U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25334870

Date: MAY 08, 2023

Appeal of Vermont 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 Vermont Service Center denied the petition, concluding that the record did not establish that the job offered qualifies as a specialty occupation under section 101(a)(15)(H)(i)(b) of the Act. The matter is now before us on appeal. 8 C.F.R. § 103.3.

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. LABOR CONDITION APPLICATION

Before addressing the basis upon which this petition was denied—the Director's determination that the proffered position is not a specialty occupation—we will first discuss an issue we have identified on appeal that precludes the petition's approval. As we will discuss, the Petitioner has not established that they submitted a labor condition application (LCA) that corresponds to the H-1B petition it purports to support.

The Petitioner is offering the Beneficiary the position of general manager. The petition included an LCA certified for a position located within the "General and Operations Managers" occupational category corresponding to the Standard Occupational Classification (SOC) Occupational Information Network (O*NET) code 11-1021.00.

A certified LCA memorializes the attestations a petitioner makes regarding the employment of the noncitizen in H-1B status.[1] Whilst the U.S. Department of Labor (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) ("DHS determines whether the petition is supported by an LCA which corresponds with the petition...."); *Matter of Simeio Solutions*, 26 I&N Dec. 542, 546 n.6 (AAO 2015). *See also ITServe Alliance, Inc. v. DHS*, 590 F. Supp. 3d 27, 40 (D.D.C. 2022) (noting 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").

Most importantly here, the Petitioner attested in the LCA that they would protect workers from wage abuse by paying a required wage no lower than the higher of the actual or prevailing wage at Level I for the occupational classification in the area of intended employment to employees with similar duties, experience, and qualifications. The DOL guidance provides a five-step process for determining the appropriate wage level out of the four distinct DOL wage levels (I to IV) based on the duties and requirements for the employer's proffered position to the general duties and requirements for most similar occupations as provided by O*NET. The correct wage level is determined by evaluating whether the wage indicated on the H-1B petition corresponds with the wage level on the LCA using DOL's guidance at U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance* (rev. Nov. 2009), available at https://www.flcdatacenter.com/download/npwhc_guidance_revised_11_2009.pdf. DOL's guidance requires selecting the correct O*NET occupational classification and then comparing the experience, education, special skills and other requirements, and supervisory duties described in the O*NET entry to those required by the employer for the proffered position.[2] A point is assigned for each instance of the petitioner's requirements exceeding the experience, education, special skills and other requirements contained in the O*NET standard. The number of points corresponds to the assigned wage level. Accumulation of more than four points defaults to the Level IV wage level.

The Petitioner here improperly designated the proffered position as a Level I wage. The Petitioner selected wage Level I on the LCA, but the record of proceeding reflects that the petition requires "a master's degree in business administration" as a minimum educational requirement for entry into the proffered position. Appendix D of the DOL guidance lists a minimum education requirement of a bachelor's degree for the General & Operations Manager category based on categorization in Education and Training Category Code four. Education and Training Category Code four provides minimum prerequisites not in excess of a bachelor's or higher degree with work experience. Code four groupings are typically managerial in nature and require experience in a related non-managerial position. So, the Petitioner's enhanced educational requirement requires the addition of a point per the DOL's guidance.

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[1] *See* 20 C.F.R. § 655.734(d)(*1*)-(*6*).

[2] A wage level is relevant in the context of H-1B petition adjudication because we must evaluate whether an LCA corresponds to the H-1B petition with which it is submitted. A wage level is not dispositive to a determination of whether a proffered position is a specialty occupation under section 214(i)(1) of the Act. A position with an entry-level, or Level I wage is not per se disqualified from being considered a specialty occupation.

And the Petitioner's experience requirement exceeds the usual requirement contained in Appendix D and in Education and Training Category Code four. The Petitioner states that they require three years of experience for the general manager position. The "General and Operations Managers" category is contained in JobZone 4 of O*NET. A Job Zone is a group of occupations that are similar in how much education people need to do the work, how much related experience people need to do the work, and how much on-the-job training people need to do the work. The DOL guidance reflects that experience not in excess of two years is normal for jobs contained in JobZone 4. So the Petitioner's enhanced experience requirement requires the addition of a point per the DOL's guidance.

The job for which the LCA was certified consequently warrants, at minimum, a two-level increase in the wage from the default Level I to Level III due to the Petitioner's enhanced educational and experiential requirements. The Level I wage obligation is $67,121 less than the Level III wage obligation, representing an underpayment by 51%.

As the LCA in the record was certified with a Level I wage, it is not in correspondence with the proffered position. An H-1B petition cannot be approved without a corresponding LCA. *See* section 212(n)(1) of the Act; 20 C.F.R. § 655.731(a). So the petition is unapprovable as filed, irrespective of whether the Petitioner can demonstrate that the proffered job is a specialty occupation under section 214(i)(1) of the Act and the regulations at 8 C.F.R. § 214.2(h)(4)(ii).

The dispositive nature of this deficiency does not require us to evaluate the matter before us any further. However, for the reasons below, the petition would not have been approved even if the Petitioner had submitted a corresponding LCA with the Form I-129 because the proffered job is not a specialty occupation under section 214(i)(1) of the Act and the regulations at 8 C.F.R. § 214.2(h)(4)(ii).

II. SPECIALTY OCCUPATION

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).

A. 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) 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 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;

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 vague and inconsistent description of the Petitioner's proffered position and its job duties. 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 2014, is a 10-person limited liability company in the business of purchasing and recycling scrap metal. It seeks to employ the Beneficiary as a general manager at its recycling facility.

The proffered job duties the Petitioner submitted with the petition were overbroad and lacked sufficient detail to evaluate the nature of the proffered job. The nature of the vague duties obscured whether the proffered job was a specialty occupation. The Director requested additional evidence because the Petitioner's duties were generalized and did not provide sufficient information to assess what the actual occupation is. In response to the request for evidence (RFE), the Petitioner provided significantly different job duties that remained vague and inconclusive as to whether the Petitioner's proffered position is a specialty occupation.

An RFE is an opportunity for a petitioner to clarify their eligibility for the benefit they seek. 8 C.F.R. § 103.2(b)(8). But it is not an invitation to redesignate or otherwise materially change the job the proffered job. A petitioner must demonstrate eligibility on the date of filing. 8 C.F.R. § 103.2(b)(1). We observe material unexplained differences when we compare and contrast the Petitioner's job duties submitted with the petition to those submitted with the RFE response. In the petition, the Petitioner vaguely stated that the general manger would oversee overall quality of operations, develop new markets and management alignments, adhere to the company's budget and strict labor compliance, drive down costs through generating operations, develop and maintain client relationships, correct problems, and ensure client satisfaction, and hire, train, and develop a management team composed of direct reports.

But, in the RFE response, the Petitioner significantly departed from this job description. The Petitioner attempted to step away from the vague job duties provided in the petition by providing new duties in their RFE response. The new duties also provide a percentage breakdown of the individual components of the proffered job duties. The Petitioner stated for the first time in the RFE response that the general manager would be required to formulate policies, plan the use of materials and human resources, examine, analyze, and interpret quarterly records and financial statements, and facilitate internal auditing. But these duties were alternatively wholly and in part verbatim extracts from job duties contained in O*NET for the general and operations manager category. O*NET duties do not have the detailed substance to determine whether a position's duties comprise a specialty occupation.

And the duties the Petitioner submitted with the RFE response described duties which ventured away from the "General and Operations Managers" O*NET category the Petitioner has selected for their proffered position. Specifically, the duties require managing plant safety, product quality and performing market research comprising a significant 35% of the job duties. These duties are more appropriately classified with other job categories, such as occupational health and safety specialists (plant safety),[3] validation engineers (product quality),[4] and market research analysts (market research and new market identification).[5]

[3] Bureau of Labor Statistics, U.S. Dep't of Labor, Occupational Outlook Handbook, Occupational Health and Safety Specialists (Sept. 8, 2022), https://www.bls.gov/ooh/healthcare/occupational-health-and-safety-specialists-and-technicians.htm

[4] O*NET Summary Report for "Validation Engineers," https://www.onetonline.org/link/summary/17-2112.02

[5] Bureau of Labor Statistics, U.S. Dep't of Labor, Occupational Outlook Handbook, Market Research Analysts (Feb. 6, 2023), https://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm

The Petitioner's new duties presented at RFE, sourced directly from the O*NET entry for "General and Operations Managers," are considerably doubtful when evaluated in combination with a line and block organizational chart submitted by the Petitioner with the initial petition. The line and block organizational chart reflected that employees in the functions of yard operations, logistics and purchases/sales were subordinate to the general manager. A portion of the general manager's time (15%) was dedicated to the hiring, training, and development of the management team. But there were no management level employees subordinate to the general manager according to the line and block chart. And the line and block organizational chart tended to reflect that the Petitioner's general manager position was more akin to a first line supervisor than a general and operations manager.

Instead of providing an explanation for how the duties of the proffered position function with the Petitioner's business, the new duties raised new unresolved questions about the proffered job's nature and function because of how different they were from the duties the Petitioner had initially provided. In fact, 50% of the duties the Petitioner provided in the RFE response are contained in job categories other than the "General and Operations Manager" category selected by the Petitioner. The job category the Petitioner selected here does not bind these diverse job classifications under a single classification. So we are unable to determine the substance and nature of the Petitioner's proffered job because we are unable to assess, categorize, and comprehend the type and complexity of the work described in the proffered job duties. And this is made especially more difficult when the job duties provided are vague and inconsistent, as is the case here. This vagueness obscures whether the proffered job is a specialty occupation.

Our doubts about the accuracy of the job duties go directly to the heart of whether the proffered job is a specialty occupation. And any evidence rooted in the job duties is considerably weaker as a result. The Petitioner provided a position evaluation with the RFE response from [redacted] professor and chair in the department of business information systems at [redacted] University. The writer based their opinion on the nonspecific job duties provided by the Petitioner. So this opinion statement based on the Petitioner's various job descriptions was unreliable. And although the writer references that they conducted research in combination with a review of the job description provided by the Petitioner, they do not specify what that research is or what authority it constituted in their conclusions regarding the Petitioner's proffered position. There is no summary of points of authority or citation references to get a full picture of the writer's opinion. We may use opinion statements submitted by the Petitioner as advisory. *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). But an opinion statement is afforded less weight by us where there is cause to question or doubt the opinion, or if it is not in accord with other information in the record as is the case here due to the divergent job descriptions the Petitioner has provided at different stages of the prior proceedings.

In summary, we are 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*).

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.