U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

MATTER OF D-, LLC

DATE: NOV. 8, 2018

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an information technology company, seeks to temporarily employ the Beneficiary as a "QA engineer" 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 did not sufficiently establish that the proffered position qualifies as a specialty occupation.

On appeal, the Petitioner submits additional evidence and contends that the petition should be approved.

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

## 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

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

(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). 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"); *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

B. Analysis

Upon review of the record in its totality and for the reasons set out below, we conclude that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation. Specifically, the Petitioner has not established the substantive nature of the work that the Beneficiary will perform, which precludes a finding that the proffered position satisfies any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).[2]

The Petitioner, which is located in Ohio, indicated on the Form I-129, Petition for a Nonimmigrant Worker, and on the certified labor condition application (LCA)[3] that the Beneficiary would work as a

[2] 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.

[3] A petitioner submits the LCA to 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

QA engineer for [redacted] (end-client), in New York, for the petition's entire requested employment period. The claimed contractual chain is as follows:

Petitioner → [redacted] (mid-vendor) → [redacted] (end-client)

As recognized by the court in *Defensor*, 201 F.3d at 387-88, where, as here, the work is to be performed for entities other than the petitioner, evidence of the client company's job requirements is critical. 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.

Preliminarily, we conclude that the Petitioner has not established definitive, non-speculative employment for the Beneficiary. The Petitioner claims that the Beneficiary would work for the end-client in New York for the entire period of H-1B period, a period of 35 months. However, the record does not contain contractual agreements between the Petitioner and the mid-vendor,[4] and between the mid-vendor and the end-client,[5] supporting this claim. Nor are there any copies of the types of documents commonly executed pursuant to such contractual agreements, such as work orders, statements of work, invoices, receipts, or similar evidence. In other words, the record of proceedings is currently insufficient to establish that the position described in this petition actually exists. There is little indication that this petition was filed for non-speculative employment.[6]

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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).

[4] We acknowledge that the Petitioner submitted a "Subcontractor Master Services Agreement" (MSA) document executed between the mid-vendor and the Petitioner, and numerous invoices between the parties. The Petitioner has not established the MSA's relevance to the Beneficiary's assignment as it does not reference the Beneficiary, the job title of the proffered position, or the job duties and tasks to be performed by a QA engineer, the proffered position. Nor does the document reference the end-client. Moreover, while the invoices indicate a relationship between the Petitioner and the mid-vendor, and the Beneficiary's consulting services work for the mid-vendor between May 2017 and March 2018, the invoices do not establish what type of work the Beneficiary was doing, and for whom. As such, the submitted documentation has little evidentiary value towards substantiating what type of work the Beneficiary would perform for the end-client.

[5] The end-client states in their support letter that they have a Statement of Work (SOW) with the mid-vendor entitled "Engineering Transformation Migrate and Capacity Program Testing" with a start date of "August 2017," but no evidence of this contractual relationship between the end-client and the mid-vendor is contained in the record. Most importantly, the end-client does not reference the Petitioner, the job title of the proffered position, or the job duties and tasks to be performed by the Beneficiary. The end-client only states that the Beneficiary is "performing services for [the end-client] as a contractor onsite."

[6] 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

Even if we set the issue of speculative employment aside, we would still be unable to ascertain the substantive nature of the proffered position. The Petitioner submitted a letter from the end-client stating that it has a Statement of Work (SOW) with the mid-vendor, and indicating that the Beneficiary is performing services for the end-client as a contractor onsite. We hereby incorporate our previous discussion regarding the lack of contractual documentation in the record, including the absence of the referenced SOW. The letter also does not provide a detailed explanation of the project upon which the Beneficiary will work, the timeframe of the project, and the Beneficiary's role in that project. Nor does it reference the Petitioner and the Petitioner's specific role with respect to the Beneficiary's day to day work. There is little evidence of an obligation on the part of the end-client to provide any work for the Beneficiary, let alone work of specialty occupation caliber lasting through the end of the requested validity period. The letter therefore does little to establish the substantive nature of the proffered position.

The Petitioner also submitted a letter from the mid-vendor, which confirmed its service agreement with the Petitioner and purchase order for the contract and for the Beneficiary's services as a QA engineer to work on a project for the end-client in New York. The mid-vendor also provided a list of duties for the Beneficiary as well as the educational requirements for the position. As previously noted, however, the Petitioner has not submitted the referenced agreement with the mid-vendor, or the contractual agreements between the mid-vendor and the end-client, which diminishes the letter's evidentiary weight. As such, the letter from the mid-vendor has little evidentiary value towards substantiating what type of work the Beneficiary would perform for the end-client.

Without documentary evidence outlining the nature and duration of the Beneficiary's claimed assignment, it is very difficult to determine the purpose and scope of duties required of the Beneficiary while working on the project for the mid-vendor and subsequently the end-client. Given this specific lack of evidence and the insufficient job descriptions contained in the record, we cannot determine the substantive nature of the proffered position and its associated job duties.

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> 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 petition for H-1B classification on the basis of facts not in existence at the time the instant petition was filed, it must nonetheless file a new petition to have these facts considered in any eligibility determination requested, as the agency may not consider them in this proceeding pursuant to the law and legal precedent cited, *supra*. See also USCIS Policy Memorandum PM-602-0157, *Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites*, (Feb. 22, 2018), https://www.uscis.gov/legal-resources/policy-memoranda.

Moreover, the record does not contain documentation from the end-client regarding the specific job duties that the Beneficiary will perform or the educational requirements for the position. Although the Petitioner and the mid-vendor provided a list of duties the Beneficiary will perform in their support letters, the record is devoid of a detailed explanation of her day-to-day duties from the end-client for whom she will perform services.[7] We are therefore precluded from determining (1) the actual work the Beneficiary will perform; (2) the complexity, uniqueness and/or specialization of the tasks; and (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty.

The record also contains inconsistencies with respect to the qualifications required to perform the duties of the proffered position. As previously noted, to prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, we interpret the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position.

Here, the Petitioner and the mid-vendor state different minimum requirements for the proffered position. For example, in the initial H-1B submission, the Petitioner stated that the position requires a "Bachelor's degree in Computer Science, Engineering, Information Technology, Mathematics, or Science, or other related technical field in addition to relevant work experience." The record is silent on the "relevant work experience" required for the proffered position. The mid-vendor, however, stated that the proffered position requires "a Bachelor's degree or equivalent in the relevant technology field," but no reference is made to the specific technology fields that are deemed to be "relevant," or that any experience is required for the position. Most importantly, the end-client did not specify that the position requires a bachelor's or higher degree in a specific course of study. *See Defensor*, 201 F.3d at 387-88 (evidence of the client company's job requirements is critical). Overall, the record contains insufficient and confusing information about the nature of the proposed position, the minimum educational requirements, associated job duties, and level of responsibility.

[7] The Petitioner's use of the past tense for many of the claimed duties also leads us to question whether these are actual duties proposed for the Beneficiary, or duties he has performed in the past. In addition, we find that the duties provided by the Petitioner are vague and carry no substantive detail. For instance, documentation in the record details that the Beneficiary was "involved in preparing the estimate for automating various modules in the project," but the Petitioner did not provide any detail on the purported project, the work these duties with the end-client will entail, and how this task merits recognition of the proffered position as a specialty occupation. The mid-vendor's verbatim repetition of these generally-stated duties adds little to our understanding of the Beneficiary's duties. The letter lists the duties of the position in a bullet-pointed fashion similar to that of the Petitioner's letter, which calls into question its actual authorship.

The generalized information described above does not establish a necessary correlation between the proffered position and a need for a particular level of education, or educational equivalency, in a body of highly specialized knowledge in a specific specialty. It is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. To the extent that they were described, the proposed duties did not provide a sufficient factual basis for conveying the substantive matters that would engage the Beneficiary in the actual performance of the proffered position, so as to persuasively support the claim that the position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the duties and responsibilities of the proffered position. Given this specific lack of evidence and the insufficient job descriptions contained in the record, we cannot determine the substantive nature of the proffered position and its associated job duties.

In summary, there is little evidence of an obligation on the part of the end-client to provide any work for the Beneficiary, let alone work of specialty occupation caliber lasting through the end of the requested validity period. Without probative documentation, such as contracts or agreements between all the parties that outline the terms and conditions of the Beneficiary's employment, we are not able to fully ascertain what the Beneficiary would do, where the Beneficiary would work, as well as how this would impact the substantive nature of the proffered position. This documentation therefore does little to establish the substantive nature of the proffered position. Given this specific lack of evidence and the insufficient job descriptions contained in the record, we cannot determine the substantive, non-speculative nature of the work to be performed by the Beneficiary.

Because the Petitioner has not established the substantive nature of definite, non-speculative work that the Beneficiary would actually perform for the stated end-client, 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. We therefore determine that the evidence of record does not sufficiently establish the existence of a definite, non-speculative specialty occupation position.

## II. CONCLUSION

The Petitioner has not established that the requirements of the requested classification have been met.

**ORDER:** The appeal is dismissed.

Cite as *Matter of D-, LLC*, ID# 1621015 (AAO Nov. 8, 2018)