U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10106676

Date: JULY 23, 2020

Appeal of California Service Center Decision

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

The Petitioner, an information technology services provider, seeks to extend the Beneficiary's temporary employment 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, and that it did not reflect the requisite employer-employee relationship. 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 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), 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.

[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).

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) adds a non-exhaustive list of fields of endeavor. In addition, the regulations provide that the offered 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
>
> (*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.[4]

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.[5]

II. ANALYSIS

The Petitioner, located in Michigan, seeks to employ the Beneficiary at an offsite location for [redacted] (end-client) in Indiana through multiple mid-vendors. Based on a lack of sufficient evidence, we conclude that the Petitioner has not established the substantive nature of the position, which precludes a determination that the proffered position qualifies as a specialty occupation under at least one of the four regulatory criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*)–(*4*).

We begin noting the Petitioner indicated on the appeal form that it would submit a brief and/or additional evidence within 30 days of filing the appeal. Further, within the brief offered with the appeal form, the Petitioner indicated that additional evidence would accompany its arguments. However, we have not received anything further from the Petitioner to date.

Turning to the case, the Petitioner initially provided the position's description and indicated its education requirements for the proffered position. However, as recognized by the court in *Defensor*, 201 F.3d at 387–88, 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.[6] Such evidence must be

[4] 8 C.F.R. § 214.2(h)(4)(iii)(A).
[5] *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"); *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).
[6] *Id.*

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.

First, the present scenario is analogous to that of the *Defensor* decision, as one in which the duties the Beneficiary will actually perform and the qualifications to perform them should originate from the end-client.[7] The material from the end-client should sufficiently convey the functions the Beneficiary would actually perform in his daily work.

We observe multiple issues with the material from the end-client. Notably, the duties the client provided are overly generalized, which undermines the Petitioner's claims that the position's duties are specialized and complex. For example, it is unclear what theoretical and practical application of a body of highly specialized knowledge is required in "[e]stablishing a detailed program specification through discussion with clients," in "[e]valuating and increasing the program's effectiveness," or in "[a]dapting the program to new requirements, as necessary." We note that the Petitioner provided additional position details in an attempt to demonstrate the duties were sufficiently specialized and complex that they would require the attainment of at least a bachelor's degree in a specific specialty. However, as the Beneficiary would perform those functions at and on behalf of the end-client, we conclude that such job details should also originate from the end-client who possesses the greatest familiarity with its own project.[8]

From the indeterminate nature of the duties, it is not self-evident that they are qualifying under the H-1B program. Without more, it would be difficult to conclude that such amorphous duties are so specialized and complex, or that the duties comprise a position that is so complex or unique, that one must attain a bachelor's degree in a specific specialty in order to perform them.[9] It is always the Petitioner's responsibility to ensure the record demonstrates what functions make up a position, and how those tasks demonstrate eligibility.[10] Additionally, the truth is to be determined not by the quantity of evidence alone but by its quality.[11] The Petitioner should ensure the material duties sufficiently convey the Beneficiary's regular activities at the end-client location, which allows a person without a great familiarity with the technical nature of these functions to be able to grasp what the position consists of, and why it and the duties are so specialized and complex.[12] To establish eligibility, the end-client must describe the Beneficiary's specific duties and responsibilities in the context of the assigned project; but it has not done so here.[13]

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[7] It is important to note that within the reference to the *Defensor* decision, we are not correlating the Petitioner's business model as a simple token employer. However, it is apparent that the Beneficiary would provide services to the end-client, not to the Petitioner. Furthermore, we conclude that it is more likely than not that the end-client possesses the technical knowledge of the duties that would comprise the proffered position, as well as the requirements to perform those duties.

[8] *See Defensor*, 201 F.3d at 387-88.

[9] *Cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm'r 1988) (indicating U.S. Citizenship and Immigration Services (USCIS) must evaluate the actual tasks, demands, and duties to determine whether a petitioner has established the position realistically requires the specialized knowledge—both theoretical and applied—which is almost exclusively obtained at the baccalaureate level). A broad and generalized presentation of a position's responsibilities prevents USCIS from making such a determination. *See also Sagarwala v. Cissna*, 387 F. Supp. 3d 56, 68 (D.D.C. 2019).

[10] Section 291 of the Act, 8 U.S.C. § 1361.

[11] *Chawathe*, 25 I&N Dec. at 376 (citing *Matter of E-M-*, 20 I&N Dec. 77, 80 (Comm'r 1989)).

[12] *See Sagarwala*, 387 F. Supp. 3d at 68-70.

[13] We further note that the end-client did not provide sufficient information with regard to the order of importance and/or frequency of occurrence (e.g., regularly, periodically, or at irregular intervals) with which the Beneficiary will perform the stated functions and tasks. Thus, the record does not specify which tasks are major functions of the proffered position.

Second, the opinion letter from [redacted] a faculty member of [redacted] University, also does not establish that the position in the petition satisfies the requirements under the H-1B program. Although [redacted] mentioned the end-client, he relied on the additional position details the Petitioner provided as a primary basis for his overall opinion that the position qualified as a specialty occupation. However, as we noted above, those additional details the Petitioner provided should not factor into the eligibility analysis. As a result, this significantly diminishes the evidentiary value of [redacted]'s opinion. Additionally, [redacted] opined:

> [T]he duties of the proffered position are firmly within the scope of the specialized education covered in a standard degree programs [*sic*] in Bachelor degree, or equivalent, in a field such as [the Petitioner's previously stated degree requirements]. Both Universities/Academics and Employers expect that after completing an undergraduate degree, or the equivalent, in [the Petitioner's previously stated degree requirements], a graduate will be able to successfully perform this position's duties with minimal on-the-job training.

[redacted] also stated that the duties "fit within" topics covered in a computer science curriculum. We acknowledge that in support of his conclusions, the professor cited to material located on a website maintained by the Association for Computing Machinery's Special Interest Group for Information Technology Education, but he did not provide copies of the specific material that he referenced as part of his analysis. Additionally, the Petitioner did not submit evidence to establish that this website is an authoritative source on the duties and educational requirements of the "Software Developers, Applications" occupation.

Nonetheless, we conclude that within the professor's analysis, he confused *the ability* of a degreed candidate to perform the duties of this position with the mandatory requirements under the H-1B program: a bachelor's degree in a specific specialty is *required to perform* the duties. While the professor may draw inferences that computer science or information technology related courses may be beneficial in performing certain duties of the position, we disagree with his inference that such a degree is required in order to perform them. Put simply, stating for instance that a person with a bachelor's degree in computer science could perform the duties of the proffered position is not the same as stating that such a degree is required to perform those duties. As such, the professor's analysis misconstrues the statutory and regulatory requirements of a specialty occupation.

We observe several other deficiencies within [redacted]'s opinion; however, we deem it unnecessary to detail each one of them here. The final issue we note is [redacted]'s statement that "[b]ecause most if not all of the positions duties are within the scope of the topics taught in [a] University level Bachelor degree . . . in the field such as Computer Science, or another closely related field . . . the position must be considered sufficiently specialized and complex [to satisfy the H-1B requirements]." We disagree with this line of reasoning as it has the potential of leading to erroneous results. The simple fact that the knowledge needed to perform a position's duties is taught within a

university curriculum does not automatically translate into that position qualifying as a specialty occupation.[14]

Third, even if the duties from the end-client were sufficient under the H-1B program and in accordance with the *Defensor* decision, the Petitioner provided these same functions within the initial filing nearly eight months prior to the email from the end-client in which the client provided the generalized duties. As a general concept, when a petitioner has provided material from different entities, but the language and structure contained within is notably similar, the trier of fact may treat those similarities as a basis for questioning a petitioner's claims.[15] When correspondence contain such similarities, it is reasonable to infer that the petitioner who submitted the strikingly similar documents is the actual source from where the similarities derive.[16]

Given the unique similarities in the duties and the order in which the Petitioner presented the evidence, we conclude that the Petitioner has not established, by a preponderance of the evidence that the duties originated from the end-client. We conclude that—in accordance with *Defensor*, 201 F.3d at 387–88, which provides that when the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical—the Petitioner has not demonstrated these elements are the end-client's actual requirements. The Petitioner must resolve this ambiguity in the record with independent, objective evidence pointing to where the truth lies.[17] Because someone other than the author of the end-client's email appears to have drafted a portion of the end-client correspondence as it relates to the duties, we ascribe it with diminished probative value. In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality.[18] While we are unable to determine the original source of the proposed duties, it remains the Petitioner's burden to establish the duties are the requirements actually imposed by the entity using the Beneficiary's services.[19] Here, the Petitioner has not offered sufficiently probative evidence in this matter.

Finally, even if the above deficiencies were not present, we would still question whether the duties contained within the end-client correspondence are the actual job functions the Beneficiary would perform at the client worksite. Most of the duties contained within the end-client correspondence can be found in online job advertisements.[20] While such a general description may be appropriate when defining the range of duties that one may perform within an occupation, such a generic description generally cannot be relied upon by the Petitioner when discussing the duties attached to specific

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[14] For example, the duties of a bookkeeping clerk may be taught within a bachelor's degree program for accountants, but that does not mean that a bookkeeping clerk position must be considered to qualify under the H-1B statute and regulations. Nor would a paralegal position qualify simply because paralegal topics are taught within a law degree program.

[15] *See Matter of R-K-K-*, 26 I&N Dec. 658, 665 (BIA 2015); *Surinder Singh v. Board of Immigration Appeals*, 438 F.3d 145, 148 (2d Cir. 2006); *Wang v. Lynch*, 824 F.3d 587, 592 (6th Cir. 2016); *Dehonzai v. Holder*, 650 F.3d 1, 8 (1st Cir. 2011).

[16] *See Mei Chai Ye v. U.S. Dept. of Justice*, 489 F.3d 517, 519 (2d Cir. 2007).

[17] *Matter of Ho*, 19 I&N Dec. 582, 591–92 (BIA 1998).

[18] *See Chawathe*, 25 I&N Dec. at 376.

[19] *Defensor*, 201 F.3d at 387-88.

[20] See the following URLs visited on July 1, 2020, for examples that are also attached to this decision in PDF form: https://jobs.smartrecruiters.com/Codeforce360/106992243-senior-android-developer; http://www.ps-1925.com/app-dev/; https://www.glassdoor.com/job-listing/software-developer-for-tech-rabbit-inc-dba-tech-firefly-tech-firefly-JV_IC1147439_KO0,55_KE56,68.htm?jl=3505332368; and https://apply.workable.com/techfirefly/j/8E8B565600/.

employment for H-1B approval. In establishing such a position as a specialty occupation, the proffered position's description must include sufficient details to substantiate that the Petitioner has H-1B caliber work for the Beneficiary, and must adequately convey the substantive work that the Beneficiary usually performs within the end-client's business operations.[21] Here, the job description from the end-client does not sufficiently communicate: (1) the actual work that the Beneficiary would perform; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level of knowledge in a specific specialty.

Given the lack of detailed information from the end-client, the Petitioner has not sufficiently established the substantive nature of the work that the Beneficiary will perform. This precludes a finding that 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 the particular position, which is the focus of criterion one; (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 two; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion two; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion three; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion four.[22]

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.

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[21] U.S. Department of Labor guidance states that for a wage level determination, it is important that the job description include "sufficient information to determine the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties." U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

[22] As the lack of probative and consistent evidence in the record precludes a conclusion that the proffered position is a specialty occupation and is dispositive of the appeal, we will not further discuss the Petitioner's assertions on appeal, and we decline to reach and hereby reserve the issues regarding the employer-employee relationship and speculative employment. We note that while this appeal was pending, the U.S. District Court for the District of Columbia issued a decision in *Itserve Alliance, Inc. v. Cissna*, --- F.Supp.3d ---, 2020 WL 1150186 (D.D.C. 2020). Subsequently, USCIS rescinded previously issued policy guidance relating to H-1B petitions filed for workers who will be employed at one or more third-party worksites, and directed its officers to apply the existing regulatory definition at 8 C.F.R. § 214.2(h)(4)(ii) to assess whether a petitioner and a beneficiary have an employer-employee relationship. USCIS Policy Memorandum PM-602-0114, *Rescission of Policy Memoranda* at 2 (June 17, 2020), http://www.uscis.gov/legal-resources/policy-memoranda.