U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21170258

Date: MAR. 31, 2022

Appeal of Vermont Service Center Decision

Form I-129, Petition for Nonimmigrant Worker (H-1B)

The Petitioner seeks to employ the Beneficiary 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 Vermont Service Center Director denied the Form I-129, Petition for a Nonimmigrant Worker, concluding that the Petitioner did not establish that the proffered position qualified as a specialty occupation. The Director further determined that the Petitioner's position requirements did not satisfy the definition of a specialty occupation. The matter is now before us on appeal. The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We review the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), 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) includes a non-exhaustive list of fields of endeavor. In addition, the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*)–(*4*) provide the additional requirement that the proffered position must also meet one of those criteria to qualify as a specialty occupation.

We note as a threshold issue that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, the regulatory requirements found in the four specialty occupation criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*)–(*4*) must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Fed. Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996).

As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

In view of this and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), we construe 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 proffered 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").

By regulation, the Director is charged with determining whether the petition involves a specialty occupation as defined in section 214(i)(1) of the Act. 8 C.F.R. § 214.2(h)(4)(i)(B)(*2*). In addition, a petitioner must establish eligibility at the time of filing the petition and must continue to be eligible through adjudication. 8 C.F.R. § 103.2(b)(1).

II. ANALYSIS

A. Priority of the Statutory Definition of a Specialty Occupation Over the Regulatory Criteria

We begin with some general concepts. The statutory definition of a specialty occupation at section 214(i)(1) of the Act is the paramount requirement for a position to qualify for this nonimmigrant classification. If a position does not satisfy this statutory definition, we are precluded from making a favorable determination that it is a specialty occupation.

To determine whether a particular job qualifies as a specialty occupation, we do not simply rely upon a position's title or the broader occupational category within which a petitioner claims the position is located. A position's specific prerequisites are one of the primary elements we evaluate to determine whether it satisfies the statutory definition of a specialty occupation under section 214(i)(1) of the Act. The critical element is whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act. To

preponderantly demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge, 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.

We therefore face one overarching question on appeal: Did the Petitioner consistently state and establish the proffered position's prerequisites in a manner that sufficiently conveyed it could meet the statutory definition of a specialty occupation. If the Petitioner fails to make such a showing, the other bases in the Director's denial will not affect our determination (i.e., (1) was its acceptance of any engineering degree sufficiently connected to the position's duties; and (2) did the position meet any one of the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)). However, if they demonstrate that their prerequisites are sufficient to satisfy the statutory definition, we will address the other bases of the decision.

B. This Position's Mandatory Prerequisites

For the below reasons, we have determined that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation.[1] First, we observe that there are inconsistencies and discrepancies in the petition and supporting documents, which lead us to question the Petitioner's claims regarding the prerequisites it requires to perform in the position, as well as the actual nature and requirements of the proffered position. When a petition includes discrepancies, those inconsistencies will raise concerns about the veracity of the Petitioner's assertions. The Petitioner must resolve these inconsistencies with independent and objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591–92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

Within the initial filing, the Petitioner described the position it was offering to the Beneficiary, discussed the definition of a specialty occupation, and stated:

> Performing the duties described above requires the "theoretical and the practical application . . . of specialized knowledge" in Engineering as it relates to project scheduling in order to perform the level of work demanded of the professional holding this job. This specialized knowledge in Engineering equips [the Beneficiary] to provide appropriate scheduling and coordination of construction projects in accordance with timelines, which will maximize the client's return on investment and assist [the Petitioner] in fulfilling its contractual commitments.

The Petitioner made no mention that it required any particular amount or type of experience within the section describing the position's requirements. However, later in its initial filing correspondence when explaining why it designated a Level II wage rate on the U.S. Department of Labor's ETA Form 9035 & 9035E, Labor Condition Application for Nonimmigrant Workers (LCA), the Petitioner stated: "In this case, the Petitioner requires three (3) years of experience for entry into the position. This elevates the Level to a Level 2."

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

When responding to the Director's request for evidence (RFE) and on appeal, the Petitioner provided information that conflicts with its initially stated position prerequisites. These discrepancies are material and must be considered prior to the issues identified within the Director's denial because it would serve no purpose to evaluate whether the position satisfies one of the regulatory criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) if the stated prerequisites undermine the Petitioner's eligibility claims. It is important to note that the Petitioner did not offer an explanation for the variances in its position requirements.

When responding to the RFE, the Petitioner offered the following statements that omitted its experiential requirement and only listed the degree prerequisite:

- The Petitioner "requires employees (Beneficiary included) to possess a minimum of a Bachelor's degree for hire";
- "[T]he Beneficiary is qualified as she has the equivalent of a qualifying U.S. Degree in Engineering which meets Petitioning Employer's requirement for a Bachelor's Degree as a minimum . . . .";
- "The ability to perform this work requires that the Analyst (Project Controls & Scheduling) have a Bachelor's degree in Engineering";
- The Beneficiary has "the minimum prerequisite qualification from the Engineering core curriculum"; and
- "[T]he Beneficiary has been assigned . . . two a project that requires that Beneficiary to perform work that requires that she apply principles earned by completing a degree in [] Engineering that includes data analytics, mathematics, statistics, project governance, and computer modeling, all of which requires subject matter knowledge gained from completion of her degree and Engineering".

In response to the RFE, the Petitioner provided an opinion letter from [redacted] an assistant professor at [redacted] University. We agree with the Petitioner that the Director should have discussed and considered this evidence in the decision to deny the petition. Further, we observe that the opinion letter author also does not shed additional light on the issue of the Petitioner's inconsistent requirements, as he never mentions the Petitioner's requirement of three years of experience in order to qualify for the position. Instead, he summarizes stating that the beneficiary "is in possession of academic experience well beyond the minimum requirement for the position . . . through her technical knowledge obtained via Bachelor's Degree in Chemical Engineering . . . ." From this statement, it appears that the Petitioner either did not provide the author with its full position requirements, or the author did not fully consider all of the position's requirements in evaluating both the position and the Beneficiary's qualifications in order to perform in the position. Ultimately, contrary to the Petitioner's contention, there is a basis in which to ascribe diminished evidentiary value to the opinion letter.

Even within the appeal the Petitioner repeatedly indicates that for the offered position, it only requires a degree without also informing us that the position requires experience. For example, the Petitioner states:

- "The Petitioning Employer . . . requires as a minimum qualification for hire, a degree in Engineering." (Emphasis in original);

- "The Petitioning Employer stated that its requirement for entry into the position is a Bachelor's Degree in Engineering . . . ."
- "[T]he question is whether the Beneficiary's degree in engineering . . . provides the minimum skills required to perform the job duties associated with the position offered by the Petitioning Employer. It is"; and
- "As an Analyst (Project Controls & Scheduling), [the Beneficiary] will be assigned to major, multi-billion dollar projects and will be responsible for applying the knowledge she gained from completing her education in engineering to perform services for [the Petitioner]".

We note that the Petitioner did not offer this or any job announcements to provide additional indications of what prerequisites it employs for this or similar positions. The Petitioner has presented inconsistent requirements for the offered position. The Petitioner must remedy this discrepant information in the record. Such a resolution must be demonstrated through the submission of relevant, independent, and objective evidence that reveals which position requirements were their true prerequisites. *Matter of Ho*, 19 I&N Dec. 582, 591–92 (BIA 1988). And any evidence to establish the Petitioner's actual requirements must make such a showing as of the date they filed the petition. 8 C.F.R. § 103.2(b)(1), (12). USCIS may not approve a visa petition at a future date after a petitioner or a beneficiary becomes eligible under a new set of facts or based on evidence that postdates the filing date. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978) (finding that nonimmigrant eligibility criteria must be met at the time a petitioner files the petition)).

We further note that the Petitioner indicated that it would require three years of experience in order to qualify for the position. However, lacking from that statement was any further detail or guidance regarding what the petitioning organization would consider as "experience." We cannot intuit the breadth of the types of experience the Petitioner would, or would not, consider to be sufficiently related. This illustrates the manner in which the Petitioner's initial position requirements lacked sufficient specificity in addition to being inconsistent with the rest of the record.

When a petitioner fails to establish what the actual requirements are for a position in an H-1B petition, ingrained within that shortcoming, it has not established that the position can satisfy the primary H-1B requirement of meeting the statutory definition of a specialty occupation. Based on our review of the entire record, we conclude that the Petitioner has not consistently and sufficiently established what it requires to qualify for the proffered position in this petition. And finally, if the Petitioner's position requirements are a bachelor's degree in any engineering field and at least three years of experience, it has also not demonstrated that the Beneficiary in this petition is qualified for the position because the record is devoid of any work experience she has earned.

C. We Reserve Other Eligibility Determinations

Because the identified basis is dispositive of this appeal, we decline to reach and hereby reserve the Petitioner's remaining appellate arguments. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *see also Matter of M-F-O-*, 28 I&N Dec. 408, 417 n.14 (BIA 2021) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible). Those reserved arguments relate to the bases in the Director's decision: (1) whether the Petitioner's acceptance of

any engineering degree bore a sufficient nexus to the position's duties; and (2) whether the position met any one of the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

III. CONCLUSION

The appeal will be dismissed for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.