U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21285653

Date: MAY 23, 2022

Appeal of Nebraska 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 Nebraska 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. On appeal, the Petitioner asserts that the Director erred in denying the petition.

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 considers 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

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.

For the following reasons, we determine that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation. First, we observe that there are inconsistencies, ambiguities, 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 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.*

The Petitioner is a [redacted] company, that "cater[s] to a variety of different geographic regions and lifestyles." Within the initial filing, the Petitioner described the "web software developer" position it is offering to the Beneficiary, noting: "In this capacity, [the Beneficiary] will be responsible for translating business requirements into specific systems, applications or process designs for web solutions. [She] will also be responsible for design, development, deployment, maintenance, and in some cases support of multi-tiered web applications." The Petitioner listed some of the "essential responsibilities" of the position along with the relative percentage of time devoted to each responsibility, as follows: [1]

- Use best practices and industry standards to design, write, and deploy solid and maintainable application components using HTML, Advanced JavaScript, CSS, internal frameworks, and 3rd party tools. . . . 60%
- Maintain a core understanding of the software development cycle and of [q]uality [a]ssurance techniques using source code control repositories, debugging, and testing experience. 20%
- Keep up to date with advances in software development methodologies and technologies, with a particular focus on full stack web frameworks. 10%
- Communicate effectively and persuasively with management and peers. 10%

The Petitioner initially asserted that the proffered position requires at least a master's degree in computer science or a related field and relevant (but unspecified) work experience.

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 explain the variances in its position requirements.

Specifically, after filing the petition, the Petitioner submitted its own job advertisements asserting this evidence shows it "requires and has a clear pattern and practice of recruiting and hiring only candidates with a minimum of a *bachelor's* degree in computer science or a closely related field[s]. . . . for [the] web software developer and closely related positions." However, the Petitioner's reliance on this material is misplaced. The Petitioner did not provide copies of its job posting for the instant position,

[1] The Petitioner submitted documentation to support the petition, including evidence regarding the position and its business operations. For instance, it submitted a more expansive listing of the responsibilities of the position with differing relative percentages of time devoted to the duties itemized therein in response to the Director's request for evidence (RFE). While we may not discuss every document submitted, we have reviewed and considered each one.

but we carefully reviewed its postings for other information technology positions, a sampling of which follows:

- Net Developer: Bachelor's degree in a computer-related field *or* the equivalent technical work experience. Minimum of 3 to 5 years' experience in coding distributed internet/eCommerce applications that support high traffic websites.
- Email Developer: Bachelor's degree in computer science E-commerce *or* Coding Bootcamp. HTML, CSS accreditation. 2-5 years' experience with email coding and development. 2-3 years' demonstrated success in fast-paced marketing or agency team.
- Programmer Analyst II: Bachelor's degree in computer science *or* equivalent work experience. 3+ years software engineer experience, 3+ years SQL coding experience, and 3+ years API experience.
- Architect Sr., Solutions: Bachelor's degree – computing science/IT disciplines – performance engineering and platform architecture, 7+ years related education and/or work experience in (1) the field of application performance management (APM) and performance engineering, (2) on-premises platform infrastructure designs and solutions, and (3) cloud SaaS and IaaS designs and solutions. Additionally, 4+ years related education and/or work experience in application development.

The Petitioner did not provide evidence sufficient to show that these advertised job openings are for positions that are "closely related" to the instant position. We acknowledge that it discussed aspects of the underlying positions in the submitted job postings noting that they (and the proffered position) involve the initially stated responsibilities presented in the petition. However, some of the postings, such as the Architect, Sr., Solutions advertisement, appear to be for a more senior, experienced position than the proffered position. Other postings do not include sufficient information about the duties and responsibilities for the advertised positions.

The Petitioner has also submitted contradictory information regarding the specific occupation within which the Beneficiary will be employed which raises questions regarding whether these job advertisements offer employment in positions comparable to the one being offered to the Beneficiary. On the labor condition application (LCA) submitted in support of the H-1B petition, the Petitioner designated the proffered position as a full-time position with a Level III wage under the occupational category "Web Developers" corresponding to the standard occupational classification (SOC) code 15-1134 from the DOL's Occupational Information Network (O*NET).[2]

In the RFE response and on appeal, the Petitioner asserts that the duties of the proffered position are "very closely aligned with the duties and responsibilities of the "Web Developers" ([SOC] 15-1254 formerly 15-1134) and the "Software Developers ([SOC] 15-1252 [formerly Software Developers, Applications 15-1132 and Software Developers, System Software 15-1133]).[3] The Petitioner quotes

[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).

[3] For more information about archived O*NET occupation reports *see* https://www.onetonline.org/Archive_ONET-SOC_2010_Taxonomy_09_2020/.

verbatim the job duties from the current O*NET summary reports for "Web Developers" and "Software Developers" contending that the instant position falls within both occupational categories, and as such "requires a bachelor's degree or higher in a specialized field." We understand there may be overlap between various occupations; however, we conclude that the Petitioner's introduction of its premise that the position encompasses duties "closely aligned to these two occupations" in the RFE response and then later on appeal constitutes a material change to critical aspects of the proffered position.

After filing the petition, the Petitioner cannot offer a new position to the Beneficiary, or materially change aspects of the proffered position, including its requirements for entry into the position, as well as the occupational category specified in the LCA. 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).

Notably, at the time the Petitioner's LCA was certified, the Level III prevailing wage in the area of intended employment for "Software Developers" was $98,738[4] per year, which is higher than the prevailing wage for "Web Developers" which was $71,739 per year.[5] Such a wage disparity highlights the difference between the "Web Developers" and "Software Developers" occupational categories generally, and more specific to this case, the significance of the Petitioner's choice of the lower paying occupational category. Notwithstanding the material change regarding the occupational category, the record does not include sufficient clarifying information or evidence distinguishing the proffered position from the higher paying occupation. Although these occupations may include overlapping duties, in general, if the duties of a proffered position involve more than one occupational category, the Department of Labor's "Prevailing Wage Determination Policy Guidance" states that the employer "should default directly to the relevant O*NET-SOC code for the highest paying occupation."[6]

Moreover, even if we assume that the submitted job advertisements include duties and responsibilities that are parallel to the duties listed for the proffered position, the prerequisites articulated in the advertisements themselves do not support the Petitioner's contention that it "requires and has a clear pattern and practice of recruiting and hiring only candidates with a minimum of a *bachelor's* degree in computer science or a closely related field[s]" for the instant petition. Here, the Petitioner has stated different types of degrees for the position (either a *bachelor's* or a *master's* degree) and submitted advertisements for positions it asserts are closely related to the proffered position which require either a bachelor's degree and work experience *or* simply work experience for entry into the position. As discussed, it did not explain the variances in its prerequisites for the proffered position.

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[4] *See* https://www.flcdatacenter.com/OesQuickResults.aspx?code=15-1132&area=[redacted]&year=21&source=1 and https://www.flcdatacenter.com/OesQuickResults.aspx?code=15-1133&area=[redacted]&year=21&source=1.

[5] See https://www.flcdatacenter.com/OesQuickResults.aspx?code=15-1134&area=[redacted]&year=21&source=1.

[6] We observe that if a position is a combination of two different, but related occupations, the higher paying SOC code must be on the LCA. *See* U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.flcdatacenter.com/pdf/NPWHC_Guidance_Revised_11_2009.pdf. To permit otherwise may result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A), by allowing that petitioner to submit an LCA for a different occupation and at a lower prevailing wage than the one being petitioned for.

In response to the RFE, the Petitioner also provided an opinion letter from a professor at A- University. We observe that the opinion letter author does not present any discussion or analysis that addresses the issue of the Petitioner's inconsistent prerequisites relative to her own conclusion that "no less than a bachelor's degree in computer science or related field" are prerequisites for the position. As a result, the professor's evaluation does not assist in establishing that the proffered position qualifies as a specialty occupation. We may, in our discretion, use opinion statements submitted by the Petitioner as advisory. *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Id.*

The Petitioner must remedy the incongruent 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 its true prerequisites. *Matter of Ho*, 19 I&N Dec. at 591-92. Additionally, any evidence to establish the Petitioner's actual requirements must make such a showing as of the date it 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)).

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.

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 include (1) whether the Petitioner has demonstrated the substantive nature of the work to be performed by the Beneficiary, 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.