U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-B-C-, INC.

DATE: NOV. 8, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a company engaged in systems and software development services, seeks to temporarily employ the Beneficiary as a "software developer" under the H-1B nonimmigrant classification for specialty occupations. 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 Petitioner had not demonstrated sufficient specialty occupation work for the entire requested H-1B validity period.

On appeal, the Petitioner submits additional evidence and asserts that it has established eligibility for the benefit sought.

Upon *de novo* review, we will dismiss the appeal.[1]

I. PROFFERED POSITION

In the H-1B petition, the Petitioner stated that the Beneficiary will serve as a "software developer." 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 "Software Developers, Applications" corresponding to the Standard Occupational Classification (SOC) code 15-1132.

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[1] We follow the preponderance of the evidence standard as specified in *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).

[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).

The Petitioner provided the following job duties for the position:

Duties Duty Description	Percentage devoted
Design and Analysis of requirements	10%
Use case reviews with Business Analysis team	5%
Mastronix Development and, Database administration	50%
QA and UAT Testing	15%
Application production support and bug fixing	20%

According to the Petitioner, the proffered position requires a bachelor's degree in computer sciences.

II. 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;
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> *(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;
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> *(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). 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").

B. Analysis

To establish eligibility, the Petitioner must establish that the proffered position qualifies as a specialty occupation, demonstrate that a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the Beneficiary for the duration of the employment period requested in the petition.[3]

Upon review of the record of proceedings, we find that the Petitioner did not provide sufficient, credible evidence to establish in-house employment for the Beneficiary for the validity of the requested H-1B employment period. Specifically, the Petitioner did not provide sufficient documentation of the projects in which the Beneficiary will be part of and his duties on these specific projects to adequately convey the substantive work to be performed by the Beneficiary.

As reflected in the description of the position as quoted above, the proffered position has been described in terms of generalized and generic functions that do not convey sufficient substantive information to establish the relative complexity, uniqueness and/or specialization of the proffered position or its duties. For example, the Petitioner stated that the Beneficiary will "design and analysis of requirements;" "Mastronix development, and database administration;" "QA and UAT testing;" and, "application production support and bug fixing." The Petitioner's description is generalized and generic in that the Petitioner does not convey the substantive nature of the work that the Beneficiary would actually perform, or any particular body of highly specialized knowledge that would have to be theoretically and practically applied to perform it. The Petitioner provided a description of the Mastronix product that is being developed but it does not provide a detailed understanding of the Beneficiary's responsibilities with working on this product. The responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance.

In this matter, the Petitioner indicated that the Beneficiary will be employed in-house as a software developer to work on the Mastronix project. The Petitioner explained that Mastronix is the "core technology that will become a platform to launch many more products," and that "further advancements to Mastronix are necessary to create our own products based on this technology and to integrate with enterprise, cloud and consumer applications to launch Mastronix integrated solutions."

[3] The Petitioner submitted documentation to support the H-1B petition, including evidence regarding the proffered position and its business operations. While we may not discuss every document submitted, we have reviewed and considered each one.

However, the Petitioner did not provide detail explanation of the projects or work required in order to make more products, and the role of the Beneficiary in achieving this goal.

On appeal, the Petitioner also stated that development of Mastronix began in 2016 and that "we now have more than 90% of the initial development needed to be overseen and performed by the resident technical staff in our Virginia office for quality control purposes." If the Petitioner is seeking to employ the Beneficiary to design and develop a product that is 90% developed, it is not clear if the Beneficiary will perform software development services for the entire requested employment period. In addition, the Petitioner provided a one-page document entitled, "Mastronix R3 Project Timelines" that indicate several release dates that go through December 2020. However, the timeline does not list the Beneficiary as a resource, and does not specifically state the duties to be performed by the Beneficiary for the project deadlines. The job duties stated that the Beneficiary will spend 50 percent of his time on "Mastronix Development and, Database administration." This explanation does not provide any real context to the work to be performed by the Beneficiary for this project.

Although the Petitioner submitted a business plan for developing Mastronix, it did not provide specific information regarding the software that will be developed by the Beneficiary, or information regarding the budget and personnel needed to develop the new software. According to the submitted organizational chart, there are several employees working solely on Mastronix. The job titles include: Director, Product Development, Product Manager, Business Development Manager, QA Lead, Delivery Lead, Quality Analyst, Developer(s), and, Business Analyst(s). However, upon review of the employee list and job descriptions submitted by the Petitioner, it is not clear which employees, if any, are working on Mastronix as indicated in the organizational chart. The Petitioner did not explain if the Beneficiary would be able to develop the software alone or provide information regarding the employees that will be working with him.

In addition, the Petitioner did not submit documentary evidence to demonstrate that specific clients had actually requested the Mastronix system for their business needs. The Petitioner did not submit any documentation such as contracts, agreements, purchase orders or invoices from customers that have engaged the Petitioner to use its Mastronix software. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). In other words, eligibility for the benefit sought must be assessed and weighed based on the facts as they existed at the time the instant petition was filed and not based on what were merely speculative facts not then in existence. As such, the Petitioner has not sufficiently established that the petition was filed for

non-speculative specialty occupation work for the Beneficiary that existed as of the time of the petition's filing.[4]

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. The record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. Because the Petitioner has not established the substantive nature of the Beneficiary's work, we are unable to evaluate whether 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 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.

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.

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[4] The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

> Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30,419, 30,419-20 (proposed June 4, 1998) (to be codified at 8 C.F.R. pt. 214). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

III. CONCLUSION

The evidence of record does not establish that the proffered position qualifies as a specialty occupation.

ORDER: The appeal is dismissed.

Cite as *Matter of N-B-C-, Inc.*, ID# 1639135 (AAO Nov. 8, 2018)