U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10106684

Date: JULY 23, 2020

Appeal of Vermont Service Center Decision

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

The Petitioner, an information technology services provider, 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 Vermont Service Center Director denied the Form I-129, Petition for a Nonimmigrant Worker, concluding that the record did not establish: (1) that the proffered position qualified as a specialty occupation; (2) that the Petitioner would have an employer-employee relationship with the Beneficiary; and (3) additional issues relating to the Beneficiary's status. 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 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

[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).

proffered position must meet one of four criteria to qualify as a specialty occupation position.[4] 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 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.[5]

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.[6] The Director may request additional evidence in the course of making this determination.[7] In addition, a petitioner must establish eligibility at the time of filing the petition and must continue to be eligible through adjudication.[8]

II. ANALYSIS

Relating to the Petitioner's appellate claims on the specialty occupation issues, the petitioning organization appears to base its rebuttal to the Director's determination on its expectations that the work would be available, that the vendor and end-client letters confirmed that expectation, and that the collective evidence demonstrated eligibility by the preponderance standard.

The Petitioner, located in New Jersey, seeks to employ the Beneficiary at an offsite location for [redacted] [redacted] (end-client) in Florida through a mid-vendor. Based on a lack of sufficient evidence, we

[4] 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").

[5] 8 C.F.R. § 214.2(h)(4)(iii)(A).

[6] 8 C.F.R. § 214.2(h)(4)(i)(B)(*2*).

[7] 8 C.F.R. § 103.2(b)(8).

[8] 8 C.F.R. § 103.2(b)(1).

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*).[9]

A. Petitioner-provided Duties

A crucial aspect of this matter is whether the Petitioner has sufficiently described the proffered position's duties to enable us to discern the nature of the position. The Petitioner has not done so here, as it has offered unoriginal and generalized duties. For instance, the entire set of duties within the Petitioner's March 26, 2019, letter were copied verbatim or virtually verbatim from job search websites that date back to at least June 2016.[10] 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 will perform.[11] This job description 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.

We consider this to erode the Petitioner's claim that the proffered position's duties are specialized and complex. In other words, this collection of duties existed before the Petitioner filed the petition, and it appears one of the involved parties copied the information from other companies. While a general description may be appropriate when defining the range of duties that one may perform within an occupation, a petitioner generally cannot rely on such a generic description 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. The Petitioner has not done so here.

Within its response to the Director's request for evidence (RFE), the Petitioner altered most of the initial set of duties, which appear to contain multiple material changes to the initially provided copied duties as it relates to user interface, testing, and security. For instance, the duties within the RFE

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[9] The Petitioner submitted documentation to support the petition, including evidence regarding the position and its business operations. While we may not discuss every document submitted, we have reviewed and considered each one.

[10] See the attached job announcements attached as PDFs, one of which is titled "Mid Java Developer" dated June 29, 2016. *Mid Java Developer*, dcjobs.com (July 15, 2020), https://www.dcjobs.com/job/detail/18989559/Mid-Java-Developer. The second announcement titled "Software Engineer (Java Developer) job" clearly indicates that the announcement is from March 2017. *Software Engineer (Java Developer) job*, LENSA (July 15, 2020), https://lensa.com/software-engineer-java-developer-jobs/mclean/jd/6323e19bad0c92b36695dcf4561fc383.

[11] 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.

response discussed how the position would include building the proposed frontend user interface (UI) base on the proposed UI designs. However, a review of the Petitioner's initial set of duties did not include any such functions. Further, the RFE duties reflected the Beneficiary would coordinate with the testing team, while the initial duties indicated he would be a member of the testing team as it related to changes in the application, the infrastructure, or the related systems. Finally, the initial set of duties did not include any security related functions, but the RFE response explained that he would work on the application code to prevent hackers from intruding on the servers.

The Petitioner may 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.[12] U.S. Citizenship and Immigration Services (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.[13] Accordingly, a petitioner may not make material changes to a petition in an effort to make an apparently deficient petition conform to USCIS requirements.[14]

B. Duties from the End-client

Notwithstanding the foregoing, 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.[15] 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. In other words, as the nurses in that case would provide services to the end-client hospitals and not to the petitioning staffing company, the petitioner-provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination.[16]

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.[17] 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

[12] 8 C.F.R. § 103.2(b)(1), (12).
[13] *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978).
[14] *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998).
[15] *Id.*
[16] *See id.*
[17] 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.

body of highly specialized knowledge is required to perform any of the following as presented in the end-client letters:

- Translation of complex functional and technical requirements into detailed architecture and design.
- Implement high-quality code in an Agile, test-driven development environment.
- Deliver systems and features with top—notch quality and on time.
- Design reusable components by utilizing various standard frameworks.
- Work with the product owners and other team members to complement and complete the development process.
- Investigate software problems identified in testing or via support and provide solutions.
- Work in a team environment as well as alone depending upon the project.

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 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.[18]

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.[19] It is always the Petitioner's responsibility to ensure the record demonstrates what functions make up a position, and how those tasks demonstrate eligibility.[20] Additionally, the truth is to be determined not by the quantity of evidence alone but by its quality.[21] 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.[22] 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.

Also lacking is any indication of which end-client provided duties are more prominent than others, meaning the record does not reflect which tasks are major functions of the proffered position. This is an additional missing factor that, if present, might aid in discerning the nature of the position, and

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[18] *See id.*

[19] *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).

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

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

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

whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge attained through at least a baccalaureate degree in a specific discipline.[23]

Additionally, the Director questioned the propriety of the end-client letters based on unexplained anomalies within the first version. On appeal, the Petitioner offers one possible explanation for the anomalies, but it failed to state that its proposed reasoning was the actual reason. Specifically, the Petitioner states that the end-client "letter might have been corrupted during scanning and transmission to its attorney's office . . . ." This appears to be speculation at best and the Petitioner did not offer any material from any involved party to verify that possibility. Moreover, within the appeal the Petitioner claims to submit an email from the end-client that verifies none of the end-client letter was altered, but there is no such document at Exhibit D or anywhere else in the record.

C. Opinion Letter

Next, 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. First, we note that [redacted] did not discuss the duties of the proffered position in any substantive detail 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 the Petitioner's initially provided job description prior to documenting his opinion (e.g., interviewed the Petitioner's or 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.

Second, [redacted] largely based his opinion off of the duties we established were copied from pre-existing websites. However, as we noted above, those additional details originating from the Petitioner should not factor into the eligibility analysis. Instead, [redacted] should have evaluated the end-client provided duties. Additionally, the initial set of duties the Petitioner provided appears to have been copied from websites and did not likely represent the actual functions of the proffered position. As a result, this significantly diminishes the evidentiary value of [redacted]'s opinion and it falls short of meeting the Petitioner's burden of proof.

D. Substantive Nature of Position

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

[23] *See GCCG Inc v. Holder*, 999 F. Supp. 2d 1161, 1167 (N.D. Cal. 2013) (finding that an employer's ability to demonstrate a position qualifies as a specialty occupation is significantly hindered when it does not establish the amount of time a beneficiary would spend performing each duty).

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.[24]

E. Additional Eligibility Issues

We observe additional discrepancies that while they do not serve as an independent basis for this adverse decision, could also pose as significant hurdles for the Petitioner to demonstrate that the petition should be approved. First, we note the parties utilized an inconsistent job title. The versions included: software developer, software engineer, senior software developer, senior software engineer. None of the parties offered an explanation of why the record contains varying job titles. This mismatch leads us to question whether the end-client and the Petitioner have the same understanding of the Beneficiary's position. At minimum, it further causes us to question the reliability of the various job descriptions contained in the record.

Next, based on the varying job titles and other questions the deficient evidence raised, we reviewed the end-client's open job postings on its website. We observe that most software development positions we accessed on the website required at least a bachelor's degree and more than three years of work experience, which would require a prevailing wage rate at least at the Level III rate while the Petitioner only designated the position at the Level II rate on the labor condition application.[25] This may be an indication that the position prerequisites listed within the end-client letters were not a comprehensive representation of their actual position requirements for significantly similar positions. Were that the case, it would require the Petitioner to increase the Beneficiary's compensation by more than $19,000.

Further potential effects on the prevailing wage are some of the functions listed in the duties the Petitioner provided in the RFE response. For instance, the extent of the security-related functions listed in the RFE response do not appear to be included in the Tasks, Work Activities, Knowledge, and Job Zone Examples for the Software Developers, Applications occupation contained within the

[24] 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 the other remaining issues. 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.

[25] See the following examples from the end-client's website: https://jobs
https://jobs
https://jobs
https://jobs
https://jobs
https://jobs
https://jobs
; and

Occupational Information Network. According to guidance from the U.S. Department of Labor (DOL), such a scenario might warrant an increase in the prevailing wage rate by one increment. Such security-related duties appear to align with the functions found under the Information Security Analysts occupational classification.[26] We note a similar situation relating to the UI functions falling under the Web Developers occupational title rather than under the Software Developers, Applications occupation, which might also require an increase in the prevailing wage rate.

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.

[26] See DOL, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://flcdatacenter.com/download/NPWHC_Guidance_ Revised_11_2009.pdf.