U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF B-B- LLC

DATE: AUG. 22, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a computer programming services company, seeks to temporarily employ the Beneficiary as a "senior software engineer" under the H-1B nonimmigrant classification for specialty occupations. *See* section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 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 Petitioner had not demonstrated that the proffered position qualifies for treatment as a specialty occupation position.

On appeal, the Petitioner submits additional evidence and asserts that the evidence submitted is sufficient to demonstrate eligibility.

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 the H-1B petition, the Petitioner stated that the Beneficiary would serve as a senior software engineer. 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]

In the H-1B petition, the Petitioner stated that the Beneficiary would work in-house at its offices in [redacted] Florida. In response to the Director's request for evidence (RFE), the Petitioner submitted the following description of the duties of the proffered position:

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[1] The Petitioner is required to submit a certified LCA 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 II wage (the second-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 DOL provides a description of the wage levels. A Level II wage rate is generally appropriate for positions for which the Petitioner expects the Beneficiary to perform "moderately complex tasks that require limited judgment." 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.*

- Maintain modern web applications that are compatible with mobile and traditional devices, using a variety of technologies and programming languages including Ruby, Ruby on Rails, PostgreSQL, MySQL, Redis, apache, nginx, memcache and responsive design techniques on a linux platform.
- Participate in all phases of software development life cycle including feature specification, time and cost estimate, design, development, testing, deployment, bug fixing and maintenance.
- Be involved in front end and back end development leveraging Open Source frameworks and Technologies.
- Develop user interface using HTML, CSS and JavaScript.
- Implement performance enhancing techniques to ensure that applications do not become too slow.
- Implement security protocols and safeguards to ensure possible hackers are not able to steal private information. This will require proper usage of techniques like HTTPS. He will also ensure that codes are not vulnerable to sql injection attacks, cross site scripting attacks, and other common forms of attacks hackers employ to hack into web applications.
- Ensure that proper event monitoring systems are in place in case server goes offline or user is experiencing an issue, our support staff is notified with full information so that a fix could be deployed as soon as possible.
- Analyze user needs, research new technologies, and use appropriate solutions to build customs software solutions.
- Perform profession assignments that require managing, architecting, developing multiple projects, evaluating software applications, and related issues.
- Develop and create the most appropriate design for an application/or application infrastructure to suit the business needs, satisfy client requirements, and achieve the desired results.
- Develop data driven web applications to build highly scalable and SEO friendly fast web applications that reach millions of users.
- Build API for mobile applications.
- Develop rich AJAX applications and write complex data models and tune SQL for complex queries.
- Collaborate on all stages of software development from design to implementations.
- Other similar professional responsibilities as needed.

According to the Petitioner, the proffered position requires at least a bachelor's degree in computer science or a related field.

III. ANALYSIS

We follow the preponderance of the evidence standard as specified in *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Specifically, a petitioner must establish that it meets each eligibility requirement of the benefit sought by a preponderance of the evidence. *Id.* In other words, a petitioner must show that what it claims is "more likely than not" or "probably" true. To determine whether a petitioner has met its burden under the preponderance standard, we consider not only the quantity, but also the quality (including relevance, probative value, and credibility) of the evidence. *Id.* at 376; *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989).

For H-1B approval, the Petitioner must demonstrate a legitimate need for an employee exists and substantiate that it has H-1B caliber work for the Beneficiary for the period of employment requested in the petition. 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.[3]

The Petitioner claims that it specializes in building mobile applications for iPhones, iPads, and Android devices. It initially stated that it required the services of the Beneficiary to "complement [the Petitioner's] growing team and aid in the company's expansion plans." In response to the RFE, the Petitioner claimed that the Beneficiary would be working in-house at its own offices on a project for client In support of this assertion, the Petitioner submitted a copy of its Master Services Agreement with as well as a letter from the client.

The record lacks credible evidence that, when the petition was filed, the Petitioner had secured work of any type for the Beneficiary to perform during the requested period of employment. For example, the Beneficiary's employment agreement submitted in response to the RFE was not executed until September 2016, over five months after the filing of the petition. Moreover, as noted by the Director, the MSA and client letter were executed in September 2016 and October 2016, five to six months after the petition was filed. U.S. Citizenship and Immigration Services (USCIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). 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).

[3] 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.

On appeal, the Petitioner acknowledges that "[t]he Service was correct in stating that the Master Services Agreement between [redacted] and the Petitioner] was dated in September 2016, and signed thereafter." Nevertheless, the Petitioner asserts that "it was made clear in the petition that this was not the only project to which the Beneficiary was to be assigned, and USCIS has made clear that it will consider the totality of the evidence in the record." The Petitioner supplements the record with, *inter alia,* its tax returns, a Mutual Non-Disclosure Agreement executed in August 2015 between the Petitioner and [redacted] (C-L-), and the Petitioner's invoices to C-L-.

Upon review, however, we find this evidence insufficient to demonstrate that specialty occupation work was available for the Beneficiary at the time of filing. The Petitioner's tax returns reflect upon the company's general business operations, but do not illustrate the specific work that the Beneficiary would perform. The non-disclosure agreement with C-L- merely outlines the procedures for the management and treatment of confidential information, and does not identify any specific project or assignment for which the Beneficiary's services would be required. The invoices do not establish the nature of the claimed work available for the Beneficiary, either; they merely represent past services provided to a client by other employees of the Petitioner. While the invoices establish that the Petitioner and C-L- previously had a relationship where the Petitioner provided computer-related services, these invoices are not specific to the Beneficiary and do not establish that specific project(s) or assignment(s) were available for him at the time of filing, and what those project(s) or assignment(s) would entail.

Moreover, although the Petitioner designates the position as a *senior* software engineer, and repeatedly asserts that Beneficiary's job duties are "highly technical" and "complex in nature," we recall the Petitioner's designation of the proffered position as a Level II position, which suggests that the Petitioner expects the Beneficiary to perform "moderately complex tasks that require limited judgment."[4] The Petitioner must resolve this inconsistency in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

It appears that the Beneficiary's work would be dictated by the needs of various end-clients who require various levels of software development services. Specifically, it appears that the Petitioner's clients are seeking custom application development, which the Beneficiary and other employees of the Petitioner would perform pursuant to each individual client's specifications. Although the Petitioner provided a lengthy list of duties the Beneficiary would perform, its overview of the Beneficiary's responsibilities, the duties are presented in abstract and generalized terms such as "analyze user needs," "research new technologies," and "use appropriate solutions to build customs software solutions" that do not communicate what the Beneficiary would do on day-to-day basis or what bodies of knowledge are required to perform these duties. Given that the duties of the position appear to be client-driven, absent evidence of the existence of a specific project or assignment, and

[4] 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. Again, a Level II wage is the second-lowest of four assignable wage levels.

the requirements of such a project or assignment, we are unable to determine the true nature of the Beneficiary's duties and the skills required to perform them.

As recognized in *Defensor*, 201 F.3d at 387-8, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location in order to properly ascertain the minimum educational requirements necessary to perform those duties. In other words, as the nurses in that case would provide services to the end-client hospitals and not to the petitioning staffing company, the Petitioner-provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination. *See id.*

The Petitioner has provided insufficient evidence to corroborate the existence of any project for the Beneficiary, and likewise has provided insufficient evidence of the substantive nature of the particular duties that such projects would require.[5]

That the Petitioner did not establish the substantive nature of the work to be performed by the Beneficiary precludes a finding that the proffered position is a specialty occupation under 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 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;[6] (3) the level of complexity or uniqueness of the proffered position, which is the focus of the

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[5] The agency made clear long ago that 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). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

[6] The Beneficiary provided evidence that might ordinarily be relevant to various criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). For instance, the Petitioner provided vacancy announcements placed by other companies for software engineers and software developers. These might ordinarily be relevant to the first prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(2)*. In this case, however, because the Petitioner has not demonstrated the substantive nature of the duties the Beneficiary would perform, it has not demonstrated that the Beneficiary would work as a software engineer or

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.

For the reasons related in the preceding discussion, the Petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, that the proffered position qualifies as a specialty occupation.

IV. BENEFICIARY'S QUALIFICATIONS

As discussed in this decision, the Petitioner did not submit sufficient evidence regarding the proffered position to determine whether it will require a baccalaureate or higher degree in a specific specialty or its equivalent. Absent this determination that a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position, it also cannot be determined whether the Beneficiary possesses that degree or its equivalent. Therefore, we need not and will not address the Beneficiary's qualifications further, except to note that, in any event, the Petitioner did not submit an evaluation of the Beneficiary's foreign degree or sufficient evidence to establish that his degree is equivalent to a U.S. bachelor's degree in a specific specialty. As such, since evidence was not presented that the Beneficiary has at least a U.S. bachelor's degree in a specific specialty, or its equivalent, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

V. CONCLUSION

The Petitioner has not established that the proffered position qualifies as a specialty occupation.

ORDER: The appeal is dismissed.

Cite as *Matter of B-B- LLC*, ID# 467345 (AAO Aug. 22, 2017)

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a software developer, and that those vacancy announcements are relevant.