U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 9091195

Date: JULY 2, 2020

Appeal of California Service Center Decision

Form I-129, Petition for Nonimmigrant Worker

The Petitioner, an information technology staffing solutions company, seeks to temporarily employ the Beneficiary as a "performance 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 the requisite 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 Beneficiary will be performing services in 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. Proffered Position

The Petitioner states that the Beneficiary will be assigned to work for an end-client at their office for the duration of the requested validity period by a series of agreements between the Petitioner and two vendors. The record indicates that the contractual path of the Beneficiary's assignment is as follows:

[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").

Petitioner →	N- → (Mid-Vendor)	T- → (Prime Vendor)	C- (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 "Computer Occupations, All Other," corresponding to the Standard Occupational Classification code 15-1199.

C. Analysis

The Director concluded that the Petitioner did not establish that the offered position qualifies as a specialty occupation. In her decision, the Director discussed the Petitioner's failure to meet any of the four regulatory criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*)–(*4*). Upon consideration of the entire record, including the evidence submitted and arguments made on appeal, 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, located in Arizona, seeks to employ the Beneficiary as a performance engineer offsite for C- (end-client) in Rhode Island through contractual agreements involving two vendors. Based on a lack of sufficient evidence, we conclude that the Petitioner has not sufficiently established the services in a specialty occupation that the Beneficiary would perform as requested. That outcome precludes a determination of whether 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*).

As a central holding, the *Defensor* court discussed above determined that the agency acted appropriately in interpreting the statute and the regulations as requiring petitioning companies to provide probative evidence that the outside entities where the Beneficiary would actually provide their

[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.

services (i.e. end-clients) required candidates to possess a qualifying degree.[4] The *Defensor* court reasoned that the position requirements from the entity where the beneficiary would actually work—be it the required degree or the position's actual duties a candidate would perform—should serve as the more relevant characteristics we should consider under our specialty occupation determination. If a petitioner is unable to establish the actual work a beneficiary will perform for a client and their prerequisites to perform them, we cannot determine whether the proffered position is a specialty occupation.[5]

Here, the Petitioner submitted a copy of its Vendor Agreement with the mid-vendor, demonstrating that the Petitioner will provide "professional computer consulting, programming and related services" to one or more of the vendor's clients. The Petitioner also submitted a copy of a work order between the parties, indicating that the Beneficiary would be assigned to work for the end-client for a 12-month period commencing on January 1, 2019. A second work order, submitted in response to the Director's request for evidence (RFE), reflects a modification to the duration of the assignment, indicating that the Beneficiary's services will commence on January 1, 2019 for a period of "3 years with possible extension." No explanation for this inconsistency was provided. Moreover, we note that the work orders indicate that they were issued pursuant to a "Master Services Agreement" executed between the Petitioner and the mid-vendor. However, no such agreement between the Petitioner and the mid-vendor was submitted.

The Petitioner also submitted a copy of a Professional Services Agreement between the mid-vendor and the prime vendor, indicating that the mid-vendor will provide "professional services, including information technology, engineering, consulting, and business process outsourcing services" to the prime vendor's customers. In addition, the Petitioner submitted a Statement of Work no. 1533642 between the vendors, indicating that the Beneficiary would render services to the end-client beginning on October 20, 2018. No end date or additional information regarding the assignment was submitted. Further, we note that this statement of work indicates that it is issued pursuant to a Consulting Services Agreement between the vendors, but no such agreement was submitted into the record.

Regarding the end-client's role in the contractual chain, the Petitioner submitted a copy of its one-page Memorandum of Understanding (MOU) with the prime vendor. According to this document, the Beneficiary will work on the [redacted] project for the end-client through December 2019. The end-client provided no additional details regarding the project or the duties to be performed by the Beneficiary during the course of her assignment. Moreover, the end-client provided the following general statement regarding its minimum requirements:

> [End-client] requires Resource(s) with the equivalent of a U.S. bachelor's degree or higher in Computer Science, Information Systems, Management Information Science, Business or a relevant Engineering degree or the foreign equivalent to perform the duties of the specialty occupation position.

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[4] *Defensor*, 201 F.3d at 388.

[5] We must review the actual duties the Beneficiary will be expected to perform to ascertain whether those duties require at least a baccalaureate degree in a specific specialty, or its equivalent, as required for classification as a specialty occupation. To accomplish that task in this matter, we review the duties in conjunction with the specific project(s) to which the Beneficiary will be assigned. To allow otherwise, results in generic descriptions of duties that, while they may appear (in some instances) to comprise the duties of a specialty occupation, are not related to any actual services the Beneficiary is expected to provide.

The Petitioner also submitted two letters from the mid-vendor. Each letter states that the Beneficiary will provide services to the end-client pursuant to the contractual path outlined above, and each letter provides the same general overview of the duties of the position. The mid-vendor also stated that the assignment is anticipated to last for one year with possible extensions, and indicates that the proffered position requires at least a bachelor's degree in computer science, or equivalent.

Part of a petitioner's burden is to demonstrate the actual duties a beneficiary will perform while deployed to an end-client worksite, by a preponderance of the evidence. The most relevant method is to provide material directly from the entity where the work will take place, which is the entity that possesses the greatest knowledge and understanding of how a beneficiary's contributions will factor into its business model and its projects.[6] Here, given the lack of 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 heavily factors into each of these regulatory criteria.[7]

The Petitioner presented no statement of duties from (or endorsed by) the end-client. Although we acknowledge the Petitioner's statements regarding the duties to be performed, as well as the two mid-vendor letters which restate those same duties, there is no similar endorsement from the end-client, such as a letter, statement of work, work order, or other similar documentation.

Moreover, the MOU between the prime vendor and the end-client provides contradictory statements regarding the end-client's minimum requirements. The Petitioner and the mid-vendor state that the proffered position requires a bachelor's degree or the equivalent in computer science. However, the end-client states in the MOU that is will accept degrees in a variety of fields, including business. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm'r 1988). In addition to demonstrating that a job requires the theoretical and practical application of a body of specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must also establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. We interpret 8 C.F.R. § 214.2(h)(4)(iii)(A) as requiring a degree in a specific specialty that is directly related to the proposed position. We have consistently stated that, although a general-purpose bachelor's degree, such as a degree in business or business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a conclusion that a particular position qualifies for classification as a specialty occupation. *Royal Siam Corp.*, 484 F.3d at 147.

The record contains no independent statement from the end-client outlining the nature of the assignment. Although one brief reference is made to the '[redacted]' project, no additional documentation outlining the nature of this project was submitted. The record contains no statement

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

[7] 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.

from the end-client confirming the requirements of the project, such as the duties to be performed by the Beneficiary and the educational requirements necessary to perform those specific duties. Rather, the record contains an MOU between the end-client and the prime vendor which provides a general statement regarding the minimum educational requirements it imposes on its "Resource(s)," which does not specifically pertain to the Beneficiary or the Beneficiary's claimed assignment to the [redacted] project. The minimal and contradictory documentation from the end-client does not sufficiently inform USCIS of the substantive nature of the duties to be performed, and any particular academic requirements for the proffered position.

We acknowledge that the Petitioner provided a set of duties and position qualifications within the initial filing, and expanded upon those within its response to the Director's RFE. However, similar to the *Defensor* case, the duties, education details, and experience requirements the Petitioner provided are much less probative to our analysis than these same elements from the end-client. Nevertheless, we note the Petitioner's reliance on this description to establish that the proffered position requires the Beneficiary to perform services in a specialty occupation despite the evidentiary deficiencies noted above. In support of this assertion, the Petitioner submitted a letter prepared by [redacted] Professor of Computer Information Systems, College of Business [redacted] University to understand why or how the duties described require a bachelor's degree in a specific specialty, or its equivalent. [redacted] repeats the Petitioner's description of the proposed duties and opines that a position with these duties would "normally be filled by a graduate with a minimum of a Bachelor's Degree in Computer Science, a related, area, or the equivalent."[8]

[redacted] however, does not state that he reviewed information regarding whether the end-client requires a bachelor's or higher degree in a specific specialty, or its equivalent, to perform the position's duties, which is critical. *See Defensor*, 201 F.3d at 387-88. [redacted]'s letter provides neither a description of the duties in the context of the Beneficiary's assignment with the end-client nor a statement of whether the end-client requires a qualifying degree. In fact, there is no mention of the Beneficiary's assignment at the end-client at all, thereby raising doubts regarding his familiarity with the actual duties to be performed in this matter. Furthermore, there is no indication that [redacted] has conducted any research or studies pertinent to the educational requirements for such positions, and no indication of recognition by professional organizations that he is an authority on those specific requirements. Accordingly, [redacted]' opinion, which does not address the end-client project and its requirements bears minimal probative value.

[redacted]s letter is insufficient to support the Petitioner's assertion that the proffered position qualifies as a specialty occupation. As a matter of discretion, we may use opinion statements submitted by the Petitioner as advisory. *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, we will reject an opinion or give it less weight if it is not in accord with other information in the record or if it is in any way questionable. *Id.*

Finally, we note several unresolved discrepancies in the record that raise further questions regarding the nature of the Beneficiary's assignment. As noted above, the work orders between the Petitioner

[8] Although [redacted]'s conclusion regarding the minimum educational requirements for the proffered position mirrors the claims of the Petitioner and the mid-vendor, it contradicts the claims of the end-client, who states a broader range of degrees are acceptable, including business.

and the mid-vendor, and the statement of work between mid-vendor and the prime vendor, were both executed pursuant to agreements that were not submitted into the record. For instance, although the Petitioner submitted a copy of its Vendor Agreement with the mid-vendor, the work orders indicate they are issued pursuant to a Master Services Agreement between the parties. Similarly, the Petitioner submitted a copy of the Professional Services Agreement between the mid-vendor and the prime vendor, yet the statement of work indicates that it was issued pursuant to a Consulting Services Agreement between the parties. 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).

Moreover, the claimed dates of the Beneficiary's assignment in these documents are contradictory. For example, the statement of work between the vendors indicates a commencement date of October 20, 2018, whereas the work orders indicate that the assignment commenced on January 1, 2019. No explanation for this inconsistency was provided. Moreover, the Petitioner submitted an updated work order between the Petitioner and the mid-vendor in response to the RFE, indicating that the assignment has a duration of three years from January 1, 2019, in contrast to the original claim of 12 months. In addition, this further contradicts the statement of the end-client in the MOU, which indicates that the assignment ends in December 2019. The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Id.* Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

Here, the Petitioner has not provided sufficient details regarding the nature and scope of the Beneficiary's employment or any substantive evidence regarding the actual work that the Beneficiary would perform for the end-client. Without a meaningful job description, the record lacks sufficiently probative and informative evidence to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. 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.

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 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 here, and the petition will remain denied.

ORDER: The appeal is dismissed.