U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10107894

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 company, seeks to employ the Beneficiary temporarily 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:

(1) The duties as described did not establish the depth, complexity, level of specialization, or substantive aspects of the work the Beneficiary would perform;
(2) The record did not demonstrate that the Beneficiary would perform services in a specialty occupation for the requested period of employment; and
(3) The record did not establish that the proffered position qualified as a specialty occupation under the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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. ANALYSIS

For the reasons set out below, we have determined that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation. The Director concluded that the Petitioner did not establish that the offered position qualifies as a specialty occupation. In her decision, the Director thoroughly discussed the Petitioner's failure to establish that the duties were sufficiently described to

[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).

demonstrate the substantive nature of the position. Upon consideration of the entire record, including the evidence submitted and arguments made on appeal, we adopt and affirm the Director's decision as it relates to that aspect (i.e., item number three listed above) with the following comments.[4]

We begin noting that 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 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.[5] 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.

A. *Defensor's* Application

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.[6] 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. When it filed the petition, the Petitioner provided the first letter from the end-client that simply reflected he would be working as a database administrator, but it did not detail any duties the Beneficiary would perform in that role. When it responded to the Director's request for evidence (RFE), the Petitioner provided a second letter 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, while it appears the functions listed in the end-client letter relate to the occupational code listed on the labor condition application (LCA), the record lacks adequate detail to demonstrate how these functions are incorporated into the end-client's project. Stated differently, the Petitioner has not established that the generalized functions it claims the Beneficiary would perform for the end-client is the actual work he would execute at the end-client worksite.

We note that the Petitioner provided additional position details in an attempt to demonstrate the duties were so specialized and complex that they would require the attainment of at least a bachelor's degree

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[4] *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).

[5] *Id.*

[6] 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.

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.[7]

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 generalized duties relating to databases 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.[8] It is always the Petitioner's responsibility to ensure the record demonstrates what functions make up a position, and how those tasks demonstrate eligibility.[9] Additionally, the truth is to be determined not by the quantity of evidence alone but by its quality.[10] 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.[11]

To establish eligibility, the end-client should describe the Beneficiary's specific duties and responsibilities in the context of the assigned project; but it has not done so here. 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 professor at the University of [redacted], also does not establish that the position in the petition satisfies the requirements under the H-1B program. Of notable importance, [redacted] did not discuss the duties of the proffered position in any substantive detail. Rather, he restated the same duties listed in the Petitioner's RFE response and in the end-client letter. He did not discuss them in the specific context of the end-client's business, or the end-client project upon which the Beneficiary would work. There is no indication that he possessed any knowledge of the proffered position beyond this limited job description prior to documenting his opinion regarding the proffered position (e.g., interviewed the end-client's managerial teams, observed either entity's employees about the nature of their work, or documented the knowledge that these workers apply on the job). His level of familiarity with the actual job duties as they would be performed in the context of the end-client project has therefore not been substantiated. We observe several other deficiencies within [redacted]'s opinion; however, we deem it unnecessary to detail each one of them here.

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

[8] *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).

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

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

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

B. Origin of Position's Duties

Third, even if the duties contained within the end-client's second letter 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 second letter 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.[12] 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.[13]

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.[14]

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.[15] 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.[16] Here, the Petitioner has not offered sufficiently probative evidence in this matter.

Notwithstanding the above deficiencies, the Petitioner has failed within its appellate filing to sufficiently respond to this element within the Director's denial. The Director concluded that the duties presented before her did not convey the actual work the Beneficiary would perform as they were overly vague. On appeal, the Petitioner merely contends that the duties as previously presented aligned with the database administrator's occupation, and that the position was sufficiently complex or unique. The Petitioner provides a new letter from the end-client on appeal. However, that letter contains the same set of duties the end-client previously offered without any further details. Those functions remain insufficient to demonstrate the position qualifies under the H-1B regulatory requirements.

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

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[12] *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).

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

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

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

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

client worksite. Ninety percent of the duties in the end-client letters can be found either within online job advertisements, or within online sample database administrator resumes.[17] 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 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.[18] 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.[19]

C. Additional Eligibility Issue

Based on one of the end-client's job postings the Petitioner stated was a similar job to the one in the petition, we question whether the Petitioner designated the correct wage level on the LCA. The end-client required a bachelor's degree plus five years of work experience in that similar job

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[17] See the following URLs visited on July 6, 2020, for examples that are also attached to this decision in PDF form: https://lensa.com/senior-oracle-database-administrator-jobs/salt-lake-city/jd/632fb073d79dc153bf8e310396882835; https://www.postjobfree.com/resume/ac6ai1/rac-dba-guard-aix-pl-ux-import-denver-co; and https://www.hireitpeople.com/resume-database/78-oracle-dba-resumes/83513-oracle-database-administrator-resume-detroit-mi.

[18] 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.

[19] 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 whether the position qualifies as a specialty occupation under the four regulatory criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Additionally, 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. USCIS Policy Memorandum PM-602-0114, *Rescission of Policy Memoranda* at 2 (June 17, 2020), http://www.uscis.gov/legal-resources/policy-memoranda.

advertisement. If we were to take the Petitioner at its word that the position in the job advertisement was sufficiently similar to the position in this petition, that would mean the Petitioner designated the incorrect prevailing wage rate on the LCA, which should have been a Level IV wage rate. This would require the Petitioner to compensate the Beneficiary at a much higher annual salary than it proposed to in the petition; more than a $31,000 pay increase.

II. 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.