacks sufficient evidence to support this claim. Therefore, the Petitioner has submitted insufficient evidence to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

E. Third Criterion

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position.

The record must establish that a petitioner's stated degree requirement is not a matter of preference for high-caliber candidates but is necessitated instead by performance requirements of the position.[19] Were USCIS limited solely to reviewing the Petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the Petitioner created a token degree requirement.[20] Evidence provided in support of this criterion may include, but is not limited to, documentation regarding the Petitioner's past recruitment and hiring practices, as well as information regarding employees who previously held the position.

On appeal the Petitioner claims that the Director ignored the plain language requirements of the regulation, relies on [redacted]'s letter as evidence reiterating that it should be treated as expert testimony, and without explanation argues the Director unilaterally imposed novel, substantive, or evidentiary requirements beyond those set forth in the regulation. The Petitioner further contends that the Director "did not consider and address the applicable evidence of record in the context for which that evidence was offered . . . ."

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[18] It is insufficient to allege eligibility through conclusory assertions that are not supported by sufficient evidence, which proves the allegation. *Matter of Ho,* 22 I&N Dec. 206, 213 (Assoc. Comm'r 1998); *see also Innova Sols., Inc. v. Baran*, 338 F. Supp. 3d 1009, 1023 (N.D. Cal. 2018); *1756, Inc. v. Att'y Gen*, 745 F. Supp. 9, 17 (D.D.C. 1990).

[19] *See Defensor*, 201 F.3d at 387–88. A petitioner must demonstrate that its imposed requirements are genuine. *Sagarwala v. Cissna*, 387 F. Supp. 3d 56, 69 (D.D.C. 2019). *Cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (BIA 1988) (finding: (1) the requirement of a degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, does not establish eligibility; and (2) an analysis of eligibility includes not only the actual requirements specified by the petitioner but also those required by the specific industry in question, to determine, in part, the validity of a petitioner's requirements).

[20] *Defensor*, 201 F.3d at 387–88.

First, the Petitioner did not explain how the Director ignored the regulatory language or imposed additional burdens on it under this criterion. As a result, we will not discuss those allegations further. Second, we disagree with the Petitioner that the Director did not consider and address the applicable evidence. The Director quoted directly from the Petitioner's correspondence relating to [redacted]'s letter but found it insufficient to meet this criterion's requirements.

Considering [redacted]'s letter, she addressed the duties and the knowledge usually associated with those functions. However, she did not discuss the Petitioner's historical hiring practices for the offered position or whether the employer normally requires a qualifying degree or its equivalent for the position. As a result, the letter from [redacted] does not sufficiently aid the Petitioner in meeting this criterion's requirements.

Of the remaining material, we have internal documentation for other personnel that the Petitioner claims occupy similar positions and the Petitioner's statements. Relating to the internal documentation, we conclude this evidence also falls short of aiding the Petitioner's efforts under this criterion. This material consists of a profile sheet listing the employee's name, job title, work experience, and education. Lacking from the record is an indication the number of personnel the Petitioner has employed in the position. The Petitioner did not indicate how many personnel it has employed in the proffered position, and we will not presume that three profiles submitted in the RFE response accurately represents that number.

Further, even if we were to presume these three profiles fully represented the entirety of its data analytics and automation manager hiring, the Petitioner has not demonstrated the duties the personnel in the profiles perform for it are sufficiently similar to the position it offers in this petition. Lacking from the record is probative evidence establishing the duties these personnel perform for the petitioning organization. Moreover, the job titles are not consistent between any of the three profiles. As a result, the evidence relating to the Petitioner's other personnel does not meet this criterion's requirements.

Finally, regarding the Petitioner's claims within its correspondence that they normally require a degree or its equivalent for the position, the Director addressed this aspect noting the Petitioner's statements that were not accompanied by probative evidence were no more than self-imposed standards that were inadequate to demonstrate eligibility under this criterion. In other words, the Petitioner's claims of its hiring practices that are not corroborated with sufficient evidence were unsupported assertions. Such statements made without supporting documentation are of limited probative value and are insufficient to satisfy the Petitioner's burden of proof.[21]

Without more, the Petitioner has not provided sufficient evidence to establish that it normally requires at least a bachelor's degree in a specific specialty, or its equivalent, for the proffered position. Therefore, it has not satisfied the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Consequently, the Petitioner has not satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

[21] *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998).

F. Definitional Requirement

The process of demonstrating that a proffered position is sufficient to meet the requirements under the H-1B program includes more than satisfying one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). The regulation also requires a petitioner to demonstrate that a petition "involves a specialty occupation as defined in section 214(i)(1) of the Act."[22] This statutory definition states: "the term 'specialty occupation' means an occupation that requires . . . [a] 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." (Emphasis added).

First, both the statutory and regulatory definitions mandate that the broader occupation as a whole requires a bachelor's degree in a specific specialty (or an equivalent), at the entry level.[23] Consequently, an H-1B approval demands more than simply demonstrating that the particular position a petitioner is offering normally requires a bachelor's degree or its equivalent as the minimum for entry under criterion one. A petitioner must also establish that one cannot even enter the broader occupation if they do not possess the qualifying degree (or its equivalent).

Second, we reason that the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) should be read logically as being necessary—but not necessarily sufficient—to meet the statutory and regulatory definition of a specialty occupation. To otherwise interpret the regulatory criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) as stating the necessary, but not necessarily sufficient conditions as being adequate to qualify would result in some positions meeting a condition under the criteria, but not under the statutory definition.[24] To avoid this erroneous result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory definition of a specialty occupation. This results in a multi-part analysis to determine whether a particular position qualifies as a specialty occupation. As a result, an H-1B petition cannot be approved unless a petitioner demonstrates that a proffered position satisfies this statutory definition; not even if it demonstrates it has satisfied one of the four regulatory criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Accordingly, were a petitioner to submit sufficient evidence to satisfy one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), we would still have to evaluate whether it had also demonstrated that the broader occupation as a whole requires a bachelor's degree in a specific specialty (or an equivalent), even at the entry level. We conclude that in addition to not meeting any of the regulatory criteria, the Petitioner has not demonstrated the position in this petition qualifies as a specialty occupation under the statutory definition.

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[22] 8 C.F.R. § 214.2(h)(4)(i)(B)(*2*); *see also* 8 C.F.R. § 214.2(h)(1)(ii)(B)(*1*).

[23] *See Itserve All., Inc. v. Cissna*, No. CV 18-2350 (RMC), 2020 WL 1150186, at *19 (D.D.C. Mar. 10, 2020) (recognizing that a specialty occupation would encompass a host of jobs, beginning at the trainee level and extending to an expert along with concomitant but differing personal job duties).

[24] *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000); *Sagarwala v. Cissna*, 387 F. Supp. 3d 56, 64 (D.D.C. 2019).

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. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.