U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-R- INC.

DATE: APR. 18, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, an information technology firm, 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) § 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, California Service Center, denied the petition. The Director concluded that the proffered position is not a specialty occupation.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred in finding that the proffered position is not a specialty occupation.

Upon *de novo* review, we will dismiss the appeal.

I. SPECIALTY OCCUPATION

A. Legal Framework

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), defines the term "specialty occupation" as an occupation that requires:

> (A) theoretical and practical application of a body of highly specialized knowledge, and
>
> (B) 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 this statutory definition, but adds a non-exhaustive list of fields of endeavor. In addition, the regulations provide that the proffered position must meet one of the following criteria to qualify as a specialty occupation:

(*1*) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

(*2*) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(*3*) The employer normally requires a degree or its equivalent for the position; or

(*4*) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. § 214.2(h)(4)(iii)(A). U.S. Citizenship and Immigration Services (USCIS) has consistently interpreted the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) 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"); *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

B. Proffered Position

In the H-1B petition, the Petitioner stated that the Beneficiary will serve as a software engineer. The Petitioner described the Beneficiary's day-to-day responsibilities as follows:

- Develop custom-based modules of the ERP (Enterprise Resource Planning) system using
- Perform batch server setup, EDI implementation and integrate OLAP multidimensional reports in
- Plan, design, develop, test, implement and support custom proprietary software applications;
- Research, design, implement, document, and test system software, in accordance with the firm's development process;
- Provide technical support to project team members;

- Contribute to company's intellectual property development;
- Evaluate users requests for new or modified programs;
- Consult with users to identify current operating procedures to clarify program objectives;
- Formulate plans outlining steps required to develop programs, using structured analysis and design; prepare flowcharts and diagrams to illustrate sequence of steps program must follow, and to describe logical operations involved;
- Write documentation to describe program development, logic, coding and corrections;
- Oversee installation of hardware and software, monitor performance of program after implementation;
- Conduct user training, perform periodic system updates, interact with users for future enhancements; and
- Resolve software application problems.

The Petitioner further indicated that the position requires a bachelor's degree in Computer Science, Information Systems, or related field.

On the labor condition application (LCA) submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category "Software Developers, Applications" corresponding to the Standard Occupational Classification code 15-1132.[1]

C. Analysis

Upon review of the record in its totality and for the reasons set out below, we determine that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation.

[1] The Petitioner classified the proffered position at a Level I wage (the lowest of four assignable wage levels). We will consider this selection in our analysis of the position. The "Prevailing Wage Determination Policy Guidance" issued by the DOL provides a description of the wage levels. A Level I wage rate is generally appropriate for positions for which the Petitioner expects the Beneficiary to have a basic understanding of the occupation. This wage rate indicates: (1) that the Beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; (2) that she will be closely supervised and her work closely monitored and reviewed for accuracy; and (3) that she will receive specific instructions on required tasks and expected results. U.S. Dep't of Labor, 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. A prevailing wage determination starts with an entry level wage and progresses to a higher wage level after considering the experience, education, and skill requirements of the Petitioner's job opportunity. *Id.*

Specifically, the record of proceedings contains discrepancies and misleading information that undermine the Petitioner's claims regarding the proffered position, and the Petitioner has not established the nature and scope of the Beneficiary's employment.

For example, the Petitioner provided misleading information regarding its in-house employment. In its support letter, the Petitioner stated that the Beneficiary will "perform 100% of her duties in-house" at its location. The Petitioner indicated that "[the Petitioner] needs to re-design and re-engineer the user interface of the [Petitioner's] package and integrate the package into the [Petitioner's] software which the Beneficiary has advanced expertise in." While the Petitioner also stated that "this position does not require the candidate to work at a client location," it did not submit any evidence to indicate that the Beneficiary will be working on a client project. However, in response to the request for evidence (RFE), the Petitioner then submitted a copy of contract and statement of work (SOW) with (Client), and indicated that the Beneficiary would work on a project for its Client.

Further, there is a discrepancy in the record of proceedings that casts doubt on the Petitioner's claim that the Beneficiary's employment will be in-house. For example, the SOW executed between the Petitioner and the Client stated that the Client "is responsible for the cost of flights, hotels, car/taxi related expenses and food per diem," which undermines the Petitioner's claim that the Beneficiary will "perform 100% of her duties in-house" at its location.

We also note that the Director stated in its decision that public records indicate that the Client is a consulting company which provides computer-related services to its clients. The Director further noted that absent additional evidence between the Client and the actual end-client firm, the evidence does not establish the work to be performed. However, the Petitioner did not address this issue on appeal.

Moreover, the documents from the Client indicated that it shares the same address as the Petitioner as provided in the H-1B petition and the LCA. Even assuming that an in-house project exists, the fact that the Petitioner shares its office with the Client also brings into question whether there is sufficient work space for the Beneficiary to perform her duties in the Petitioner's office space. In the H-1B petition, the Petitioner indicated that it has 14 employees, but it did not provide information regarding how many of these employees work onsite. The Petitioner did provide photographs of a desk and copy machine areas. However, the Petitioner did not provide a lease agreement that indicates the size of its office space or maximum occupancy allowed, and information from the Client that indicates the number of its employees working at the same location. Therefore, we are unable to determine if the Beneficiary will have adequate work space to perform her duties, which in turn raises doubts about whether the Beneficiary will be working in-house as described in the H-1B petition.

The Petitioner also provided misleading and vague information regarding the proffered duties. Specifically, the Petitioner initially indicated that the Beneficiary will, in part, "contribute to company's intellectual property development," "plan, design, develop, test, implement, and support

custom proprietary software applications," and "research, design, implement, document, and test system software, in accordance with the firm's development process." However, in response to the RFE, the Petitioner indicated that it "does not produce its own software product," but "utilizes software for [its] services."

Moreover, the job descriptions lack sufficient detail and concrete explanation to establish the substantive nature of the work within the context of the project, and the associated applications of specialized knowledge that their actual performance would require. For example, a document titled "Project Description" states that the Beneficiary's tasks include "test application functionality and usability with the users," "identify bugs, develop fixes," and "use regression testing," which require 1600 hours. There is no further explanation as to who the users or what particular tasks the Beneficiary will perform on a day-to-day basis (e.g., what specific testing and fixing activities are involved), the complexity of such tasks, and the substantive application of knowledge involved. Further, the general description does not delineate the demands, level of responsibilities and requirements necessary for the performance of these duties.

In addition, the Petitioner provided inconsistent information regarding the minimum educational requirements for the proffered position. Specifically, the Petitioner initially stated that the proffered position requires at least "a Bachelor's degree or equivalent in Computer Science, Information Systems, or related field." However, in response to the RFE, the Petitioner provided a "detailed position description," that indicated it requires at least a bachelor's degree in computer science and experience including "at least 3 years of experience" for the proffered position, which differs from the prior minimum requirements stated.[2]

On appeal, the Petitioner asserts that it is providing additional evidence to distinguish itself from the employer in *Defensor v. Meissner*, 201 F.3d at 387. The Petitioner submits copies of contracts it has with other clients and documentation regarding work performed by its employees as evidence that the proffered position is a specialty occupation. However, none of these documents appear to pertain to the proffered position in this petition as they do not mention either the project with the Client on which the Beneficiary would allegedly work for the duration of the petition, or the Beneficiary. There are no documents from the Client that outline the requirements for the position and, therefore, we cannot determine that the proffered position requires a minimum of a bachelor's degree or its equivalent in a specific specialty.

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[2] We note that this requirement does not correspond with the Level I prevailing wage on the LCA. In designating the proffered position at a Level I, entry-level wage rate, the Petitioner has indicated that the proffered position is a comparatively low, entry-level position relative to others within the occupation, in which the Beneficiary is only required to have a basic understanding of the occupation. The Petitioner's designation of the proffered position as a Level I, entry-level position thus undermines the reliability of the requirements for the proffered position contained in the "detailed position description" that requires additional experience. No explanation for the variances was provided by the Petitioner. Therefore, the Petitioner has not submitted an LCA that corresponds to the position and that is certified for the proper wage level. 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.

We note that, 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 v. Meissner*, 201 F.3d at 387-88. 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.

Because of the discrepancies discussed above, we cannot determine the nature and scope of the Beneficiary's employment. The record lacks evidence sufficiently concrete and informative to demonstrate: (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 education of highly specialized knowledge in a specific specialty. "[I]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence." *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the Petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92.

The inability to establish the substantive nature of the work to be performed by the Beneficiary consequently 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 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. Accordingly, as the Petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation.

II. CONCLUSION

The burden is on the Petitioner to show eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.[3]

[3] Since the identified bases for denial are dispositive of the Petitioner's appeal, we will not address any of the additional grounds of ineligibility we observe in the record of proceeding.

ORDER: The appeal is dismissed.

Cite as *Matter of D-R- Inc.*, ID# 16150 (AAO Apr. 18, 2016)