U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-ITR- INC

DATE: JULY 7, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, an IT consulting services firm, seeks to employ the Beneficiary as a "computer 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, Vermont Service Center, denied the petition. The Director concluded that the evidence of record did not establish that the proffered position qualifies as a specialty occupation position.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred denying the petition.

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

I. SPECIALTY OCCUPATION

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

(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) largely restates this statutory definition, but adds a non-exhaustive list of fields of endeavor. In addition, the regulations provide that the proffered position must meet one of the following criteria to qualify as a specialty occupation:

(*1*) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

(*2*) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(*3*) The employer normally requires a degree or its equivalent for the position; or

(*4*) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. § 214.2(h)(4)(iii)(A). U.S. Citizenship and Immigration Services (USCIS) has consistently interpreted the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"); *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

B. The Proffered Position

The Petitioner stated on the Form I-129, Petition for a Nonimmigrant Worker, that the proffered position is a computer programmer analyst position. Although the Petitioner's address is in New Jersey, the Form I-129 states that the Beneficiary would work at in Pennsylvania. Other evidence in the record indicates that this is a location of (end-client).

On the labor condition application (LCA) submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category "Computer Systems Analysts," corresponding to the Standard Occupational Classification code 15-1121.[1]

[1] 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.*

The Petitioner identified the following as the requirements of the proffered position in a letter filed with the petition:

- Gathering requirements and documentation for application development
- Demonstrated knowledge of programming languages: ASP.Net, C#
- Designs, modifies, develops, writes and implements software programming applications
- Able to create and develop complex SQL queries
- Significant experience in managing multiple priorities
- Exceptional analytical skills, with strong attention to details and accuracy; as well as the ability to provide ad hoc analysis

C. Analysis

Upon review of the record in its totality and for the reasons set out below, we determine that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation. Specifically, the record does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.[2]

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 387-388. 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.

Here, the record of proceedings in this case is devoid of sufficient information from the end-client. The evidence in the record indicates that the Petitioner has an agreement with a vendor, who provides services to the end-client. The Petitioner submitted a vendor services agreement with (vendor), which sets out general terms pursuant to which the Petitioner might provide workers to the vendor's clients specified in work orders to be issued subsequently. However, the record of proceedings does not contain documentary evidence from the end-client. In a letter submitted in response to the Director's request for evidence, the vendor stated that the end-client "does not provide project verification for non-employees."

We further note that the record of proceedings does not contain a contractual agreement between the vendor and the end-client. Without documentary evidence that delineates the contractual terms

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

between the end-client and the vendor, including the duties and the requirements for the position, we are unable determine the substantive nature of the proffered position.

Consistent with *Defensor*, *supra*, where the work is to be performed for entities other than the Petitioner, evidence of the client companies' job requirements is critical. In the instant case, both the Petitioner and the vendor make clear that the Beneficiary will be assigned to work at the end-client's location. Under these circumstances, evidence of the work the end-client would assign to the Beneficiary and evidence of the educational requirement it imposes for the performance of that work are indispensable. "[G]oing on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings." *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Further, the Petitioner has not established that it has definite, non-speculative work for the Beneficiary for the entire validity period requested. Without documentary evidence from the end-client that covers the duration of the period of employment requested, we are not able to ascertain what the Beneficiary would do, where the Beneficiary would work, as well as how this would impact circumstances of his relationship with the Petitioner. Further, in an offer letter to the Beneficiary, Petitioner stated that the "job duties, title, compensation and benefits [of the proffered position] . . . may change from time to time." In an employment agreement letter, the Petitioner also stated that its rights include sole responsibility for "Project & location assignments and relocations." 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.[3] For this additional reason, the Petitioner has not demonstrated the substantive nature of the duties the Beneficiary would perform.

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[3] 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 individual 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 individual 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 individual 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 individual 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).

Moreover, we find that the letters from the vendor and the Petitioner's own letters describing the duties and requirements of the proffered position are entitled to little probative weight. Aside from the fact that they were not issued directly by the end-client, these documents do not describe in detail the specific duties, demands, level of responsibilities and requirements necessary for the proffered position. Instead, they provide vague job descriptions that do not convey the specific tasks to be performed, the complexity of such tasks, and the substantive application of knowledge involved.

For example, the Petitioner and the vendor state that the Beneficiary's duties would include "gathering requirements and documentation for application development." However, there is no further information of what specific tasks the Beneficiary will perform in furtherance of these overarching duties, what types of "application development" will be involved, or what bodies of knowledge are required to perform such duties.

We also observe that some of the stated job responsibilities indicate that the Beneficiary would be expected to exercise significant judgment and expertise. For example, the stated job requirements indicate that the Beneficiary would be expected to possess "significant experience in managing multiple priorities" and be required to provide "ad hoc analysis" and write "complex SQL queries." However, such responsibilities appear inconsistent with the Level II wage level selected here. Again, in designating the proffered position at a Level II wage, the Petitioner indicated that the Beneficiary would perform only "moderately complex tasks" that require only "limited judgment." The Petitioner's designation of the proffered position as a Level II position appears inconsistent with these responsibilities, and raises additional questions regarding the substantive nature of the proffered position.

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; (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]

[4] Because the Petitioner has not demonstrated the nature of the duties the Beneficiary would perform, it has not demonstrated that the Beneficiary would work as a programmer analyst, as claimed. Therefore, we will not further address evidence submitted to show that programmer analyst positions qualify as specialty occupation positions, except to note that even if the proffered position were established as being that of a programmer analyst, a review of the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (*Handbook*) does not indicate that, simply by virtue of its occupational classification, such a position qualifies as a specialty occupation in that the *Handbook* does not state a normal minimum requirement of a U.S. bachelor's or higher degree in a specific specialty, or its equivalent, for entry into the occupation of programmer analyst. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., "Computer Systems Analysts," http://www.bls.gov/ooh/computer-and-information-

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

II. EMPLOYER-EMPLOYEE

As the Petitioner did not demonstrate that the proffered position is a specialty occupation, we need not fully address other issues evident in the record. That said, we wish to identify an additional issue to inform the Petitioner that this matter should be addressed in any future proceedings.[5] The Petitioner has not established that it meets the regulatory definition of a United States employer. 8 C.F.R. § 214.2(h)(4)(ii).

The United States Supreme Court determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (quoting *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

> "In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

Id.; *see also Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 445 (2003) (quoting *Darden*, 503 U.S. at 323). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968)).

In the instant case, the vendor services agreement indicates that, notwithstanding other evidence in the record, if the Beneficiary were assigned to one of the end-client locations, the end-client would

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technology/print/computer-systems-analysts.htm (last visited June 30, 2016). As such, absent evidence that the position of programmer analyst satisfies one of the alternative criteria available under 8 C.F.R. § 214.2(h)(4)(iii)(A), the instant petition could not be approved for this additional reason.

[5] In reviewing a matter *de novo*, we may identify additional issues not addressed below in the Director's decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd, 345 F.3d 683 (9th Cir. 2003) ("The AAO may deny an application or petition on a ground not identified by the Service Center.").

supervise her. Specifically, it states that the Beneficiary's work would be performed "under supervision of [the end-client]." Further, the Petitioner made clear in its letters that it could assign the Beneficiary to a different project. The terms of that other employment, including who would supervise the Beneficiary's work if he were assigned elsewhere, have not been demonstrated, nor even asserted.

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control a beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the Beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the Beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the Beneficiary's employer.

The evidence, therefore, is insufficient to establish that the Petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters that the Petitioner would exercise complete control over the Beneficiary, when the evidence discussed above demonstrates that it would not, does not establish eligibility in this matter. Therefore, the petition must be denied for this additional reason.

III. CONCLUSION

The burden is on the Petitioner to show eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of E-ITR- Inc*, ID# 17329 (AAO July 7, 2016)