U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21819818

Date: AUG. 22, 2022

Appeal of Vermont Service Center Decision

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

The Petitioner, a software related services company, seeks to temporarily employ the Beneficiary as a "software 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 Vermont Service Center denied the petition, concluding that the record does not establish: (1) that the position qualifies as a specialty occupation under the statutory or regulatory definitions of a specialty occupation; and (2) that the Beneficiary is qualified for the proffered position. On appeal, the Petitioner asserts that the Director erred.

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. 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. 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 (or duties) 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

The Petitioner describes the position as a full-time software engineer. The Petitioner asserts that the duties of the proffered position are consistent with those of positions located within the "Software Developers" occupational category, which at the time of filing corresponded to the standard occupational classification (SOC) code 15-1132.

The Director issued a request for additional evidence (RFE) explaining that the evidence of record was insufficient to establish the services (or duties) the Beneficiary would perform. As such, the RFE requested a detailed description of the duties of the proffered position so that the Director could determine whether it meets the definition of a specialty occupation. The RFE suggested the Petitioner provide a percentage breakdown of the time devoted to each duty, and the educational requirements, skill, training and/or experience needed to perform each duty. The RFE also delineated how the initial evidence fell short of satisfying any of the four qualifying criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). The RFE explained that although the Petitioner contended the Beneficiary would be performing the duties of a position located within the "Software Developer" occupational category, the actual duties of the position were ambiguous, and the record did not establish that the proffered position was actually such a position. Furthermore, the RFE noted that no evidence had been submitted to establish eligibility under the second, third or fourth criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), and it suggested possible documentation that might satisfy them.

The RFE also discussed why the evidence was insufficient to establish the Beneficiary is qualified to perform the duties of the proffered position, and it provided the Petitioner detailed information about the regulatory requirements, and the types of evidence needed to satisfy them.

The Petitioner timely responded to the RFE and reiterated that: (1) it will maintain an employer-employee relationship with the Beneficiary, and (2) it had verbally agreed to pay the Beneficiary

$121,000 a year. The Petitioner provided printouts from the *Occupational Outlook Handbook* (*Handbook*) other websites that spoke to the general duties and working conditions of software developer positions, and argued that the position met three of the four specialty-occupation criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). It declined to provide any of the evidence suggested in the Director's RFE to address the lack of specificity regarding the actual duties of the proffered position. Instead, the RFE response included a verbatim recitation of the duties the Beneficiary carried out when he worked for another company, located in India, as a senior manager. The RFE response described "job skills," "work activities," and "detailed work activities" associated with the position but omitted any percentage breakdown of how the Beneficiary's time would be spent carrying out these "activities." The "job skills" noted include "experience," "critical thinking," "active listening," "communication and presentation skills," and "consulting" (among others). None of these "job skills" required a bachelor's level of education or the theoretical and practical application of a body of highly specialized knowledge as required by the statute. *See* section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l). Furthermore, only three of the seven "job skills" needed for the position appear to have required any computer science skills at all. Since it is unclear what percentage of the position's duties require each skill, it is unclear whether the position requires more managerial skills or computer science skills. We note too that because the Beneficiary's prior position was a senior manager, and the Petitioner used the same set of duties he performed in that job to describe the duties of the proffered position, it appears more likely than not that the proffered position requires managerial skills beyond those considered typical for a software engineering position.

On appeal, the Petitioner argues that the Director erred when determining its software engineer position is not a specialty occupation. The Petitioner advances three main arguments on appeal. First it argues USCIS should only evaluate the job title, and that it cannot require job duties, or client letters, to verify the duties associated with the position because it is the Petitioner that decides what the job is and who is qualified to perform the job. In making this argument, the Petitioner cites to *Innova Sols., Inc. v. Baran*, 983 F.3d 428 (9th Cir. 2020), and USCIS Policy Memorandum PM-602-0142.1, *Rescission of 2017 Policy Memorandum PM-602-0142* (Feb. 3, 2021), https://www.uscis.gov/legal-resources/policy-memoranda. The Petitioner then argues that the *Handbook's* information establishes the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*). Finally, the Petitioner contends that its receipt of approvals for petitions filed on behalf of other H-1B beneficiaries establishes it as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*). As we will discuss below, we find none of them persuasive.

Although the Director's decision did not rest on the matter, the first issue we will explore on appeal is whether we are able to determine if the labor condition application (LCA) corresponds to the petition as required by 20 C.F.R. § 655.705(b).[1] DOL has explained that a job's SOC code is identified by

[1] 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

selecting the O*NET job description "that most closely matches the employer's request" from a list of similar occupations. Emp't & Training Admin., U.S. Dep't of Labor, *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009). Here, we are unable to fully compare the duties of the position to those of the O*NET's job description for "Software Developers" because the Petitioner has not described those duties fully. The consequence of the Petitioner's argument that USCIS is not entitled to receive the full duties of this position is that its substantive nature of the position is not clear. As a consequence, we are unable to determine if the LCA corresponds to the petition because we can not determine whether the actual duties to be performed match those of a Software Developer as defined in O*NET. *See* Emp't & Training Admin., Dep't of Labor, Occupational Information Network (O*NET), Software Developers (2022), https://www.onetonline.org/link/summary/15-1252.00.

Next, we will consider each of the Petitioner's arguments on appeal. Every argument fails because each one is a variation of the Petitioner's unpersuasive assertion that H-1B filers are not required to establish a proffered position's substantive nature. If we cannot ascertain what a beneficiary would actually be doing, we cannot determine whether a petitioner has satisfied any of the specialty-occupation criteria.

The Petitioner first argues that *Innova Sols, Inc.,* and the 2021 policy memorandum cited above preclude USCIS from requesting job duties so as to understand the substantive nature of a position, and that the agency must instead treat a proffered position's title as dispositive. We do not agree. The *Innova* decision held, in part, that the language of the *Handbook* supports a position located within the "Computer Programmers" occupational category's classification as specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*). But without job duties, we cannot tell whether a proffered position is, in fact, located within that occupational category. If we do not know a position's substantive nature, we cannot determine whether it satisfies 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

The Petitioner also cites to *Itserve Alliance, Inc. v. Cissna*, 443 F.Supp.3d 14, 2020 WL 1150186 (D.D.C. 2020) and USCIS Policy Memorandum PM-602-0114, *Recission of Policy Memoranda* (June 17, 2020), https://www.uscis.gov/legal-resources/policy-memoranda in support of its argument that USCIS cannot require job duties. Those authorities, however, do not stand for such a broad principle. For example, the 2020 policy memorandum specifically states that "[p]etitioners must meet all other statutory and regulatory requirements, binding court precedent, [AAO] adopted and precedent decisions, and effective policy guidance (that is, not relying on the itinerary requirement under 8 CFR 214.2(h)(2)(i)(B) or guidance in the 2010 or 2018 policy memoranda)." If we do not know what the actual tasks are, we cannot determine whether those requirements have been met.

Lastly, the Petitioner argues that the petition satisfies 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*) because the Petitioner has obtained other H-1B visa approvals on behalf of other software engineer(s) it employs. This argument is similarly flawed for several reasons. First, without a sufficiently detailed job description, we are unable to determine whether this position is in fact parallel to such positions . Second, we are not required to approve petitions where eligibility has not been demonstrated, merely

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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).

because of a prior approval that may have been erroneous. *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988). Furthermore, the Petitioner does not provide us with detailed job descriptions for any other its other software engineers, and instead simply provides a list of receipt numbers, and the allegedly associated job titles. However, this information, coupled with the lack of evidence regarding the substantive nature of the proffered position is insufficient to meet the Petitioner's burden.

Lastly, the record contains conflicting information regarding the actual substantive nature of the position. For example, it appears as though the Petitioner may not actually be seeking the Beneficiary's services as a "Software Developer" but instead, seeks his services as a "Senior Manager" to carry out the same duties he carried out for his overseas employer. A petitioner must resolve inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Furthermore, unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.* Because the record does not establish the actual, substantive nature of the position, it is unclear what services the Petitioner is requesting the Beneficiary to perform.

For all of these reasons, we conclude that the Petitioner has not established the proffered position's actual, substantive nature. As noted above, 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). If we do not know what services the Beneficiary is asked to provide, we cannot determine the substantive nature of the position, and therefore whether it is a specialty occupation.[2]

We have long-required, and reviewing courts have long-agreed, that the specific services to be rendered by a Beneficiary are of utmost import in understanding the substantive nature of a position, and a Petitioner and Beneficiary's eligibility for a work visa. If it was simply a matter of providing a job title, we would be undermining decades long policy and caselaw on this issue. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990) (stating "[t]he actual duties themselves reveal the true nature of the employment. Therefore, there is a rational basis for INS's denial of plaintiffs' visa application since it lacks specific evidence that [the Beneficiary's] duties at [Petitioner] are primarily managerial and executive in nature.")

As Petitioner has not established the substantive nature of the position, we are unable to determine whether it is a specialty occupation. For this reason, we will dismiss the appeal.

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[2] We note here that the Petitioner itself argued that the Beneficiary's prior work as a "Senior Manager" encompassed duties of a software developer/engineer. But the only way the Petitioner can argue that is by understanding the actual duties the Beneficiary performed in that position. The title of "Senior Manager" does not alone connote or even convey duties related to the software developer/engineer profession. Still, the Petitioner argues and expects that USCIS accept the position's title alone as sufficient to establish the position's substantive nature, and whether it is a specialty occupation.

Although the Director also found the Beneficiary unqualified to perform the duties of this position, because the record does not establish its services (or duties), we find the Beneficiary's qualifications to perform its duties immaterial and will not reach this issue.

III. 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. 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.