U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28491742

Date: AUG. 24, 2023

Appeal of California Service Center Decision

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

The Petitioner seeks to temporarily 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 Director of the California Service Center denied the petition, concluding that the record did not establish that the Beneficiary's proffered position was an occupation requiring performance of duties requiring the application of a theoretical and practical body of specialized knowledge under section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*)-(*4*).[1] The matter is now before us on appeal. 8 C.F.R. § 103.3.

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[1] The Director also concluded that the petition was not supported by a corresponding valid labor condition application (LCA) certified for a work location in the area of intended employment. The Director based their conclusion on reasonable concerns arising from facts in the record relating to the number of beneficiaries who would work at the address and likelihood for space constraints at the address contained in the LCA. But we will withdraw the Director's conclusion relating to the LCA because these concerns do not implicate the validity of the LCA in this particular case. A petitioner seeking to file an H-1B petition must submit a certified LCA. Section 212(n)(1) of the Act; 20 C.F.R. § 655.731(a). A DOL certified LCA memorializes the attestations a petitioner makes regarding the employment of the noncitizen in H-1B status. *See* 20 C.F.R. § 655.734(d)(1)-(6). Whilst DOL is responsible for certifying that the Petitioner has made the required LCA attestations, USCIS evaluates whether the submitted LCA corresponds with the Petitioner's H-1B petition. 20 C.F.R. § 655.705(b). USCIS may consider DOL regulations when adjudicating H-1B petitions. *See Int'l Internship Programs v. Napolitano*, 853 F.Supp. 2d 86, 98 (D.D.C. 2012), *aff'd sub nom Int'l Internship Program v. Napolitano*, 718 F.3d 986 (D.C. Cir. 2013). *See also ITServe Alliance, Inc. v. DHS*, 590 F. Supp. 3d 27, 40 (D.D.C. 2022) (noting that 20 C.F.R. § 655.705 requires USCIS "to check that the [H-1B] petition matches the LCA"); *see also United States v. Narang*, No. 19-4850, 2021 WL 3484683, at *1 (4th Cir. Aug. 9, 2021)(per curiam)("[USCIS] adjudicators look for whether [the] employment [listed in the H-1B petition] will conform to the wage and location specifications in the LCA"). The correct identification of the area of intended employment is critical to the attestations an employer makes in an LCA. It is the frame of reference for determining the required wage, evaluating the existence of a strike or lockout, and determining where to provide notice of filing of the LCA. *See* 20 C.F.R. § 655.730(d)(1)-(6). The Petitioner submitted a certified LCA that identified the place of employment for the proffered job as [redacted] as did the Form I-129. Subsequent to the filing of the petition, the Petitioner changed the work location to a suite at [redacted] Publicly available resources contained in the record reflect that the addresses are within the

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *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. SPECIALTY OCCUPATION

The Petitioner filed its petition seeking to employ the Beneficiary as a software developer and submitted a labor condition application (LCA) certified for a position in the "Software Developer, Applications" occupational category.[2] The Director may request additional evidence when determining eligibility for the requested benefit. 8 C.F.R. § 103.2(b)(8). 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).

Upon review of the record in its totality, we conclude that the Petitioner has not established that the proffered position qualifies as a specialty occupation. The record does not sufficiently establish the substantive nature of the proffered position, which precludes us from determining that the proffered position qualifies as a specialty occupation under sections 101(a)(15)(H)(i)(b), 214(i)(1) of the Act, 8 C.F.R. § 214.2(h)(4)(i)(A)(1), 8 C.F.R. § 214.2(h)(4)(ii) and (iii)(A). The record contains material inconsistencies in documents and materials submitted with the petition, RFE, and appeal.[3]

A. Legal Framework

The Act at Section 214(i)(1), 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires: (A) the 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) adds a non-exhaustive list of fields of endeavor to the statutory definition. And the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the proffered position must also 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.

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same metropolitan statistical area (MSA) and are within a commutable distance of one another. So, both addresses are in the same area of intended employment. *See* 20 C.F.R. § 655.715. As the two addresses provided by the petitioner are located within the same area of intended employment, the LCA provides a sufficient frame of reference to determine the required wage, evaluate the existence of a strike or lockout and determine where to provide notice of filing of the LCA and consequently corresponds to the petition.

[2] After the petition's filing, the Department of Labor's Bureau of Labor Statistics (BLS) advised that the "Software Developer, Applications" entry contained at Standard Occupational Code (SOC) 15-1132 had been discontinued. BLS replaced the "Software Developer, Applications" entry with the "Software Developers" entry described at SOC 15-1252.

[3] Although we may not discuss every document submitted, we have reviewed and considered each one.

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.

The statute and regulations must be read together to make sure the proffered position meets the definition of a specialty occupation. *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 statue 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). Considering the statute and the regulations separately could lead to scenarios where a petitioner satisfies a regulatory factor but not the definition of specialty occupation contained in the statute. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). The regulatory criteria read together with the statute gives effect to the statutory intent. *See* Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991).

So we construe the term "degree" in 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 supporting the statutory definition of specialty occupation. *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"). USCIS' application of this standard has resulted in the orderly approval of H-1B petitions for engineers, certified public accountants, information technology professionals, and other occupations commensurate with what Congress intended when it created the H-1B category.

And job title or broad occupational category alone does not determine whether a particular job is a specialty occupation under the regulations and statute. The nature of a petitioner's business operations along with the specific duties of the proffered job are also considered. We must evaluate the employment of the individual and determine whether the position qualifies as a specialty occupation. *See Defensor*, 201 F.3d 384. So a petitioner's self-imposed requirements are not as critical as whether the nature of the position the petitioner offers requires the application of a theoretical and practical body of knowledge gained after earning the required baccalaureate or higher degree in the specific specialty required to accomplish the duties of the job.

B. Analysis

We are unable to ascertain the position's substantive nature due to the Petitioner's discordant and inconsistent expressions of where they expect the Beneficiary to perform the duties of a specialty occupation. And if we cannot ascertain the position's actual, substantive nature, then we cannot determine whether it satisfies at least one of the specialty-occupation criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*)-(*4*). We therefore agree with the Director that the Petitioner has not established that the position is a specialty occupation.

The Petitioner, founded in 2016, is a three-person limited liability company in the business of data migration and cybersecurity. This description of the company does not shed any meaningful light on the Petitioner's business and whether it requires the services of an individual performing the duties of a specialty occupation. The Petitioner submitted evidence of its tax documents and state registration with amendments. The tax documents indicate a quantifiable level of income which tends to reflect that the Petitioner may be conducting some business. However, it is not clear what the nature of the business operations is. Whilst it can be inferred from the record and other materials that the Petitioner's business may have some connection to information technology and staff augmentation, it is wholly unclear what the nature of the service provided by the Petitioner to its clients is. When it is unclear as to what exactly the Petitioner does, it is equally unclear whether work of a specialty nature is required to accomplish the Petitioner's services for client IT organizations. The Petitioner's state registration and corporate governance documents are similarly unable to illuminate what specific business the Petitioner operates and the services it offers.

The Petitioner seeks to employ the Beneficiary as a software developer. The petition was accompanied by a LCA certified at the Petitioner's apparent principal place of business at the time of filing in [redacted] Ohio. USCIS records as well as the LCA accompanying the petition reflected that the Petitioner either employed or intended to employ a substantial number of employees in a location that would not ordinarily be expected to be a commercial business establishment. So, the USCIS issued a request for evidence (RFE) to the Petitioner providing them an opportunity to dispel doubts about the bona fides (or legitimacy) of whether the Petitioner's proffered position was a specialty occupation. The Petitioner submitted several pictures of its principal place of business. On appeal, the Petitioner submits additional pictures of its principal place of business as well as an office agreement and pictures of a commercial office space.

The Petitioner's principal place of business is a single-family residence. USCIS records show that the Petitioner has filed at least 21 H-1B petitions for its employees to perform work at this residential address. Publicly available information reflects that the residence comprises about 1,552 square feet of space. The Petitioner claims 1,020 square feet are used for office space. But the Petitioner submitted tax information from recent years into the record stating that about 488 square feet of the property were used for office space. The Petitioner states that they were using 1,020 square feet of the residence at the time of filing this petition in June 2022. But the Petitioner had received approvals for 10 petitions prior to December 31, 2021. The Petitioner's record reflects that up to at least December 31, 2021 they continued to use no more than 488 square feet of the property as office space. The pictures of the office space the Petitioner submitted with their RFE response reflected that the place of employment consisted of two executive suites and a conferencing area. It is not apparent how 10 individuals could perform the services of a specialty occupation in the work area described by the Petitioner's pictures.

On appeal, the Petitioner submitted additional pictures of the work area showing easily removable signage and furniture. The Petitioner also submitted a "seat map" to reflect how the described space would accommodate their employees. But the seat map and new pictures did not contain the executive suites and conference area the Petitioner described in the materials they submitted in support of their response to the RFE. So, the record contains inconsistent information concerning the layout and floorplan of the Petitioner's place of business which impedes our ability to evaluate whether the Petitioner's proffered position of quality assurance lead is a specialty occupation.

The Petitioner also inconsistently expressed the nature of the alternate worksite in commercial office space they procured the same month the Director issued their RFE. The Petitioner identifies this alternate location as a "corporate branch office" with enough room to accommodate 30 employees. The "Office Agreement" is more akin to a subscription service than an actual commercial office rental. It is a month-to-month agreement for a single office on a "per person per day" rate. And the total monthly price quoted is for one person per month in a single office. The record does not support the Petitioner's statement that their "corporate branch office" could support 30 employees. The Petitioner's inconsistent representation of the availability and accommodation possible in their "corporate branch office" presents an obstacle to our ability to conclude that the Petitioner's proffered position will require the theoretical and practical application of a specific specialty related to the duties of the position.

Our evaluation of the nature of the Petitioner's proffered job and its nature as a specialty occupation is considerably compromised due to the Petitioner alternating expressions of the amount of space available to perform the duties of their proffered occupation. If the Petitioner cannot credibly and consistently articulate how their employees are situated to perform their job duties, then we cannot conclude that job duties would be performed as described.

We are unable to assess, categorize, and comprehend the Petitioner's business and proffered job due to the Petitioner's inconsistencies. And we are therefore unable to ascertain the proffered position's substantive nature due to the deficiencies outlined above. And since we cannot determine its substantive nature, we cannot conclude whether the position qualifies as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*)-(*4*). The Petitioner's inconsistent expressions described above obscure whether the proffered job is a specialty occupation because they do not permit us to evaluate how or in what form the Petitioner cultivates an environment supporting a specialty occupation position. So the Petitioner has therefore not overcome this ground of the Director's decision.

III. CONCLUSION

It is the Petitioner's burden to provide competent and credible evidence regarding the nature of its proffered position. The Petitioner has not met their burden for the reasons set forth above. This appeal must be dismissed.

ORDER: The appeal is dismissed.