



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF E-T-R-, LLC

DATE: MAR. 31, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a technology management services company, seeks to temporarily employ the Beneficiary as a “business intelligence management analyst I” 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 of the Vermont Service Center denied the petition. The Director concluded that the evidence of record did not establish that (1) the petition was filed for non-speculative work for the Beneficiary that existed as of the time of the petition’s filing; and (2) the Petitioner had obtained a certified labor condition application (LCA) for all work locations of the Beneficiary prior to filing the petition.

On appeal, the Petitioner submits a brief and additional evidence, and asserts that it has satisfied all evidentiary requirements.

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

I. NON-SPECULATIVE WORK

For an H-1B petition to be granted, a Petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the Petitioner must establish that the employment it is offering to the Beneficiary meets the applicable statutory and regulatory requirements.

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) 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 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).

Furthermore, when determining whether a proffered position qualifies as a specialty occupation, we must determine, *inter alia*, whether the Petitioner (1) has provided sufficient evidence to establish that the Beneficiary will perform the duties of the proffered position as stated in the petition; and (2) has established that, at the time of filing, it had secured non-speculative work for the Beneficiary that is in accordance with the Petitioner's claims about the nature of the work that the Beneficiary would perform in the proffered position.

B. Analysis

In the initial petition, the Petitioner requested approval for the Beneficiary from October 1, 2016, to August 23, 2019, and indicated that she would work at the following locations: (1) its corporate headquarters in [REDACTED] New York; (2) remotely from her home in [REDACTED] New Jersey; and (3) onsite at the offices of the Petitioner's client, [REDACTED] in [REDACTED] New York. The petition was accompanied by an LCA certified for these three locations.

Thereafter, in response to the Director's request for evidence (RFE), the Petitioner indicated that the Beneficiary's worksite changed to [REDACTED] Missouri, to work for another client, [REDACTED]. Upon review, we find that, while the Petitioner may be able to eventually locate some type of work for the Beneficiary, it has not established that the petition was filed for non-speculative work for the Beneficiary that existed *as of the time of the petition's filing*.¹ There is insufficient documentary evidence in the record corroborating the availability of work for the Beneficiary for the requested period of employment and, consequently, what the Beneficiary would do and where the Beneficiary would work, as well as how this would impact the circumstances of her relationship with the Petitioner. The 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 (Reg'l Comm'r 1978). Without more, the Petitioner's unsupported assertions indicate that the proffered position is not in fact a specialty occupation. The Director's decision must therefore be affirmed and the appeal dismissed on this basis alone.

Even if the above issue did not preclude a finding that the proffered position is a specialty occupation, the petition could not otherwise be approved. Although the Petitioner provided a list of the Beneficiary's proposed duties, we must review the actual duties the Beneficiary will be expected to perform to ascertain whether those duties require at least a baccalaureate degree in a specific specialty, or its equivalent, as required for classification as a specialty occupation. To accomplish that task in this matter, we must analyze the actual duties in conjunction with the specific project(s) to which the Beneficiary will be assigned. To allow otherwise, results in generic descriptions of duties that, while they may appear to comprise the duties of a specialty occupation, are not related to any actual services the Beneficiary is expected to provide.

¹ 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.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). 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).

In that regard, we have reviewed the information in the record regarding the Petitioner's technology management services. Upon review of this information, we find that the record of proceeding lacks documentation regarding the actual work that the Beneficiary will perform to sufficiently substantiate the claim that the Petitioner has H-1B caliber work for the Beneficiary for the period of employment requested in the petition.

We note that, as recognized by the court in *Defensor*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. *See Defensor*, 201 F.3d at 387-88. The court held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

Here, the record contains numerous inconsistencies regarding the Beneficiary's ultimate employment. The Petitioner initially claimed that the Beneficiary would render services to [REDACTED]. Aside from an Independent Contractor Services Agreement, the Petitioner submitted no evidence outlining the proposed project(s) upon which the Beneficiary would work, their nature and duration, or work orders, statements of work, or other documentation demonstrating that a bona fide position actually existed for the Beneficiary with this client.² Absent a specific discussion of the proposed [REDACTED] project and the tasks assigned to the Beneficiary in accordance with the project terms, we find that the Petitioner has not established that the Beneficiary would perform the claimed duties set out in its letter of support. The Petitioner must support its assertions with relevant, probative, and credible evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

In response to the RFE, the Petitioner asserted that the Beneficiary would be rendering services to a new client, [REDACTED]. As will be discussed *infra*, the evidence regarding the Beneficiary's employment with [REDACTED] will not be considered, as it constitutes a material change to the terms and conditions of the Beneficiary's employment as claimed in the initial petition. Nevertheless, we note that the documentary evidence submitted by the Petitioner in support of its agreement with [REDACTED] is similarly devoid of any detail regarding the project(s) upon which the Beneficiary would work and the duties associated therewith.

Consequently, the Petitioner has not established the substantive nature of the work to be performed by the Beneficiary, which 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

² We note that page 19 of the Independent Contractor Services Agreement contains a sample Statement of Work. This document, however, is blank and serves merely as a representative sample, and has no evidentiary weight here as it provides no information regarding the proposed assignments for the Beneficiary.

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. Thus, the Petitioner has not established that the proffered position is a specialty occupation under the applicable provisions.

Finally, we note the Petitioner's claim that a bachelor's degree in a number of disparate fields, including electrical engineering, computer science, finance, and business administration, is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. There must be a close correlation between the required specialized studies and the position; thus, the mere requirement of a degree, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility."). Thus, while a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *Royal Siam Corp.*, 484 F.3d at 147.

The Petitioner asserts that its minimum requirement for the proffered position encompasses a wide array of areas, including business administration. Without more, the Petitioner's statement alone indicates that the proffered position is not in fact a specialty occupation.

Based upon a complete review of the record of proceeding, we find that the Petitioner has not established (1) the substantive nature and scope of the Beneficiary's employment; (2) the actual work that the Beneficiary would perform; (3) the complexity, uniqueness and/or specialization of the tasks; and/or (4) the correlation between that work and a need for a particular educational level of highly specialized knowledge in a specific specialty (or its equivalent). Consequently, this precludes a determination that the Petitioner's proffered position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions.

Accordingly, as the Petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation.

II. LCA

The next issue before us is whether the Petitioner submitted a valid LCA certified for all work locations.

A. Legal Framework

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. § 103.2(a)(1), in pertinent part, as follows:

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions . . . and such instructions are incorporated into the regulations requiring its submission.

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1):

Demonstrating eligibility. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request and must continue to be eligible through adjudication. Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions. Any evidence submitted in connection with a benefit request is incorporated into and considered part of the request.

The regulations require that before filing a Form I-129, Petition for a Nonimmigrant Worker, on behalf of an H-1B worker, a petitioner obtain a certified LCA from the U.S. Department of Labor (DOL) in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. § 214.2(h)(4)(i)(B). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must submit evidence that an LCA has been certified by DOL when submitting the Form I-129.

Additionally, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) provides as follows:

Service or training in more than one location. A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions. The address that the petitioner specifies as its location on the Form I-129 shall be where the petitioner is located for purposes of this paragraph.

B. Analysis

As noted above, the Petitioner indicated on the Form I-129 that the Beneficiary would be working in three locations in New York and New Jersey for the duration of the H-1B employment period, i.e., October 1, 2016, to August 23, 2019. The certified LCA submitted *with* the Form I-129 also indicates that the Beneficiary will work only at these three locations through August 23, 2019. However, in response to the Director's RFE, the Petitioner claimed the Beneficiary's work location

had changed, and that she would instead be working in [REDACTED] Missouri, through August 23, 2019.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(E) states:

Amended or new petition. The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

It is self-evident that a change in the location of a beneficiary's work to a geographical area not covered by the LCA filed with the Form I-129 is a material change in the terms and conditions of employment. Because work locations are critical to the Petitioner's wage rate obligations, the change deprives the petition of an LCA supporting the periods of work to be performed at the two locations and certified on or before the date the instant petition was filed. While the Petitioner submitted a new LCA listing the Missouri work location and the respective dates of employment in response to the RFE, the Petitioner in this case was required to file an amended or new H-1B petition indicating the change in locations and dates along with the newly certified LCA that establishes eligibility at the time that a new or amended petition is filed.

While DOL is the agency that certifies LCA applications before they are submitted to U.S. Citizenship and Immigration Services (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. The regulations state, in pertinent part:

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.

20 C.F.R. § 655.705(b) (emphasis added).

As 20 C.F.R. § 655.705(b) requires that USCIS ensure that an H-1B petition is filed with a "DOL-certified LCA attached" that actually supports and corresponds with the petition on the petition's filing, this regulation inherently necessitates the filing of an amended H-1B petition to permit USCIS to perform its regulatory duty to ensure that a certified LCA actually supports and corresponds with an H-1B petition as of the date of that petition's filing. In addition, as 8 C.F.R.

§ 103.2(b)(1) requires eligibility to be established at the time of filing, it is factually impossible for an LCA certified by DOL after the filing of an initial H-1B petition to establish eligibility at the time the initial petition was filed.³ Therefore, in order for a petitioner to comply with 8 C.F.R. § 103.2(b)(1) and USCIS to perform its regulatory duties under 20 C.F.R. § 655.705(b), a petitioner must file an amended or new petition, with fee, whenever a beneficiary's job location changes such that a new LCA is required to be filed with DOL.

In light of the above, we find that a necessary condition for approval of an H-1B visa petition is an LCA, certified *on or before* the filing date of the petition, with information, accurate as of the date of the petition's filing, as to where the beneficiary would actually be employed. Furthermore, the petition must list the locations where the beneficiary would be employed and be accompanied by an itinerary with the dates the beneficiary will provide services at each location. Both conditions were not satisfied in this proceeding. The Petitioner's attempt to amend the petition by identifying a new work location in response to the RFE and to remedy the LCA deficiency by submitting an LCA certified after the filing of the petition is ineffective. Again, a petitioner must establish eligibility at the time of filing a nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Michelin Tire Corp.*, 17 I&N Dec. 248.

It is further noted that to ascertain the intent of a petitioner, we must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that we can determine the exact position offered, the location of employment, the proffered wage, et cetera. If a petitioner's intent changes with regard to a material term and condition of employment or the beneficiary's eligibility, an amended or new petition must be filed. To allow a petition to be amended in any other way would be contrary to the regulations. Taken to the extreme, a petitioner could then simply claim to offer what is essentially speculative employment when filing the petition only to "change its intent" after the fact, either before or after the H-1B petition has been adjudicated. 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).

In view of the foregoing, we find that the Petitioner did not obtain a certified LCA for all work locations of the Beneficiary prior to filing the petition.

III. CONCLUSION

The burden is on the Petitioner to show eligibility for the immigration benefit sought. Here, that burden has not been met.

³ The new LCA submitted in response to the RFE was certified on August 23, 2016, nearly five months after the filing of the initial H-1B petition.

Matter of E-T-R-, LLC

ORDER: The appeal is dismissed.

Cite as *Matter of E-T-R-, LLC*, ID# 287110 (AAO Mar. 31, 2017)