U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9500849

Date: JULY 2, 2020

Appeal of California Service Center Decision

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

The Petitioner, an information technology consulting services company, seeks to temporarily employ the Beneficiary as a "java developer" 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,

[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*

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, 87-88 (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

In the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner stated that the Beneficiary will serve as a java developer. Although the Petitioner's address is in Iowa, the Petitioner stated that the Beneficiary would work for an end-client in Indiana through agreements between the Petitioner and three vendors.

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").

The record indicates that the contractual path of the Beneficiary's assignment is as follows:

Petitioner	→	Company I- (First Vendor)	→	Company P- (Second Vendor)	→	Company I-L- (Third Vendor)	→	End-Client

On the labor condition application (LCA)[2] submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category "Software Developers, Applications" corresponding to the Standard Occupational Classification code 15-1132.

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).[3]

As recognized by the court in *Defensor*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. *See Defensor*, 201 F.3d at 387-388. 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. 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.

The Petitioner submitted a copy of its Professional Services Agreement (PSA) with the first vendor which indicates that the Petitioner will provide personnel to perform services for the first vendor's clients. Appended to this agreement was a Purchase Order, which indicated that the Beneficiary would be assigned to work for the end-client as a "Java Developer" for a period of 24 months commencing on March 19, 2018.[4]

Regarding the relationship between the first and second vendors, the Petitioner submitted a copy of the first and last pages of a Staffing Services Supplier Agreement (SSSA) between the first vendor and the second vendor. Much of the submitted documentation is redacted. The unredacted portion indicates that the first vendor will provide staffing services to the second vendor's client, the third

[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).

[3] 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.

[4] The Petitioner most recently employed the Beneficiary through STEM-related post-completion optional practical training and has provided copies of wage statement for his employment with the Petitioner. 8 C.F.R. §§ 274.a.12(c)(3)(i)(C), 214.2(f)(10)(ii)(C).

vendor. The redacted document contains no purchase orders or work orders, and makes no reference to the Beneficiary.

The Petitioner also submitted a Managed Services Program Master Services Agreement (MSPMSA) between the second vendor and the third vendor. Like the SSSA between the first and second vendors, this agreement is also largely redacted. The non-redacted portion of the MSPMSA indicates that the second vendor will serve as the third vendor's managed services provider, and will provide service to the third vendor under a "Description of Services" (DOS), which will describe the services to be provided and outline additional terms and conditions of those services. Although a redacted DOS was submitted into the record, we cannot ascertain the terms and conditions of the services to be provided, nor can we determine whether it pertains to the Beneficiary. Finally, we note that both documents were executed in November of 2015. As the documents are largely redacted, we are unable to determine whether they are still in effect.

Prior to adjudication, the Petitioner submitted no documentation of a contractual relationship between the third vendor and the end-client, but submitted two letters from the end-client. The second letter from the end-client, submitted in response to the Director's request for additional evidence, stated that the Beneficiary would be working on the [redacted] project with the "Team[redacted]," and described her duties on this project as follows:

- Participate in daily stand up meetings to update the team about the progress, clear impediments onpresent [*sic*] working story.
- Implement the development tasks for the respective stories.
- Refine the project backlog stories to understand the scope, impediments and define acceptance criteria for the same for the next iterations.
- Communicating, analyzing, and identifying areas of modification in developing existing code.
- Daily log hours in Jira across the working story.
- Support the production activities for[redacted] Application.

The end-client also stated that the Beneficiary's duties in the position of java developer would be as follows:

- Design and Develop cloud based software applications using AWS cloud.
- Will provide software development in support of the modernization of an existing application.
- Will research and analyse [*sic*] information to determine, recommend and plan implementation of modifications to an existing system.
- Work on designing applications based on TDD (Test Driven Development)
- Responsible to design and development of test automation scripts using selenium to enable faster delivery of solutions to the end customers
- Test an application using Unit testing, Performance testing and provide reports to business owners
- Keep abreast of emerging software development and inform management of trends and impact.

- Post implementation of new feature, provide assistance on UAT and productions issues.
- Provide assistance to team involving web applications and databases.
- Provide coding guidelines, standards required for new application.
- Work in Agile methodology and perform sprint planning, Estimation, demo and retrospective.
- Work to improve Continuous integration and Continuous delivery system to deliver quality products at a faster pace.

The end-client also stated that the minimum qualifications for the proffered position is at least a bachelor's degree in computer science or computer information systems, and that the proposed assignment was anticipated to continue until December 2021.

The Petitioner also submitted several letters from the vendors. The two letters submitted from the first vendor restate the java developer duties listed above, and also state that the assignment is anticipated to continue until December of 2021. The three letters from the second vendor differ in their overview of the duties of the position. While each letter from the second vendor states that the Beneficiary will work for the end-client, each letter contains a completely different overview of the proffered position, The first letter, submitted initially with the petition, contains a completely different list of duties than that set forth by the first vendor and the end-client. The second letter, submitted in response to the RFE, adopts the statements contained in the end-client letter virtually verbatim.

In denying the petition, the Director noted that the record as constituted did not demonstrate the specific duties the Beneficiary would perform under contract for the Petitioner's clients. Specifically, the Director noted that the record was devoid of detailed contractual documents involved in the claimed work arrangement for the Beneficiary, and specifically noted the absence of documentation between the third vendor and the end-client.

On appeal, the Petitioner provides new documentation. Regarding the relationship of the third vendor and the end-client. This documentation includes a document entitled "Amendment Number 3 to Master Services Agreement" between the third vendor and the end-client, as well as a letter from the third vendor. The Petitioner also submits an updated Purchase Order between the Petitioner and the first vendor for the Beneficiary's services. 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. *Also see 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 wished to address this newly offered 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] Under the circumstances, we need not and do not consider the sufficiency of the new contractual documentation submitted for the first time on appeal.

On appeal, the Petitioner also submits new letters from the first and second vendors, which provide a vastly detailed overview of the proffered position beyond that previously contained in the record. The Petitioner also provides a detailed overview of the duties of the position, which outlines the skills needed to perform the duties, the percentage of time to be devoted to each duty, the level of responsibility required for each duty, and the hours per week the Beneficiary would devote to each

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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).
[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.

duty. While relevant, none of these statements of duties were adopted or confirmed by the end-client. This documentation is not sufficient to overcome the Director's basis for denial.

Additionally, the new letters submitted on appeal indicate that the Beneficiary's assignment at the end-client location will continue through December 2022. However, there is no other documentation in the record to corroborate the claims regarding the extension of the Beneficiary's assignment.[11] As previously noted, the record is devoid of any contractual documentation demonstrating an existing assignment for the Beneficiary continuing through December 2021 or December 2022.

The Petitioner also submitted an affidavit from one of the Beneficiary's coworkers, in which he confirms the Beneficiary's assignment at the end-client's location. In comparing this affidavit with the newly submitted vendor letters on appeal, we note that the duties and overview of the position provided in the affidavit is identical to the duties and overview of the position provided by the vendors in their letters. Consequently, we decline to afford significant evidentiary weight to this affidavit. Even if we overlooked the verbatim language contained in this letter in comparison to the letters from the vendors on appeal, the description of the duties does not provide sufficient basis to conclude that the position requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty, or its equivalent. Again, this statement of duties is not confirmed by the end-client. Therefore, the affidavit provided by the Beneficiary's coworker has little probative weight towards establishing the actual work to be performed by the Beneficiary for the end-client.

The record of proceedings, therefore, does not contain sufficient documentary evidence from the vendors and the end-client that establishes the contractual path under which the Beneficiary's assignment will commence or its duration. The PSA between the Petitioner and the vendor is simply a general agreement for the provision of personnel by the Petitioner to various clients of the vendor. Although the Petitioner submitted a Purchase Order with the vendor, there is no similar corroborating documentation between the vendors, and between the vendors and the end-client.[12] Moreover, the Purchase Order does not detail the nature of the project upon which the Beneficiary will work, the duties she will perform, or the terms and conditions under which she will work.

This lack of documentation prohibits a determination that specialty occupation work had been secured for the Beneficiary at the time of filing. Without documentary evidence that delineates the contractual terms between the end-client and the vendors, including the true duties and the requirements for the position, we are unable determine the substantive nature of the proffered position. As discussed above, the assertions in the vendor and end-client letters regarding the Beneficiary's assignment are not supported by contemporaneous contractual documentation.

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[11] We also note the submission on appeal of a new Purchase Order between the Petitioner and the first vendor for the Beneficiary's services, indicating that the Beneficiary would be assigned to work for the end-client as a "Java Developer" for a period of "24+ months" commencing (tentatively) on March 19, 2019. As noted above, this document, signed on March 11, 2019, was previously available but the Petitioner declined to submit it in response to the Director's RFE. Nevertheless, even if we were to accept this document on appeal, the claimed 24 month validity period of the assignment would extend only through March 2021 under the terms of the purchase order, and not through December 2022 as claimed in the letters submitted on appeal.

[12] Again, for the reasons stated update, we decline to consider the new documentation submitted on appeal regarding the relationship between the third vendor and the end-client.

The record does not contain documentary evidence of the contractual terms between the end-client and any other party, raising questions regarding the substantive nature of the work for the Beneficiary to perform. Although the end-client letter generally asserts that the Beneficiary is providing services to the end-client, the letters from the vendors identify different duties and durations for the claimed assignment, and no attempt to resolve those discrepancies has been made. Although the end-client provides a general list of the duties to be performed, some of which are identical to those contained in the vendor letters, the extent to which the duties of the Beneficiary are accurately described is unclear. As recognized by the court in *Defensor*, 201 F.3d at 387-88, where the work is to be performed for an entity other than the petitioner, evidence of the client company's job requirements is critical. Here, the record does not adequately establish that the Beneficiary would provide services in a specialty occupation for the end-client for the employment period requested in the petition.

Therefore, the Petitioner's failure to establish the substantive nature of the work to be performed by the Beneficiary precludes a determination that the proffered position is a specialty occupation under 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 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.

The Petitioner has not satisfied any of the criteria at 8 C.F.R. § 214.2(h) (4) (iii) (A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation.

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.