U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-S-, INC.

DATE: DEC. 9, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an information technology consulting/software development firm, seeks to temporarily employ the Beneficiary as a "computer systems engineer" under the H-1B nonimmigrant classification. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Director, Vermont Service Center, denied the petition, and on motion, affirmed the denial decision. The matter is now before us on appeal. The appeal will be dismissed.

I. ISSUE

The issue before us is whether the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.[1]

II. SPECIALTY OCCUPATION

For an H-1B petition to be granted, the 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)(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

[1] We conduct appellate review on a *de novo* basis. *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015); *see also* 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989). We follow the preponderance of the evidence standard as specified in *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).

(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) states, in pertinent part, the following:

> *Specialty occupation* means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must meet one of the following criteria:

(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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *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 statute 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). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in

accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets 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 proffered 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"). Applying this standard, USCIS regularly approves H-1B petitions for qualified individuals who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the individual, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

We note that, as recognized by the court in *Defensor*, *supra*, where the work is to be performed for entities other than the Petitioner, evidence of the client companies' job requirements is critical. *See Defensor v. Meissner*, 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.* at 384. 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.

B. Proffered Position

On the Form I-129, the Petitioner indicated that the Beneficiary would work off-site at in New Jersey. In the letter of support, the Petitioner described itself as "a full-service provider of Information Technology consulting services." The Petitioner also stated that the Beneficiary would perform the following job duties in the proffered position:

- Participate in requirements gathering and compiled them into design document

- Analyze the Unit test framework and design the framework to meet the current requirements
- Analyzing compilation warnings on various platforms
- Writing and reviewing test cases for Application Framework components
- Involve in database design, normalization, indexing in SQL Server 2008
- Design and Development of Test Plans, Component testing
- Involved in debugging and solving the build issues
- Writing and reviewing test cases for all the modules of current working components of program

The Petitioner submitted letters from the which confirm that the Beneficiary's services will be needed in New Jersey. The Chairman also provided a list of job duties similar to the list provided by the Petitioner in its letter of support.

On appeal, and for the first time, the Petitioner clarifies that the Beneficiary will be working on the ' project for its client,

C. Analysis

The primary issue is whether the Petitioner has provided sufficient evidence to establish that it will employ the Beneficiary in a specialty occupation position.

As a preliminary matter, we find that the Petitioner has provided inconsistent information regarding the requirements for the proffered position. For instance, the Petitioner stated on motion that the proffered position requires "a bachelor's degree or its equivalent Quantitative discipline in Computer Science, Management Information Systems, Engineering or a related field." However, further in the same letter, the Petitioner stated that "a Bachelor's degree in Management Information Systems, Computer Science, Engineering, Business or its equivalent is normally the minimum requirement for entry into the position of Computer Systems Engineer. . . ." In addition, the Petitioner provided a letter from the Chairman of dated Sept. 5, 2014, which states that a "minimum [of a] bachelor's degree in Computer Science, MIS or related field" is required. No explanation for the variances was provided by the Petitioner. "[I]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence." *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the Petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92.

Moreover, it must be noted that the Petitioner's claim that a bachelor's degree in computer science, management information systems, engineering and/or business is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation.

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the

specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the Petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. *See* section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Here, the Petitioner states that a bachelor's degree in computer science, management information systems, engineering and/or business is acceptable. However, these fields cover numerous and various specialties. The issue here is that it is not readily apparent that business is closely related to engineering or computer science or that the field of business is directly related to the duties and responsibilities of the particular position proffered in this matter. Further, the Petitioner's claim that a bachelor's degree in business 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. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business, without further specification, does not establish the position as a specialty occupation.[2] *Cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm'r

[2] A general degree requirement does not necessarily preclude a proffered position from qualifying as a specialty occupation. For example, an entry requirement of a bachelor's or higher degree in business administration with a concentration in a specific field, or a bachelor's or higher degree in business administration combined with relevant education, training, and/or experience may, in certain instances, qualify the proffered position as a specialty occupation. In either case, it must be demonstrated that the entry requirement is equivalent to a bachelor's or higher degree in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d at 147.

It is also important to note that a position may not qualify as a specialty occupation based solely on either a preference for certain qualifications for the position or the claimed requirements of a petitioner. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). Instead, the record must establish that the performance of the duties of the proffered position requires both the theoretical and practical application of a body of highly specialized knowledge and the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as the minimum for entry into the occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

1988). Accordingly, as the evidence of record does not establish a standard, minimum requirement of at least a bachelor's degree in a specific specialty, or its equivalent, for entry into the particular position, it does not support the proffered position as being a specialty occupation.

On motion, the Petitioner submitted an opinion letter prepared by lists the duties of the proffered position as described by the Petitioner in its letter dated October 22, 2014, and concludes that the proffered position is a specialty occupation that requires a bachelor's degree in computer science, management information systems, engineering, or a related quantitative discipline.

In the letter, stated that he "carefully read the description of [the Petitioner], provided to [him]" and "consulted the company's website (www.[the Petitioner].com) for further information about the company." However, there is no evidence that has visited the Petitioner's business, observed the Petitioner's employees, interviewed them about the nature of their work, or documented the knowledge that they apply on the job. He does not demonstrate or assert in-depth knowledge of the Petitioner's specific business operations or how the duties of the position would actually be performed in the context of the Petitioner's business enterprise.

Furthermore, it does not appear that is aware that the Petitioner designated the proffered position as a Level II position in the Labor Condition Application. The U.S. Department of Labor's wage-level guidance specifies that a Level II designation is reserved for positions involving only moderately complex tasks requiring limited judgment. *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://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf. We consider this to be a significant omission, as it appears that would have found this information relevant for his opinion letter. Moreover, without this information, the Petitioner has not demonstrated that possessed the requisite information necessary to adequately assess the nature of the Petitioner's position and appropriately determine similar positions based upon job duties and responsibilities.

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.* As a reasonable exercise of our discretion, we find that the advisory opinion letter possesses little probative value for any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Furthermore, we find that the record of proceeding in this case does not contain sufficient information regarding the specific job duties to be performed by the Beneficiary while assigned to the project.

In the instant case, the Petitioner submitted several documents in support of its petition, including an offer of employment letter between itself and the Beneficiary, a Services Agreement and a Purchase Order between itself and and two letters from the Petitioner's client. The

evidence does not establish, however, the substantive nature of the work to be performed by the Beneficiary. There is a lack of documentation regarding the claimed project and the Beneficiary's specific role in the project. Although the Petitioner's client, [redacted] states that the Beneficiary will work at its offices in New Jersey for the duration of the petition, the Services Agreement between the Petitioner and [redacted] dated September 18, 2013, references project work that could be performed on behalf of an unidentified end-client. Here, the Petitioner does not establish that the petition was filed for non-speculative work for the Beneficiary that existed *as of the time of the petition's filing*. 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 how this would impact the circumstances of her relationship with the Petitioner.

For instance, upon review of the offer of employment letter, dated March 7, 2014, we note that it does not mention the [redacted] project. The letter states that the Petitioner "will provide a written description of the project assigned to the Employee, a copy of which is attached to this Agreement as Exhibit A and incorporated herein." However, no such attachment is appended to the offer letter. In addition, the letter states, "When and if the Employee is assigned to perform services for a Client Company or End-Client Company of [the Petitioner], the work of the Employee shall, at all times, be set by and supervised by [the Petitioner]." According to the offer letter, the Beneficiary may be placed at various locations and assigned to various projects and, thus, not necessarily in New Jersey on the [redacted] project as indicated by the Petitioner.

Further, upon review, we find that the Services Agreement and the Purchase Order lack the necessary level of detail regarding the Beneficiary's claimed assignment. For example, these documents also do not indicate that the Beneficiary will work on the [redacted] project. In addition, although the Purchase Order lists the proffered position, it specifies the duration of the assignment as "12 months with possible extension." Thus, the Purchase Order indicates that the Beneficiary's assignment will end prior to the end of the requested H-1B validity period.[3] A petition must be filed for non-speculative work for the Beneficiary, for the entire period requested, that existed as of the time of the petition's filing. 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.

The letters from [redacted] too, are insufficient, as they do not describe the particular duties of the Beneficiary in detail. They list the Beneficiary's services in general and vague terms that do not appear to be specifically tied to the [redacted] project. In fact, none of the letters mention the [redacted] project and only one letter uses the job title of computer systems

[3] [redacted] June 27, 2015, letter, submitted on appeal, vaguely states that the Beneficiary's services "will be required for a period until August 2016." However, without additional explanation, including why this statement differs from the information found in the purchase order, [redacted] letter is insufficient to corroborate the Petitioner's claims.

engineer. In addition, [redacted] letter dated June 27, 2015, states that the Beneficiary will "render development and support services for multiple in-house development projects" which are "developed for and ultimately benefit [redacted] clients." Thus, it appears that the Beneficiary will be assigned to various projects for different end-clients, as was also indicated in the earlier referenced Services Agreement dated September 18, 2013.

Based on the lack of detailed information and documentation regarding the [redacted] project and the specific duties the Beneficiary will perform, we cannot find that the Petitioner has met its burden of proof in establishing that the Beneficiary will be employed to exclusively perform services on this project, as claimed, which 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 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.[4]

Accordingly, as the evidence of record does not satisfy 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. For this reason, the appeal will be dismissed and the petition denied.

III. BEYOND THE DECISION OF THE DIRECTOR

A. Employer-Employee

Beyond the decision of the Director, we find that the Petitioner did not establish that it will have a valid employer-employee relationship with the Beneficiary. Specifically, the Petitioner has not established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii). The record of proceeding lacks sufficient documentation evidencing what exactly the Beneficiary would do for the period of time requested or where exactly and for whom the Beneficiary would be providing services and, given this specific lack of evidence, the Petitioner does not establish who has or will have actual control over the Beneficiary's work or duties, or the condition and scope of the Beneficiary's services. In other words, the Petitioner does not establish whether it has made a bona fide offer of employment to the Beneficiary based on the evidence of record or that the Petitioner, or any other company which it may represent, will have and maintain the requisite employer-employee relationship with the Beneficiary for the duration of the requested

[4] The Petitioner attested in the Labor Condition Application that the proffered position falls under the "Computer Occupations, All Other" occupational category, which is an occupational category that is not covered in detail in the U.S. Department of Labor's *Occupational Outlook Handbook*.

employment period. *See* 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer" and requiring the Petitioner to engage the Beneficiary to work such that it will have and maintain an employer-employee relationship with respect to the sponsored H-1B nonimmigrant worker). Again, there is insufficient evidence detailing where the Beneficiary will work, the specific projects to be performed by the Beneficiary, or for which company the Beneficiary will ultimately perform these services covering the duration of the petition. Therefore, the appeal must be dismissed and the petition must be denied for this additional reason.

B. Itinerary Requirement

We also find that the Petitioner did not comply with the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B).

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) states, in pertinent part:

> *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.

The itinerary language at 8 C.F.R. § 214.2(h)(2)(i)(B), with its use of the mandatory "must" and its inclusion in the subsection "Filing of petitions," establishes that the itinerary as there defined is a material and necessary document for an H-1B petition involving employment at multiple locations, and that such a petition may not be approved for any employment period for which there is not submitted at least the employment dates and locations. Here, there is a lack of documentary evidence sufficient to corroborate the claim that the Beneficiary would be serving as a computer systems engineer at [redacted] facility for the period sought in the petition. Although the Petitioner requested the Beneficiary be granted H-1B classification until August 31, 2016, the Petitioner did not substantiate the proposed employment at [redacted] for the duration of the period requested. Given the indications in the record that the Beneficiary would work at multiple locations during the requested period of employment, the Petitioner was required to submit an itinerary. The Petitioner did not provide this initial required evidence when it filed Form I-129 in this matter; therefore, the petition must also be denied on this additional basis.

IV. CONCLUSION AND ORDER

We may deny an application or petition that does not comply with the technical requirements of the law even if the Director does not identify all of the grounds for denial in the initial decision. *See Spencer Enters., Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001); *see also Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542.

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of the enumerated grounds. *See Spencer Enters., Inc. v. United States*, 229 F. Supp. 2d at 1037; *see also BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1183 (D.C. Cir. 2003) ("When an agency offers multiple grounds for a decision, we will affirm the agency so long as any one of the grounds is valid, unless it is demonstrated that the agency would not have acted on that basis if the alternative grounds were unavailable.").

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the Petitioner's burden to establish 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) (citing *Matter of Brantigan*, 11 I&N Dec. 493, 495 (BIA 1966)). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of S-S-, Inc.*, ID# 15183 (AAO Dec. 9, 2015)