U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-S- INC.

DATE: AUG. 11, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a software development and consulting company, seeks to temporarily employ the Beneficiary as a "programmer analyst" 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 Petitioner had not established the proffered position is a specialty occupation.

On appeal, the Petitioner submits a brief and additional evidence and asserts that the Director erred when determining the proffered position is not a specialty occupation.

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

I. LEGAL FRAMEWORK

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). We have consistently interpreted the term "degree" 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 a statement submitted in response to the Director's request for evidence (RFE), the Petitioner provided the following overview of the duties of the proffered position:

> [The Beneficiary] is responsible to design and develop and customize various modules of our in house application, [redacted] utilizing VB.Net, VB, HTML, XML, JavaScript, jQuery, JSON, CSS, REST on .Net Framework in Windows client server environment; design and develop graphical user interface utilizing JavaScript, VB.net, MS Visual Studio.Net 2008/2010;
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> [The Beneficiary] is responsible in designing and developing and customizing the relational database management system modules of our in house application, [redacted] utilizing MS SQL Server; designing the data warehouse and core Database for the system including tables, Stored Procedures, Indexes, UDF and triggers; fine-tuning queries and stored procedures and providing consultation to other developers; analyzing and improving the architecture of databases, creation & indexing of the tables; implementing SSIS to extract and transform data from RDBMS and Flat files CSV, SQL Server instances and to load into staging and then to DW for further Data Analysis and Reporting by using multiple transformations provided by SSIS such as Data Conversion, Conditional Split, Bulk Insert, merge and union all; scheduling and maintained nightly and weekly loads of data by creating the corresponding job tasks; creating views to facilitate easy user interface implementation, and triggers on them

> to facilitate consistent data entry into the database; generating parameterized reports, sub reports, tabular reports using SSRS;
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> [The Beneficiary] is also responsible to analyze, review, and alter programs from time to time to optimize the performance of the applications; formulate plan-outlining steps required to develop the applications; prepare flowcharts and diagram to illustrate sequence of steps program must follow and to describe logical operations utilizing MS Project, MS Visio;
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> [The Beneficiary] is also responsible to direct and participate in various aspects of life cycle of a system (SDLC) including analysis, design, programming, testing, maintenance, and support; and establish system requirements, client operating systems, software, network operating systems, system security, back-up schedules and recovery plans; document and map existing processes and suggest process optimization;
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> [The Beneficiary], further, is responsible to test the developed applications for software quality assurance utilizing HP Quality Center; responsible to develop Test cases for Unit Testing of the mappings, and involve in the Integration Testing; involve in fallout analysis and fixing the issues; utilize Apex unit test methods/classes to verify error free coding; implement version controls for the developed applications and modifications utilizing VSS, SVN, TFS, Subversion; and develop user manual to describe steps to be followed for installation and system requirements, trouble-shooting techniques.

On the labor condition application (LCA)[1] submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category "Software Developers, Applications" corresponding to the Standard Occupational Classification code 15-1132.[2]

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[1] The Petitioner is required to submit a certified LCA to U.S. Citizenship and Immigration Services (USCIS) 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 experience and qualifications who are performing the same services. *See Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 545-546 (AAO 2015).

[2] The Petitioner classified the proffered position at a Level I wage (the lowest of four assignable wage levels). We will consider this selection in our analysis of the position. The "Prevailing Wage Determination Policy Guidance" issued by the U.S. Department of Labor (DOL) provides a description of the wage levels. A Level I wage rate is 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 the Beneficiary will be closely supervised and his work closely monitored and reviewed for accuracy; and (3) that the Beneficiary 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. 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. *Id.*

The Petitioner stated that "our minimum requirement for the position of ***Programmer Analyst*** is a bachelor's level academic training in computers or its equivalent."

According to the documentation submitted by the Petitioner, the Beneficiary will be working onsite at the Petitioner's offices developing a product identified as '[redacted]'.

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.[3] Specifically, the Petitioner has not established that (1) it has secured definite, non-speculative specialty occupation work for the Beneficiary for the entire validity period requested;[4] and (2) the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.[5]

The Petitioner stated that it wishes to employ the Beneficiary for a 34-month period; however, the record lacks documentation regarding the work that the Beneficiary would perform to sufficiently substantiate that it has H-1B caliber work for the requested period. For instance, the Petitioner stated its intention to create a vendor-management tool, [redacted] which is described as a "Web-Based application to manage resources." In support of this contention, the Petitioner submitted a "Functional Specification" document, a 39-page document which provides an overview of the [redacted] project.

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[3] We hereby withdraw the Director's statement that the position of programmer analyst is traditionally considered a specialty occupation. The Director does not cite to any authoritative or objective source to support this statement.

[4] Speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

> Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30,419, 30,419-20 (proposed June 4, 1998) (to be codified at 8 C.F.R. pt. 214).

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

The Petitioner, however, did not submit documentation demonstrating that it has the capacity and resources to develop such a product. We note that the Petitioner submitted a "Project Budget" for Phase I of the project. According to this document, the Petitioner will require the services of a project manager, a project leader, a system analyst/business analyst, an undefined number of programmers, an undefined number of system testers, and an undefined numbers of vendor consultants. The document also allows for additional team resources (i.e., contractors, temporary staff, and other consultants) as necessary.

At the time of filing, however, the Petitioner stated on the Form I-129, Petition for a Nonimmigrant Worker, that it currently has only one employee, who we presume is the Petitioner's president and signatory. There is no indication that the Petitioner has since hired the additional resources identified in the budget report, nor does it appear, based on the financial documents included in the record, that the Petitioner has the available funds to employ the number of staff it deems necessary for work on the proposed project. As noted by the Director, the Petitioner's 2015 tax return indicates that the Petitioner had approximately $41,000 in gross receipts or sales, paid no salaries or wages to employees, and had a negative ordinary business income. Although the Petitioner claims on appeal that these low figures are the result of the Petitioner's relatively short time doing business, they nevertheless present a recent financial snapshot of the Petitioner's operations.

The Petitioner also submitted an internal market analysis report, which estimates the total cost of the project in Phase I to be $175,000. The plan further indicates that it will be targeting small and mid-sized financial and health care organizations as potential prospects for the project, thereby suggesting that it has not secured any customers. Therefore, despite the submission of the functional specification document and the marketing plan, which provide an overview of this proposed project, there is no evidence in the record to establish that the Petitioner has initiated such a project, or has the resources and funding to do so. The record lacks supporting evidence such as: (1) a business plan; (2) competitive and/or cost analysis; (3) evidence substantiating investments or revenue sources; (4) documentation regarding its sales, costs, and income projections; (5) contracts; or (6) its timeline for developing the product.[6]

Further, the terms and conditions of the Beneficiary's employment, as described in the offer of employment letter submitted in response to the RFE, indicate that the term of the Beneficiary's employment is 24 months. This statement contradicts the Petitioner's attestation on the Form I-129 that it will employ the Beneficiary for a 34-month period. Regardless, the record as currently constituted does not establish that a legitimate project is available for any part of the requested validity period.

[6] The H-1B classification is not intended for companies to engage in speculative employment and hire foreign workers to meet possible workforce needs arising from potential business expansions, customers, or contracts. The agency made clear long ago that speculative employment is not permitted in the H-1B program. *See, e.g.*, 63 Fed. Reg. at 30,419- 20.

Moreover, the description of the Beneficiary's duties provided by the Petitioner lacks the specificity and detail necessary to support the Petitioner's contention that the position is a specialty occupation. While a generalized description may be appropriate when defining the range of duties that are performed within an occupation, such generic descriptions generally cannot be relied upon by the Petitioner when discussing the duties attached to specific employment for H-1B approval. In establishing such a position as a specialty occupation, the description of the proffered position must include sufficient details to substantiate that the Petitioner has H-1B caliber work for the Beneficiary.

The Petitioner has not provided sufficient details regarding the nature and scope of the Beneficiary's employment or substantive evidence regarding the actual work that the Beneficiary would perform. Without a meaningful job description, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. The tasks as described do not communicate (1) the actual work that the beneficiary would perform; (2) the complexity, uniqueness or specialization of the tasks; or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty.

The Petitioner thus has not established the substantive nature of the work to be performed by the Beneficiary, which therefore precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for entry into the particular position, which is the focus of criterion 1; (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.

IV. ADDITIONAL ISSUES

We also find that the Petitioner has not offered the Beneficiary a wage equal to or greater than that required by law, and submitted an LCA that corresponds to the petition.

Section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A), states in pertinent part that the Petitioner must offer wages that are at least the actual wage paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question or the prevailing wage for the position in the area of employment, whichever is greater. Here, an independent review of the FLC Data Center's Online Wage Library indicates that the prevailing wage for the proffered position in the Petitioner's Metropolitan Statistical Area at the time of certification was $67,787.[7] The

[7] For more information, please see Foreign Labor Certification Data Center's Online Wage Library, on the Internet at http://www.flcdatacenter.com/OesQuickResults.aspx?code=17-2141&area= &year=15&source=1, (last visited

Petitioner attested on the Form I-129 petition, however, that it would only pay the Beneficiary an annual salary of $65,000. Therefore, the Petitioner has not offered a wage that is equal to or greater than the prevailing wage.

In addition, the Petitioner has not submitted a valid LCA that corresponds to the petition.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

> For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL-certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements for H-1B visa classification.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the Beneficiary. The Petitioner has not submitted a valid LCA for the correct wage, and the petition cannot be approved for these additional reasons.

V. CONCLUSION

The Petitioner has not (1) established that the proffered position is a specialty occupation; (2) established that it would pay the Beneficiary the prevailing wage; and (3) submitted an LCA that corresponds to the petition.

ORDER: The appeal is dismissed.

Cite as *Matter of S-S- Inc.*, ID# 456144 (AAO Aug. 11, 2017)