U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 8722196

Date: JULY 2, 2020

Appeal of California Service Center Decision

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

The Petitioner, a software development and computer services company, seeks to temporarily employ the Beneficiary as a "software automation 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 Petitioner did not establish that the Beneficiary would be employed in a specialty occupation position.

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, 387-88 (5th Cir 2000), where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The court held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

By regulation, the Director is charged with determining whether the petition involves a specialty occupation as defined in section 214(i)(1) of the Act. 8 C.F.R. § 214.2(h)(4)(i)(B)(*2*). The Director may request additional evidence in the course of making this determination. 8 C.F.R. § 103.2(b)(8). In addition, a petitioner must establish eligibility at the time of filing the petition and must continue to be eligible through adjudication. 8 C.F.R. § 103.2(b)(1).

II. PROFFERED POSITION

In the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner stated that the Beneficiary will serve in the position of software automation developer, and that he would work for its end-client in [redacted] Iowa pursuant to an agreement with a vendor.[2] On the labor condition application (LCA)[3]

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").

[2] 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).

[3] A petitioner submits the LCA to the U.S. Department of Labor (DOL) to demonstrate that it will pay an H-1B worker the

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 (SOC) code 15-1132.

According to the Petitioner, the contractual path of the Beneficiary's proposed assignment is as follows:

Petitioner → [redacted] → [redacted]

(Vendor) (End-Client)

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).[4]

As a preliminary matter, the Petitioner indicated that the Beneficiary will work at the end-client site. As recognized by the court in *Defensor*, where the work is to be performed for entities other than the Petitioner, evidence of the client's job requirements is critical. *Defensor*, 201 F.3d at 387-88. 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 record contains a copy of an Independent Contractor Agreement (ICA) between the Petitioner and the vendor, which indicates that the Petitioner will provide consulting services "to one or more of [the vendor's] clients." According to this agreement, the services to be provided will be described in a "Work Memo" which would identify the consultant and the "assigned client." No Work Memo pertaining to the claimed assignment of the Beneficiary was submitted.

The Petitioner submitted a letter from the vendor, which contains a list of duties to be performed by the Beneficiary. The vendor letter also states that the Beneficiary will work for [redacted] and claims that proffered position requires an individual with "a minimum of a Bachelor's degree, or its equivalent, with a concentration in Computer Science or a closely related field."

---

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).

[4] 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 record also contains one letter from the end-client, signed by [redacted] Commercial QA Manager, which states as follows:

> By this letter, we confirm that [the Beneficiary] is currently employed [by the Petitioner] and is currently on assignment with [end-client] as a Software Automation Developer.

In addition, the Petitioner submitted copies of two email messages from [redacted] Software Automation Tech Lead for the end-client, which repeat the list of duties contained in the vendor letter verbatim. The end-client letter and emails are silent with regard to the minimum qualifications required for the position, and provide no additional details regarding the nature of the Beneficiary's assignment or the project upon which he will work. Moreover, neither the letter nor the emails refer to any agreement between the vendor and the end-client for the Beneficiary's services.

Most importantly, the email submitted in response to the Director's request for evidence identifies a new end-client not previously identified as part of the contractual path. The first email from [redacted] indicates that he is writing in his capacity as a Software Automation Tech Lead for [redacted]" The second email from [redacted] however, identifies his title as Software Automation Development Lead – [redacted] for [redacted] Based on these discrepancies, it is unclear which entity is actually the end-client in this matter. Although the Petitioner submits a document entitled "Our History," a webpage printout which provides a chronological history for [redacted] outlining the general relationship between [redacted] and [redacted] it is not sufficient to establish which entity is actually the end-client. Although the document indicates that [redacted] "spins from [redacted] becoming a standalone company June 1, 2019," there is no other documentation in the record demonstrating that an assignment exists for the Beneficiary at [redacted] While [redacted] may be affiliated with the originally identified end-client, there is no documentation in the record indicating that this "standalone entity" has assumed the contractual obligations of the original end-client. The lack of contractual documentation outlining where and for whom the Beneficiary will render his services raises further questions regarding the true nature of the claimed assignment, and whether the claimed assignment exists. 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).

Nevertheless, we cannot determine the substantive nature of the proffered position. The documentation in the record evidencing an agreement between the Petitioner and the vendor does not include details about the project/assignment at the end-client location, and the required "Work Memo" referred to in that agreement was not submitted. Moreover, there is no documentation in the record establishing an agreement between the vendor and the end-client for the Beneficiary to provide services at the end-client location. Absent fully executed contracts and accompanying statements of work (or similar documentation) between the Petitioner and the vendor, and the vendor and the end-client, the record lacks evidence of any legal obligation on the part of the end-client to provide the position described by the Petitioner in this petition. The Petitioner did not document the contractual terms and conditions of the Beneficiary's employment *as imposed by the end-client*. *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). Moreover, the unresolved

discrepancies regarding the ultimate end-user of the Beneficiary's services further complicate our ability to analyze the substantive nature of the position.

The vendor letter and end-client emails, while relevant, are not sufficient to fill this gap, as they do not sufficiently describe the contractual relationship between the parties such that we can ascertain the nature and terms of that relationship and determine whether there is, in fact, a legal obligation on the part of the end-client to provide the position the Petitioner describes. For instance, the end-client letter simply states that the Beneficiary is an employee of the Petitioner and is rendering services to the end-client, but this letter does not discuss the terms and conditions of the agreements between all of the parties. In fact, the end-client makes no reference at all to any agreements it has with the vendor. Again, the record lacks evidence of any legal obligation on the part of the end-client to provide the position to the Beneficiary as described by the Petitioner in this petition, let alone determine its substantive nature so as to ascertain whether it is a specialty occupation.

The quality and consistency of the end-client information in this case is particularly important, therefore, given the absence of contractual documents. However, the end-client documentation does not provide any information regarding the specific project upon which the Beneficiary will assist. For example, the end-client did not identify the project, nor did it explain the scope and mission of the project, the team members on the project, how the responsibilities are delegated to the team members, the timeline of the project, or the complexity and milestones of the project. Moreover, the duties set forth in the end-client emails are generalized in nature, rendering it difficult to determine the true nature of the Beneficiary's duties and whether those duties encompass specialty occupation work.

On appeal, the Petitioner submits two affidavits from claimed coworkers of the Beneficiary at the end-client site. Both affidavits are identical, and both repeat the exact same list of duties presented by the end-client in its emails and by the vendor in its letter. The verbatim language used in both affidavits raises additional questions regarding the veracity of the statement contained therein. Moreover, there is no documentation to verify that these individuals are actually employed in the capacity claimed at the end-client location. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Matter of Ho*, 19 I&N Dec. at 591-92.

We note the Petitioner's submission of detailed overviews of the duties of the proffered position, which are more expansive than the bullet-point list of duties provided by the vendor and the end-client. Though the Petitioner described the duties of the position in multiple documents in the record in further detail, the submitted material does not communicate the actual work that the Beneficiary will perform on a day-to-day basis within the context of the end-client's project, and the correlation between that work and a need for a particular education level of highly specialized knowledge in a specific specialty.

In addition to the lack of a clear explanation of the duties to be performed by the Beneficiary, we note a further issue with regard to the ultimate end-users of the Beneficiary's services. The ICA between the Petitioner and the vendor indicates in "Section 1, Services," that the vendor's clients may serve as "intermediaries" in the ultimate placement of consultants such as the Beneficiary. It appears, therefore, that the services of the Beneficiary may possibly be subcontracted by the end-client to one or more additional clients or businesses, thus modifying the contractual path of the Beneficiary's assignment to add additional end-users of the Beneficiary's services and reducing the current

end-client to merely a vendor. Again, without documentary evidence that delineates the contractual terms between the Petitioner and the vendor, and the vendor and end-client, including the duties and the requirements for the position and the right of the end-client to assign the Beneficiary to perform work for additional entities not identified herein, we are unable determine the substantive nature of the proffered position. In summary, if we cannot determine whether the proffered position as described will actually exist, then we cannot ascertain its substantive nature so as to determine whether it is a specialty occupation.

Finally, the evidence in the record is also insufficient to establish the minimum requirements for the Beneficiary's position at the end-client location. We acknowledge that the Petitioner and the vendor specified that a degree in computer science or a related discipline was required. However, despite the submission of a letter and internal emails from the end-client, the end-client is silent on the minimum requirements for the position. Without more, the Petitioner has not established the *end-client's* minimum requirements of the proffered position. *See Defensor*, 201 F.3d at 387-88

We conclude, therefore, that the insufficient evidence from the end-client regarding the position and its requirements raises questions regarding the actual substantive nature of the proffered position, which therefore precludes a conclusion that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because the substantive nature of the work determines (1) the normal minimum educational requirement for entry into the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the 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.

Therefore, the Petitioner has not established that the proffered position is a specialty occupation.[5]

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.

[5] Although not raised by the Director as a basis for denial, the Petitioner on appeal asserts that an employer-employee relationship exists between the parties. 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 the requisite employer-employee relationship has been established. *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).