U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF K- LLC

DATE: JUNE 8, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a real estate company, seeks to temporarily employ the Beneficiary as a "web developer" under the H-1B nonimmigrant classification. *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, Vermont Service Center, denied the petition. The Director concluded that the evidence of record did not establish that the Petitioner would employ the Beneficiary in a specialty occupation position.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the proffered position requires "specialized knowledge."

Upon *de novo* review, we will dismiss the appeal.

I. LAW

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). U.S. Citizenship and Immigration Services (USCIS) has consistently interpreted 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 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 v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

II. PROFFERED POSITION

In the H-1B petition, the Petitioner stated that the Beneficiary would serve as a "web developer."[1] The Petitioner stated in its support letter that the Beneficiary would perform the following duties:

> Some of the duties of this position include: designing, building and maintaining of our company's website; updating and back up files; apply to industry standards and ensure that it is compatible with browsers, devices or operating system; analyze user needs based on the data gathered from the website.

[1] The labor condition application (LCA) submitted in support of the instant position was certified for a job prospect within the "Web Developers" occupational category, Standard Occupational Classification (SOC) code 15-1134, at a Level I (entry) wage rate. We will consider the selected occupational category and wage level in our analysis of the proffered position. More specifically, a prevailing wage determination starts with an entry level wage and progresses to a higher wage level after considering the experience, education, and skill requirements of the Petitioner's job opportunity. A Level I wage rate is the lowest of the four assignable wage-levels. The "Prevailing Wage Determination Policy Guidance" issued by the Department of Labor (DOL) describes a Level I wage rate as generally appropriate for positions for which the Petitioner expects the Beneficiary to have a basic understanding of the occupation. This wage rate indicates: (1) that the Beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; (2) that he will be closely supervised and his work closely monitored and reviewed for accuracy; and (3) that he will receive specific instructions on required tasks and expected results. U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf.

In a request for evidence (RFE), the Director asked the Petitioner to provide additional information about the position, such as a detailed description of the proffered position to include the approximate percentages of time for each duty the Beneficiary will perform. The Petitioner elected not to provide this information, and instead stated that it had hired the Beneficiary and he had "built a website from the ground up" and that the system "can be resold to investors as a . . . solution, filling a niche at a caliber nonexistent in the market and creating another source of revenue for the company."

The Petitioner did not state that the position requires any particular educational background.

III. 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 (1) does not describe the position's duties with sufficient detail; and (2) does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.[2]

First, the evidence of record does not establish the depth, complexity, level of specialization, or substantive aspects of the matters upon which the Beneficiary would engage. Rather, the record contains relatively generalized and abstract descriptions that do not relate sufficient details about either the position or its constituent duties. Further, the Petitioner stated that the provided tasks are "some" of the duties of the proffered position. This statement implies that the proffered position includes additional duties that are not stated by the Petitioner.[3]

Second, the Petitioner does not provide any information with regard to the order of importance and/or frequency of occurrence with which the Beneficiary would perform the stated duties. Thus, we cannot discern which tasks are primary functions of the proffered position, and which tasks are merely incidental to the performance of the primary functions. Thus, we cannot determine the substantive nature of all the proffered job duties, and whether they are of H-1B caliber.

Without more a meaningful description of the proffered duties and the ultimate product that the Beneficiary would be building and maintaining, the Petitioner has not adequately established the substantive nature of the proffered position. We are therefore precluded from finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive

[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.

[3] There is no provision in the law for specialty occupations to include non-qualifying duties. Nevertheless, we will view the performance of duties that are incidental to the primary duties of the proffered position as acceptable when they are unpredictable, intermittent, and of a minor nature. Anything beyond such incidental duties, however, e.g., predictable, recurring, and substantive job duties, must be specialty occupation duties or the proffered position as a whole cannot be approved as a specialty occupation. Here, the record of proceedings contains insufficient information regarding the additional duties implied by the Petitioner.

nature of the work which determines (1) the normal minimum educational requirement for entry into the particular position, which is the focus of criterion 1[4]; (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. Because the Petitioner has not satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it has not demonstrated that the proffered position qualifies as a specialty occupation.

Furthermore, the Petitioner did not state the position's minimum educational requirement. Thus, we cannot find that the proffered position qualifies as a specialty occupation.[5] It is incumbent upon the Petitioner to provide sufficient evidence to establish that the particular position that it proffers would necessitate services at a level requiring both the theoretical and practical application of a body of highly specialized knowledge and the attainment of at least a bachelor's degree in a specific specialty, or its equivalent. Section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). The Petitioner has not adequately done so here.

On appeal, the Petitioner submits three opinion letters from and The Petitioner asserts that these letters demonstrate that the proffered position requires "specialized knowledge." However, for the reasons discussed below, we conclude that these opinion letters are not probative evidence to satisfying 8 C.F.R. § 214.2(h)(4)(iii)(A).[6]

We first note that and state that the Petitioner was established in 1995; and states that the Petitioner has been in the real estate business "for 20 years." In the H-1B petition, the Petitioner stated that it was established in 2014. It is unclear on which information the authors base their opinion regarding the Petitioner's business. The authors do not state whether they visited the Petitioner's business, observed or interviewed the Petitioner's employees, or observed the work

[4] We further note that DOL's Occupational Outlook Handbook (*Handbook*) states that the typical education needed to become a web developer is an associate's degree, and that a high school diploma may be sufficient. The *Handbook* does not, therefore, indicate that the educational background, or its equivalent, is commensurate with a specialty occupation for these jobs. For additional information regarding the occupational category "Web Developer," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2015-16 ed.*, Web Developers, on the Internet at http://www.bls.gov/ooh/computer-and-information-technology/print/web-developers.htm (last visited June 7, 2016).

[5] The Petitioner stated in its RFE response that it "posted an add on looking for a web developer with database knowledge." This does not sufficiently explain the level and type of education needed for entry into the position. Although the opinion letters submitted on appeal address the position's educational requirement, we find these letters deficient for reasons we will discuss *infra.*

[6] On appeal, the Petitioner appears to assert eligibility under only one criterion: 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*), which requires that "[t]he 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." However, the Petitioner cites to 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*) and then quotes the language of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*). It therefore is not clear under which criterion that the Petitioner asserts eligibility.

product the Beneficiary has already built. Their level of familiarity with the actual job duties as they would be performed in the context of the Petitioner's business has therefore not been substantiated. In addition, the authors list job duties that are beyond the scope of duties for a Level I, entry-level position under the "Web Developers" occupational classification.[7] The authors list proffered duties involving: designing and implementing "web software" for both front-end and back-end; receiving customer applications for production process, employee management, and other related "web applications"; and designing the database with high-level security and efficiency. Indeed, specifically characterizes the proffered position as a "Web Application Designer/Database Administrator position." similarly states that "[t]he Web Developer for [the Petitioner] is a combination of website designer, project manager, Database Administrator and data analytical engineer." The information provided in the opinion letters is inconsistent with the Petitioner's descriptions as well as the LCA submitted to support the petition.[8]

Further, states that the proffered duties "are not those of a lower level employee . . . but rather those of a professional employee with a strong background in IT concepts and principles and a great level of responsibility with the company." This statement is further inconsistent with the position's Level I wage designation that is only appropriate for a comparatively low, entry-level position relative to others within its occupation. Again, it is incumbent upon the Petitioner to resolve inconsistencies in the record through competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

The authors do not indicate whether they considered, or were even aware of, the Petitioner's submission of an LCA for an entry-level position under the "Web Developers" occupational classification. We consider this a significant omission, in that it suggests an inaccurate or

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[7] The Petitioner's designation of this position as a Level I, entry-level position undermines the claim that the position is particularly complex, specialized, or unique compared to other positions *within the same occupation*. Thus, the Level I wage designation does not support the claim that the Beneficiary would perform job duties not normally performed within the occupation.

Nevertheless, we note that a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation, just as a Level IV wage-designation does not definitively establish such a classification. In certain occupations (e.g., doctors or lawyers), a Level I, entry-level position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty, or its equivalent. That is, a position's wage level designation may be a relevant factor but is not itself conclusive evidence that a proffered position meets the requirements of section 214(i)(1) of the Act.

[8] If the proffered position were a combination of "Web Developers," "Database Administrators," and possibly other occupations, then the Petitioner is obligated to choose the O*NET occupation for the highest-paying occupation. *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://flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf ("if the employer's job opportunity has worker requirements described in a combination of O*NET occupations, the [employer] should default directly to the relevant O*NET-SOC occupational code for the highest paying occupation"). The Petitioner has not demonstrated that the "Web Developers" occupational classification chosen here is the most relevant, highest-paying occupation.

incomplete review of the position in question and a faulty factual basis for the authors' ultimate conclusions.[9] For all the above reasons, we find that the advisory letters are not probative evidence of the proffered position requiring the performance of complex and specialized duties, or otherwise qualifying as a specialty occupation under the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). 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.*

IV. CONCLUSION

The Petitioner has not satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), and has not demonstrated that the proffered position qualifies as a specialty occupation. The burden is on the Petitioner to show eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of K- LLC*, ID# 17339 (AAO June 8, 2016)

[9] Because the opinion letters lack probative value in this fundamental aspect, further analysis regarding the specific information contained in each letter is not necessary. That is, not every deficit of the letters has been addressed.