U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10319138

Date: JULY 17, 2020

Appeal of Vermont Service Center Decision

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

The Petitioner, a financial software development 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 Vermont Service Center Director denied the Form I-129, Petition for a Nonimmigrant Worker, concluding that because the Petitioner did not establish the actual work the Beneficiary would perform, it had not demonstrated that (1) the Beneficiary will perform services in a specialty occupation or (2) that the proffered position qualifies as a specialty occupation.[2]

The matter is now before us on appeal. The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence.[3] We review the questions in this matter *de novo*.[4] 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, and adds a non-

[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] The Director also informed the Petition that "[a]lthough not at issue in this denial notice, the evidence of record, at this time, does not demonstrate that the offered position as described qualifies as a specialty occupation in accordance with the four criteria enumerated in 8 C.F.R. § 214.2(h)(4)(iii)(A)."

[3] Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

[4] *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015).

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.[5] 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).

II. ANALYSIS

Upon review of the record in its totality, we agree with the Director's conclusions. In this matter, the Petitioner has not sufficiently established the services in a specialty occupation that the Beneficiary would perform, which precludes a determination as to 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).[6] The record (1) does not describe the position's duties with sufficient detail and (2) does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.

The Petitioner provided a list of six duties as follows (note: errors are in original):

- Acting as a trusted advisor to our prospects as well as newly-joined customers, helping them to understand how API-driven architectures, Cloud Computing and [the Petitioner] will help them to build or transform their business into an innovative, digital organization

[5] 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").

[6] 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.

- Supporting our presales and delivery teams by architecting, engineering and demonstrating solutions

- Engaging will all levels of customer representatives, from engineers to technology leaders and managing executives

- Ensuring all client/customer concerns are satisfied and resolved

- Working closely with [the Petitioner]'s Ecosystem & Product Engineering Teams team to make sure the end-solution proposed to the customer is providing a unique competitive advantage, and fulfils all the regional and market needs

- Traveling will be an important part of [the] job as [the Beneficiary] will be covering the Americas region

A crucial aspect of this matter is whether the Petitioner has sufficiently described the duties of the proffered position in such that we may discern the nature of the position. As explained by the Director, these duties are "general and vague." Not only do the provided duties not sufficiently communicate the actual work that the Beneficiary would perform, but the Petitioner has not explained the correlation between the work as described and the need for a particular level of knowledge in a specific specialty. On appeal, rather than address this issue, the Petitioner asserts that the position qualifies as a specialty occupation on the basis of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), without providing any additional information regarding the duties.

Given the lack of detailed information from the Petitioner, 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 of the criteria 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.

Because the Petitioner has not established the actual work the Beneficiary will perform, we cannot conclude that (1) the Beneficiary will perform services in a specialty occupation or (2) that the proffered position qualifies as a specialty occupation.

In addition, we also note a serious inconsistency in the record. In the initial filing, the Petitioner submitted a labor condition application (LCA) for the position of solutions architect, corresponding to the standard occupational classification (SOC) code 15-1199 for "computer occupations, all other." However, the Petitioner also provided a copy of the portion of the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*) related to the occupation of computer systems analysts to establish that the position is a specialty occupation. The corresponding SOC code for a computer systems analyst is 15-1121. In addition, the accompanying opinion letter from [redacted]

[redacted] of [redacted] University, discusses the "specialized nature of the position of software engineer," provides an "industry analysis of the position of software engineer," and appears to consider "software engineers, solution architects, and software developers" to be very similar positions.

In her request for evidence, the Director discussed the shortcomings in the evidence submitted and, when warranted, the computer systems analyst occupation. In response, the Petitioner submitted a copy of the relevant portion of the *Handbook* for the computer network architects occupation, corresponding to the SOC code 15-1143, stating that it is "a position directly related to a Solutions Architect," without explaining why it initially submitted information from the *Handbook* for the occupation of computer systems analyst or addressing the Director's RFE discussion of the computer systems analysts occupation. On appeal, the Petitioner states that "[t]he position of a Solutions Architect is closely related to that of a Computer Systems Analyst" and again references the *Handbook* entry for that occupation to establish that the proffered position "meet[s] the statutory definition of a specialty occupation." The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

As a result of these inconsistencies and the general and vague duties the Petitioner provided, it is unclear under which occupation the proffered position falls. Therefore, the Petitioner has also not sufficiently established that it provided a certified LCA *in the occupational specialty* in which the H-1B nonimmigrant will be employed before the filing of the Form I-129. 8 C.F.R. § 214.2(h)(4)(i)(B). *See also Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 545-546 (AAO 2015).[7]

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

> For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL-certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion

[7] The LCA serves as the critical mechanism for enforcing section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). *See* Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States, 65 Fed. Reg. 80,110, 80,110-11 (proposed Dec. 20, 2000) (to be codified at 20 C.F.R. pts. 655-56) (indicating that the wage protections in the Act seek "to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers" and that this "process of protecting U.S. workers begins with [the filing of an LCA] with [DOL]."). According to section 212(n)(1)(A) of the Act, an employer must attest that it will pay a holder of an H-1B visa the higher of the prevailing wage in the "area of employment" or the amount paid to other employees with similar experience and qualifications who are performing the same services. *See* 20 C.F.R. § 655.731(a); *Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 422 & n.3 (4th Cir. 2005); *Patel v. Boghra*, 369 F. App'x 722, 723 (7th Cir. 2010); *Michal Vojtisek-Lom & Adm'r Wage & Hour Div. v. Clean Air Tech. Int'l, Inc.*, No. 07-97, 2009 WL 2371236, at *8 (Dep't of Labor Admin. Rev. Bd. July 30, 2009).

model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements for H-1B visa classification.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the Beneficiary. Here, the Petitioner has not established that it submitted a valid LCA certified for the proper occupational classification, and the petition cannot be approved for this additional reason.

II. CONCLUSION

The appeal will be dismissed for the above stated reasons. 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.