U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21199799

Date: APR. 28, 2022

Appeal of California Service Center Decision

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

The Petitioner seeks to employ the Beneficiary 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 California Service Center Director denied the Form I-129, Petition for a Nonimmigrant Worker, concluding that the record did not establish that the proffered position qualified as a specialty occupation. The matter is now before us on appeal. 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*. *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. ANALYSIS

Upon review of the entire record, 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 the decision, the Director thoroughly 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*). The Director also determined that the Petitioner's job description did not adequately convey the substantive work that the Beneficiary would perform because it lacked sufficient detail.

Upon consideration of the entire record, including the evidence submitted and arguments made on appeal, we adopt and affirm the Director's ultimate determination with the comments below. *See Matter of P. Singh, Attorney*, 26 I&N Dec. 623, 624 (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).

What the law requires, and employers must demonstrate to U.S. Citizenship and Immigration Services (USCIS), is the nature of the specialty occupation. *ITServe All., Inc. v. Cissna*, 443 F. Supp. 3d 14, 39 (D.D.C. 2020). Aligning with that authority, USCIS may require the offered position's job duties to be sufficiently detailed such that it can determine that those daily assignments will be in the specialty occupation. In other words, if the duties are not sufficiently detailed to convey the substantive nature of the position, then a petitioner has not demonstrated that a beneficiary would occupy a qualifying position. The law requires petitioners to demonstrate the nature of the specialty occupation. *Id.*

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(A)(*1*) requires that a foreign worker "[w]ill perform services in a specialty occupation which requires theoretical and practical application of a body of highly specialized knowledge and attainment of a baccalaureate or higher degree or its equivalent as a minimum requirement for entry into the occupation in the United States . . ." Stated differently, petitioners must demonstrate the nature of the specialty occupation through sufficiently detailed job duties, responsibilities, or functions. A crucial aspect of this matter is whether the Petitioner has sufficiently described the proffered position's duties sufficiently that we may discern the nature of the position, and 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. We conclude that the Petitioner has not done so.

On appeal the Petitioner offers a new set of position duties, but it did not present these duties before the Director. The Petitioner asserts that the petition and the request for evidence (RFE) did not provide a sufficient amount of space for text in which to provide a better job description. While the space available on the physical Form I-129 may be limited, nothing prevented the Petitioner from submitting separate correspondence offering a detailed set of duties. More importantly, the RFE sought a more detailed job description in at least two instances. This informed the Petitioner of was needed to better reveal the substantive nature of the offered position.

When the regulation or correspondence from the Director notified the Petitioner of a requirement, but the organization did not provide the specifically requested material before the Director, new material supplied at the appellate stage should not factor into our appellate determination. If the Petitioner wished to address this issue, it should not start at the appellate stage, but before the initial reviewing authority. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988); *Matter of Jimenez*, 21 I&N Dec. 567, 570 n.2 (BIA 1996). As such, we will not consider the newly presented duties on appeal, and the petition will remain denied.

We agree that the duties as presented before the Director did not sufficiently establish the substantive nature of the position and in what capacity the Beneficiary will be employed. Absent that foundational showing, we cannot determine whether the proffered position is a specialty occupation. Based on this shortcoming, we cannot conclude that the Petitioner has sufficiently demonstrated the actual, substantive nature of the work the Beneficiary would 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.

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 the petitioner's burden to establish eligibility for the immigration benefit sought. The Petitioner has not met that burden here, and the petition will remain denied.

ORDER: The appeal is dismissed.