U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-G- INC.

DATE: NOV. 29, 2018

FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

PETITION: APPEAL OF VERMONT SERVICE CENTER DECISION

The Petitioner, a "software development, staffing" company, seeks to temporarily employ the Beneficiary as a "programmer analyst" 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 Petitioner did not sufficiently establish that the proffered position qualifies as a specialty occupation.

On appeal, the Petitioner submits additional evidence and asserts that the Director erred in the decision.

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

I. 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). 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).

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.

II. ANALYSIS

Upon review of the record in its totality, we conclude that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation because the record lacks sufficient evidence of the actual work that the Beneficiary will perform for the end-client.[1]

The Petitioner stated on the Form I-129, Petition for a Nonimmigrant Worker, and on the certified labor condition application (LCA)[2], that the Beneficiary would work as a programmer analyst for an end-

[1] 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.

[2] The Petitioner is required to submit a certified LCA to U.S. Citizenship and Immigration Services 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

client in Texas, for the petition's entire employment period, October 2017 to September 2020. The Petitioner submitted an itinerary of the Beneficiary's services and indicated the relationship with the end-client as follows:

The record of proceedings does not contain sufficient information regarding the specific job duties that the Beneficiary would perform for the end-client; the educational requirements; and the period of any such employment.

The Petitioner submitted a "Subcontractor Agreement for (SA) between the Petitioner and , the first vendor. Under the "Services" section, it stated that the Petitioner "through its employees and third party contractors, will provide the services requested by and described in a Statement of Work document which has been agreed to and signed by both [the Petitioner] and [the first vendor]…." The SA contains general contractual terms and conditions to be automatically incorporated into any follow-on contracts executed by the first vendor and the Petitioner under the SA's umbrella. As such, the record's SA document does not bind the vendor or the end-client to any specific contract with the Petitioner. In sum, the SA has little probative weight towards establishing actual work to be performed by the Beneficiary for the end-client for any specific period or location.

By the terms of the contract, the document does not commit the vendor or the end-client to any contract with the Petitioner for any particular services during any period or at any location. Rather, the section's language indicates only that the Petitioner will provide services for the vendor for the benefit of the end-client "from time to time." Further, the SA contains no terms indicating that it would exclusively seek to engage only the Petitioner for such services. Under the section "Retention and Removal of Company Workers," specifically provides: "[The Petitioner's] services are retained on an at-will basis, and the quantity and duration of Services are within the sole discretion of [the first vendor] and no binding commitments, representations or assurances with respect thereto have been made."

In addition, the SA indicated that a statement of work must be attached with the services specified. Upon review of the submitted work order, it stated that the Petitioner will provide services to and identified the Beneficiary as the company worker. The work order indicated the start date as June 29, 2016, the client as and the end-client as It also provided a brief description

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employment" or the actual wage paid by the employer to other employees with similar experience and qualifications who are performing the same services. *See Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 545-546 (AAO 2015).

of the duties to be performed by the Beneficiary. The duties stated that the Beneficiary will perform the duties of a Mulesoft Developer/Analyst and will "design, develop and configure software systems to meet client requirements either end to end from analysis, design, implementation, quality assurance (including testing), to delivery and maintenance of the software product or system or for specific phase of the lifecycle." It is not clear if the position of "Mulesoft Developer/Analyst" is the same as programmer analyst.

The Petitioner also submitted letters from the first and second vendors to confirm that the Beneficiary is providing services as a programmer analyst at the end-client's location. The letters briefly list general duties the Beneficiary will perform, rather than a detailed explanation of the project and the Beneficiary's role in that project. In addition, the letter from the second vendor stated that the Beneficiary will work for its end-client, however, the Petitioner did not submit the agreement between the second vendor and the end-client. Without evidence of the agreement with the end-client, it is very difficult to determine the purpose and scope of duties required of the Beneficiary while working on the project for the vendor and subsequently the end-client.

Further, the Petitioner submitted a letter from the end-client that confirmed that the Beneficiary is working as a programmer analyst on "integration projects at our facility." The letter also listed a brief description of the Beneficiary's job duties, similar to the duties listed in the letters from the vendors. The letter listed general duties the Beneficiary will perform, rather than a detailed explanation of the project and the Beneficiary's day-to-day duties. For example, the letter stated that the Beneficiary is "performing software development in a team-oriented environment;" "design, development, coding, testing, debugging and support of complex computer application," and "developing interfaces to integrating complex business requirements and processes." The end-client did not explain the specific project that the Beneficiary will be working on and thus, we do not know the software the Beneficiary will develop, or what is the "complex computer application" that the Beneficiary will support. These and other stated duties do not sufficiently convey the specific work the Beneficiary will be performing. The job description did not provide an explanation of the demands, level of responsibilities, complexity, or requirements necessary for the performance of these duties. Further, the letter from the end-client did not indicate that the duties require a bachelor's degree or equivalent in a specific specialty.

In addition, the record is not clear as to the project's duration. The itinerary stated that the "date of service" is from October 2017 until September 2020. The submitted work order indicated the Beneficiary's start date as June 29, 2016 but it did not note the duration of the project. The letters from the two vendors both indicated that this is an "ongoing long term project with strong possibility of further extensions." Finally, the letter from the end-client did not indicate at all the duration of the project. Although the letters from the vendors state that it is an "ongoing" project, the Petitioner did not submit sufficient evidence such as contracts or similar corroborating evidence that the project with the end-client will continue until September 2020, and will require the services of the Beneficiary as a programmer analyst for that entire period.

For all the reasons discussed above, we find that the petition was filed for employment that was speculative, and, therefore for which the substantive nature of the associated duties had not been established.

The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. 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). 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).

Because the Petitioner has not established the substantive nature of the Beneficiary's work as it will be performed 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.

III. CONCLUSION

The evidence of record does not establish that the proffered position qualifies as a specialty occupation.[3]

ORDER: The appeal is dismissed.

Cite as *Matter of E-G- Inc.*, ID# 1740249 (AAO Nov. 29, 2018)

[3] Because this issue is dispositive of the appeal, we need not and will not further address other issues we observe in the record, including whether an employer-employee relationship exists between the Petitioner and the Beneficiary. We note that in the letter from the end-client, it stated that the Beneficiary's employer is [redacted] (the second vendor), rather that the Petitioner.