U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 9090470

Date: JULY 6, 2020

Appeal of California Service Center Decision

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

The Petitioner, a manufacturing company, seeks to temporarily employ the Beneficiary as a "machine learning 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 (1) the Petitioner will have an employer-employee relationship with the Beneficiary, and (2) 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. SPECIALTY OCCUPATION

We will first address the issue of whether the proffered position is a specialty occupation.

### A. 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, 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).

B. 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

[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 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 initially identified the path of contractual succession for the Beneficiary's services as follows:

Petitioner → [redacted]
(End-Client)

In its letter of support accompanying the petition, the Petitioner stated that it "has directly contracted with [the end-client] and there is [*sic*] no intermediate Vendors. [End-Client] has refused to provide Client letter. However, we are providing [a Statement of Work] that clearly establishes the nature of ongoing contractual relationship." The Petitioner submitted a copy of the referenced Statement of Work (SOW) with the end-client, which indicated that one worker would provide services to the end-client for the period from February 25, 2019, until April 27, 2019.

The Director found the submitted documentation insufficient, and issued a request for evidence (RFE). In response to the Director's request, the Petitioner identified a new path of contractual succession for the Beneficiary's services as follows:

Petitioner → [redacted] → [redacted] → [redacted]
(1st Mid-Vendor) (2nd Mid-Vendor) (End-Client)

In a statement accompanying its RFE response, the Petitioner stated that the Beneficiary's services will be provided "[p]ursuant to a Master Services Agreement" between the end-client, the vendors, and the Petitioner. In support of this assertion, the Petitioner submitted a copy of its offer of employment letter to the Beneficiary, a copy of its Professional Services Agreement (PSA) and Purchase Order with the 1st mid-vendor, and a letter from the 1st mid-vendor.

The Director subsequently issued a notice of intent to deny (NOID), noting that the Petitioner submitted no documentation to substantiate the role of the 2nd mid-vendor or the end-client in the claimed contractual path. In response to the NOID, the Petitioner submitted a copy of a PSA between the 1st mid-vendor and the 2nd mid-vendor, and a letter from the 2nd mid-vendor. Although the Director specifically requested copies of letters and other contractual documentation from the end-client in both the RFE and the NOID, the Petitioner declined to submit such documentation.

Upon review, we concur with the Director's determination that the record does not contain sufficient evidence to establish the services the Beneficiary will perform. Specifically, the record (1) contains insufficient and inconsistent information regarding the proffered position; (2) does not describe the position's duties with sufficient detail; and (3) does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.

[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.

The Petitioner initially stated that there were no intermediate vendors involved in the Beneficiary's assignment with the end-client. In response to the RFE, however, the Petitioner introduced two mid-vendors to the contractual path, not previously identified. This change in the contractual path contradicts its initial claim regarding its direct contractual agreement with the end-client for the Beneficiary's services. No explanation for this discrepancy was provided.

Moreover, there are discrepancies in the record regarding the duration of the Beneficiary's proposed assignment. In the Form I-129 petition and on the accompanying Labor Condition Application (LCA), the Petitioner states that the Beneficiary will work on the end-client project, at the end-client location, until July 14, 2022. However, the SOW submitted in support of the petition indicates that the period of the assignment is from February 25, 2019, until April 27, 2019. The Beneficiary's offer of employment letter states that the duration of the assignment will be from May 6, 2019, until August 18, 2019. The purchase order for the Beneficiary's services states that the project duration is 12 months beginning on April 10, 2019. On appeal, the Petitioner submits an updated offer of employment letter, indicating that the duration of the assignment is from September 3, 2019, until December 15, 2019.[3] The Petitioner must resolve these discrepancies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

Finally, the PSA between the Petitioner and the 1st mid-vendor, along with the accompanying purchase order, were executed subsequent to the filing of the petition. A petitioner must establish eligibility at the time of filing a nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978). Moreover, the Petitioner's attempt to make material changes to the petition by submitting new information modifying the claimed contractual path governing the Beneficiary's off-site employment raises concerns as to the validity of the proffered position. Again, the Petitioner must resolve inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

Here, the Petitioner initially claimed to have a direct contractual agreement with the end-client, but modified this claim in response to the RFE by introducing new intermediate vendors and contractual agreements not in effect at the time of filing. If a petitioner's intent changes with regard to a material term and condition of employment or the beneficiary's eligibility, an amended or new petition must be filed. To allow a petition to be amended in any other way would be contrary to the regulations. Taken to the extreme, a petitioner could then simply claim to offer what is essentially speculative

[3] Both offer letters indicate that the Beneficiary will be paid $42 per hour, which is significantly less than the prevailing wage in the certified LCA of $51.50 per hour. A petitioner submits the LCA to 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's offer letters suggest that it will not be paying the Beneficiary the prevailing wage set forth in this LCA. The Petitioner must resolve this discrepancy in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

employment when filing the petition only to "change its intent" after the fact, either before or after the H-1B petition has been adjudicated.[4]

On appeal, the Petitioner submits documentation from the end-client, including a letter, a copy of an Amendment to Master Services Agreement with the Petitioner, and documentation regarding the "C-Worker" program. We note that the Director requested this type of material within both the RFE and NOID, but the Petitioner did not submit it at that time. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, we will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988). If the Petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the Director's RFE or NOID. *Id.* Under the circumstances, we need not and do not consider the sufficiency of the evidence submitted for the first time on appeal.

In summary, due to the inconsistent and insufficient evidence in the record, we are unable to determine the extent of the proffered position's uniqueness, specialization, complexity, and the level of knowledge it requires, which limits our ability to determine whether the position may qualify as a specialty occupation. In addition to the unresolved inconsistencies noted above, the record does not contain detailed information from the end-client regarding its project or the duties associated with it. When determining whether a position is a specialty occupation, we look at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer. Without information regarding assignments that the Beneficiary would engage in, the general description of the duties provided by the Petitioner and the vendors 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. That is, the record does not adequately communicate (1) the nature of the work that the Beneficiary will perform; (2) the complexity, uniqueness, or specialization of the tasks; and (3) the correlation between that work and a need for a particular level of education and knowledge.

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[4] 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). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

Further, the record lacks sufficient information regarding what the end-client may or may not have specified with regard to the educational credentials and experience of persons assigned to its project; therefore, we cannot determine whether the end-client's requirements meet the requirements of a specialty occupation. See *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). Even if we were to accept the newly submitted end-client documentation on appeal, we note that this documentation does not outline the duties to be performed by the Beneficiary or the end-client's educational requirements.

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).

The Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation.

## II. EMPLOYER-EMPLOYEE RELATIONSHIP

Since the identified basis for denial is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the Petitioner's appellate arguments regarding whether an employer-employee relationship will exist between the Petitioner and the Beneficiary. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

## III. CONCLUSION

In visa petition proceedings, it is a 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.