U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF R- LTD

DATE: SEPT. 24, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, an information technology services provider, seeks to continue to temporarily employ the Beneficiary as a "senior software developer" 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 California Service Center denied the petition, concluding that the evidence of record does not establish that: (1) the Petitioner will have an employer-employee relationship with the Beneficiary; and (2) 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. EMPLOYER-EMPLOYEE RELATIONSHIP

We will first address whether the evidence of record establishes that the Petitioner would be a "United States employer" having "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii).

A. Legal Framework

A petitioner seeking to file for an H-1B beneficiary must meet the definition of a "United States employer." 8 C.F.R. § 214.2(h)(2)(i)(A). See section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act) (referring to the "intending employer"). According to the regulation at 8 C.F.R. § 214.2(h)(4)(ii), the term "United States employer" means a person, firm, corporation, contractor, organization, or other association in the United States which :

(1) Engages a person to work within the United States;

(2) *Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee*; and

(3) Has an Internal Revenue Service Tax identification number.

(Emphasis added).

For purposes of the H-1B visa classification, the terms "employer-employee relationship" and "employee" are undefined. The United States Supreme Court has determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (quoting *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). Thus, to interpret these terms, U.S. Citizenship and Immigration Services will apply common law agency principles which focus on the touchstone of control.

The Supreme Court stated:

> "In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

Darden, 503 U.S. 318, 322-23.[1] *See Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 445 (2003) (quoting *Darden*). *See also Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (even though a medical staffing agency is the petitioner, the hospitals receiving the beneficiaries' services are the "true employers" because they ultimately hire, pay, fire, supervise, or otherwise control the work of the H-1B beneficiaries). We will assess and weigh all of the incidents of the relationship, with no one factor being decisive.

[1] When examining the factors relevant to determining control, we must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. *See Darden*, 503 U.S. at 323-24.

B. Analysis

The Petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the Beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).[2]

In the instant case, the Petitioner, located in Ohio, indicated that it will assign the Beneficiary to work offsite for an end-client, located in Michigan, for the duration of the validity period requested. The claimed contractual chain is as follows:

> Petitioner → F- (mid-vendor) → C- (prime-vendor) → M- (end-client)

First, we conclude that the Petitioner has not established the existence of definitive, non-speculative employment for the Beneficiary. On the petition, the Petitioner requested the Beneficiary's services from May 2017 through December 2019. Notably, while the Petitioner submitted a subcontract agreement with the mid-vendor in support of the petition, the agreement was for another individual. In response to the Director's request for evidence (RFE), the Petitioner submitted another subcontract agreement but it also pertained to other individuals. On appeal, the Petitioner acknowledged its error and submitted a subcontract agreement for the Beneficiary. Notably, the subcontract agreement, executed in June 2017 (subsequent to the filing of the petition), between the Petitioner and the mid-vendor indicates the services to be performed will be contained within a SOW. The accompanying SOW, executed in July 2017 (subsequent to the filing of the petition), specified the end-client will require the Beneficiary's services commencing in July 2017, but did not note the duration of the work assignment. Notably, the May 2017 mid-vendor letter stated:

> We have issued a work order for 12 months, but we anticipate that the need for [the Beneficiary's] services will go beyond that time and could go for as long as 2-3 years. Please note that, this statement indicates our intent and is not a contractually or otherwise binding commitment.

The letter from the prime-vendor indicates that the Beneficiary will be required to perform services at the client site through July 2020, but it is not supported by corroborative contractual documentation. Though the documents in the record indicate that the prime-vendor's involvement will continue in the end-client's project until July 2022, the contractual material between the prime-vendor and the end-client does not establish the role of the mid-vendor, the Petitioner, and ultimately the Beneficiary within the end-client project for the duration of the requested period of H-1B employment. As a result, the Petitioner has not sufficiently demonstrated that the Beneficiary would be employed as claimed for the duration of the employment period requested.

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[2] 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.

The Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the Petitioner or the Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978). The agency made clear long ago that speculative employment is not permitted in the H-1B program. *See, e.g.*, 63 Fed. Reg. 30419, 30419-30420 (June 4, 1998).

Further, upon reviewing the entire record, including evidence provided on appeal, we conclude that the Petitioner has provided insufficient and inconsistent evidence regarding how the Petitioner will supervise and exercise control over the Beneficiary's day-to-day work at the end-client location.[3]

For example, the Petitioner initially provided an offer of employment letter executed in May 2017. Upon review of the offer letter, we note that it does not adequately establish several critical aspects of the Beneficiary's employment. For example, the document does not provide specific information regarding where the Beneficiary will work, his duties, who will supervise him on a day-to-day basis, and the requirements for the position. While an offer letter may provide some insights into the relationship of a petitioner and a beneficiary, it must be noted that the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, . . . the answer to whether [an individual] is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

The Petitioner also provided an itinerary, signed by P-T-, the president of the petitioning entity. The itinerary provided an email address for the Beneficiary's manager, N-K-, at the end-client location. Notably, the email address for the Beneficiary's manager contains the mid-vendor's domain. Further, the itinerary ends with the "name, address and contact information of the [p]erson [the] [B]eneficiary will be reporting to from your company" and identifies that individual as H-M-, who is located in Ohio. The record does not clarify which entity "your company" refers to and how H-M-'s role differs from N-K-.

Though requested by the Director in the RFE, the Petitioner did not clarify the identity of the individual within the Petitioning entity who will direct the Beneficiary's work, and describe that individual's the supervisory role within its organizational hierarchy. It provided a copy of an organization chart which lists the Beneficiary under a training manager (K-V-), who in turn reports to H-M-, the person who the Petitioner previously stated that the Beneficiary will report to in Ohio. H-M- is identified in the organizational chart as the Petitioner's services operations manager, who in turn reports to P-T-, the president of the petitioning entity. The Petitioner also provided mid-vendor and prime-vendor letters, as well as a subcontractor agreement between the Petitioner and the mid-vendor that discussed the work arrangements of other individuals, but not the Beneficiary.

[3] The Petitioner must resolve the inconsistencies and discrepancies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On appeal, the submitted prime-vendor's letter states that the Petitioner's president (P-T-) is located at the end-client site, and "will instruct and assign work to [the Beneficiary] on [a] daily basis," claiming that the "principal day-to-day management of [the Beneficiary] will therefore be conducted by [the Petitioner], except for minor operational consultations at the work site." While the prime-vendor maintains that the Petitioner will supervise the Beneficiary's work on a day-to-day basis, this assertion conflicts with the contractual documentation provided between the Petitioner and the mid-vendor. Notably, the Petitioner's subcontractor agreement with the mid-vendor for the employment of the Beneficiary, among other individuals, indicates (verbatim) that:

> [The Petitioner] agrees to provide Consultant to perform the Work under the direction of [the mid-vendor] and the [prime-vendor] or the [prime vendor's] designee upon the date specified by the [prime-vendor] and continuing thereafter pursuant to this Agreement.

Moreover, the statement of work (SOW) executed between the Petitioner and the mid-vendor indicates that the Beneficiary "will report to and be assigned work by the [prime-vendor] account [m]anager." The documentation provided does not identify any managerial role for the Petitioner in the end-client's project. Rather, the evidence suggests that the Petitioner's staff will be utilized to augment the staffing of other contracting entities, working under the direction of the mid-vendor, prime-vendor, or the end-client at the end-client location. The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

The RFE response also included copies of email exchanges between end-client employees, vendors, and the Beneficiary, and his work badge for the end-client location.[4] At most this evidence confirms the Beneficiary's assignment to the end-client location, but does not illuminate the nature of the Beneficiary's working relationship with the Petitioner. In other words, this evidence does not answer the question of who, on behalf of the Petitioner, oversees, directs, assigns, reviews, affects, supervises, or otherwise controls the Beneficiary's day-to-day work, and how such control is exercised. Therefore, the key element in this matter, which is whether the Petitioner exercises actual control over the Beneficiary, has not been adequately substantiated.

Further, we note that the Petitioner provided copies of the Beneficiary's electronic time sheets which were used to record time spent on work at the client site within the prime-vendor's time accounting system. The use of another company's accounting system to track the Beneficiary worktime indicates that at least one of the other contracting parties has some level of shared supervision and control over the Beneficiary's employment at the end-client location. The record does not contain copies of the Beneficiary's pay statements from the Petitioner, or other documentary evidence that

[4] The Petitioner claims to have employed the Beneficiary after filing the instant petition, which requests a change of employer and an extension of stay as an H-1B nonimmigrant. The Beneficiary was previously approved for the H-1B nonimmigrant classification pursuant to a petition filed by a different petitioner.

the Petitioner pays his salary for work performed at the end-client worksite. Without more, we must question the Petitioner's supervisory role over the employment of the Beneficiary at the end-client worksite.

The Petitioner also submitted a master contract documentation between the end-client and the prime-vendor, which did not include material relating to the utilization of the information technology consulting services of either the mid-vendor or the Petitioner in the end-client's project. The record contains a letter from the end-client but the letter only states that the end-client has engaged the prime-vendor for a project and does not contain any details specific to the Petitioner or the Beneficiary. The Petitioner did not provide the contractual documentation requested in the Director's RFE between the mid-vendor and the prime-vendor, and the prime-vendor and the end-client specific to the Beneficiary's proposed employment at the end-client location. Rather, it asserts that such material from the contractual parties is not required to establish the Petitioner's employment relationship with the Beneficiary.

On appeal, the Petitioner reasserts that contractual evidence from the end-client is not required to establish its employer-employee relationship with the Beneficiary for the period of requested H-1B employment.[5] It reiterates its contention that the end-client was not willing to provide a letter regarding the Beneficiary's employment at its worksite and maintains that the totality of the evidence demonstrates the Petitioner's eligibility for the benefit sought.[6] We disagree.

Notably, though the record contains contracts between the Petitioner and the mid-vendor, and the master agreements between the end-client and the prime-vendor, the master agreements do not specify any role within the end-client project for the mid-vendor and the Petitioner generally, and the Beneficiary, specifically. Without contracts or agreements between all the parties that outline the terms and conditions of the Beneficiary's employment and information regarding the Beneficiary's specific role in the end-client's project, we are not able to fully ascertain what the Beneficiary would do, where the Beneficiary would work, as well as how the contractual arrangements would impact the circumstances of his relationship with the Petitioner.

The record contains inconsistent and incomplete information about the nature of the Petitioner's claimed supervision and control of the Beneficiary's work. Accordingly, we determine that the record of evidence is insufficient to demonstrate that the Petitioner has an employer-employee relationship with the Beneficiary. Thus, the Petitioner has not sufficiently demonstrated that it meets the definition of "United States employer" as the intending employer in the instant H-1B petition.

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[5] Despite the Director's specific request, the Petitioner did not submit the requested material evidence. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

[6] Although a petitioner may always refuse to submit commercial information if it is deemed too sensitive, the Petitioner must also satisfy the burden of proof and runs the risk of a denial. *Cf. Matter of Marques*, 16 I&N Dec. 314 (BIA 1977) (holding the "respondent had every right to assert his claim under the Fifth Amendment[; however], in so doing he runs the risk that he may fail to carry his burden of persuasion with respect to his application.").

See 8 C.F.R. 214.2(h)(2)(i)(A). *See also* section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act) (referring to the "intending employer").

II. SPECIALTY OCCUPATION

We also find that the record does not sufficiently demonstrate that the proffered position qualifies as a 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). We have consistently interpreted 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*, 201 F.3d at 387.

As recognized in *Defensor*, 201 F.3d at 387-88, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location(s) in order to properly ascertain the minimum educational requirements necessary to perform those duties. In other words, as the beneficiaries in that case would provide services to the end-client hospitals and not to the petitioning staffing company, the petitioner-provided job duties and alleged requirements to perform those duties were insufficient for a specialty occupation determination. *See id.*

B. 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. Specifically, the record does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.

As a preliminary matter, the Petitioner has provided inconsistent and insufficient information regarding the minimum requirements of the position. It did not initially specify the minimum requirements of the position. Rather, it simply indicated that the Beneficiary is qualified for the H-1B nonimmigrant classification by virtue of his education. However, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself qualifies as a specialty occupation.

On appeal, the Petitioner provided a SOW from the mid-vendor which specified an expansive list of the technical proficiencies that would be required in order to adequately perform the duties of the position, to include "5 years of experience developing technical designs in consultation with other technical experts" and "5 years [of] experience with IBM WebSphere web application servers." However, the SOW did not specify any degree requirements for entry into the position.[7]

The Petitioner also provided a letter from the prime-vendor on appeal which states (verbatim):

> Bachelor's Degree Requirement: The duties of this position simply cannot be performed without knowledge contained in a bachelor's or higher degree, of the equivalent, related to this field of work. [The Beneficiary] clearly has met this requirement.

The claim that knowledge contained in a bachelor's degree relates to the duties of the position is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to

[7] As previously noted, the record lacks sufficient substantive documentation from the end-client, the company that will actually be utilizing the Beneficiary's services, regarding not only the specific job duties the Beneficiary would perform, but also information regarding what the client may or may not have specified with regard to the educational credentials and experience of persons assigned to its project.

the position in question. There must be a close correlation between the required specialized studies and the position; thus, the mere requirement of a degree, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility."). Thus, while an unspecified bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a conclusion that a particular position qualifies for classification as a specialty occupation. *Royal Siam Corp.*, 484 F.3d at 147.

Without more, the Petitioner's inconsistent and vague material regarding the requirements of the position indicates that the proffered position is not in fact a specialty occupation.

Furthermore, as discussed above, the Petitioner has not established the existence of definitive, non-speculative employment for the Beneficiary. Absent a demonstration that a position actually exists, we cannot determine whether it is a specialty occupation. Initially, the Petitioner described the proposed position as a "senior software engineer" and provided a position description that simply reiterated the duties of the occupational category "Software Developers, Applications" corresponding to the Standard Occupational Classification code 15-1132 from the Occupational Information Network (O*NET) category specified in the labor condition application (LCA)[8] submitted in support of the petition.[9] The May 2017 letter from the mid-vendor indicated that the Beneficiary in his role as a senior software engineer would perform the following duties (verbatim):

- Working in Agile methodology with daily meetings and scrum.
- [Participate] in requirements analysis, design, code, test.
- Responsible for Deliverables and managing a team.
- Responsible for process setup and execution.
- Responsible for code reviews and quality product.
- Defining test criteria and goals based on business requirements.
- Closely work with QA, BA, and Product owners to discuss requirements and client needs.
- Implementing Web application using MVC Framework Spring MVC, Java 8, JSP, HTML, CSS, Bootstrap, EJB.
- Implementing Database CRUD operations using Oracle, ORM tools Hibernate.
- Implementing design patterns.
- Responsible for code review, Jenkins CI and prod support.

[8] A petitioner submits the LCA to 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).

[9] *See* https://www.onetonline.org/link/summary/15-1132.00. (Last visited Sept. 24, 2018.)

The mid-vendor's description appears to have the Beneficiary performing application development duties, consistent with LCA for a position under the "Software Developers, Applications" occupational category.[10] However, as discussed above, the Petitioner has not provided sufficiently detailed contractual documentation and agreements between all the parties that outline the terms and conditions of the Beneficiary's employment, and inadequate information regarding the Beneficiary's specific role in the end-client's project. The record of proceedings in this case lacks sufficient material regarding the specific job duties to be performed by the Beneficiary within the end-client project. Without probative documentation detailing the work the Petitioner expects the Beneficiary to perform, as well as evidence establishing that the work requires a bachelor's degree in a specific discipline, or its equivalent, the Petitioner has not established that the proffered position qualifies as a specialty occupation.

In other words, without demonstrating the substantive nature and requirements of the position, the Petitioner has not shown 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 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 Petitioner has not established that the proffered position is a specialty occupation and that it has the required employer-employee relationship with the Beneficiary.

ORDER: The appeal is dismissed.

Cite as *Matter of R- Ltd*, ID# 1549171 (AAO Sept. 24, 2018)

[10] The prime-vendor letter submitted on appeal provides similar job duties for the position, and further expands the scope of the Beneficiary's employment to oversight of the prime-vendor's scrum teams, among other things, in a role identified as a "senior Java developer."