U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A- CORP.

DATE: OCT. 5, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a technology services company, seeks to temporarily employ the Beneficiary as a "software developer" 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 does not establish that the proffered position qualifies as a specialty occupation.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and a brief, and asserts that the Director erred in her findings.

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

I. LEGAL FRAMEWORK

The first issue before us is whether the evidence of record demonstrates by a preponderance of the evidence that the Petitioner would employ the Beneficiary in a specialty occupation position.

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).

II. PROFFERED POSITION

The Petitioner stated that the Beneficiary would be employed in-house as a software developer. In response to the Director's request for evidence (RFE), the Petitioner submitted the following duties for the proffered position:

- Development and maintenance of Internal Tools applications using Java J2EE and Spring technologies (40% of the time)
- Design, analysis and coding of applications using jQuery, HTML and CSS (10% of the time)
- Enterprise level Java/J2EE, Web Services and XML application development serving in a Systems Developer role. (30% of the time)
- Writing SQL queries for managing the database such as Oracle, SQLServer (10% of the time)
- Provide application support, analyze production issues and bug fixing and testing of change requests for complex applications (5% of the time)
- Develop Proof of Concept for new development and enhancement requests (5% of the time)

- Outstanding technical competence with Java/J2EE and in industry standard databases like Oracle 10G or SQL Server.

The Petitioner stated that it requires at least a bachelor's degree in computer science, computer applications, information systems, engineering, or an IT related field (or the equivalent), along with the related experience, for the proffered position:

III. ANALYSIS

Upon review of the record in its totality and for the reasons set out below, we determine that the Petitioner has not demonstrated that it would employ the Beneficiary in a specialty occupation.

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 entire period of employment requested in the petition. It is incumbent upon the Petitioner to demonstrate it has sufficient work to require the services of a person with at least a bachelor's degree in a specific specialty, or its equivalent, to perform duties at a level that requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty for the period specified in the petition.

In this matter, although the Petitioner indicated that the Beneficiary would be employed in-house as a software developer, evidence of the record does not sufficiently support the Petitioner's assertion. The record of proceedings contains insufficient evidence demonstrating that the Petitioner has projects for the Beneficiary for the entire period requested. Initially, the Petitioner stated that the Beneficiary would work on the following three projects:

- for for
- for corporate-branded intranet marketplaces; and,
- a product for the fitness industry.

In its RFE response, the Petitioner stated that the Beneficiary would "be assigned to work on in-house projects on which [the Petitioner] requires immediate and concentrated development, including and

In its appeal, the Petitioner states that it no longer continues with the for and the projects. Therefore, the Petitioner's acknowledgement that these two projects no longer exist is sufficient to conclude that the Petitioner has not satisfied the requirement of having specialty occupation work available for the Beneficiary for the entire period specified in the petition at the time of filing. In other words, the record of

proceedings does not demonstrate that the Petitioner has secured definite, non-speculative work for the Beneficiary for the entire period requested that existed as of the petition's filing date.[1] USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. 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 Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978).

With respect to the project, the Petitioner submitted a master service agreement executed on September 25, 2015. This agreement did not exist at the time the Petitioner filed the petition on April 1, 2015. Furthermore, the agreement states that this contract may be "terminated at any time by either party provided that the other part is notified in writing two (2) weeks prior to the termination date." Therefore, this agreement does not demonstrate a definite commitment between the parties for the entire period requested in the petition. In addition, this agreement states that the Petitioner "shall perform the services set forth in work orders," and that "[e]ach Work Order will specify a general description of the services to be performed, an approximation of the service duration, the delivery schedule and rates, fees, and costs of the service." The Petitioner did not submit a document specifically entitled "Work Order," but instead submitted an "Annexure B" which listed the assigned resources and hourly rates for this project. The "Annexure B" did not, however, provide a general description of the services to be performed, an approximation of the service duration, or the delivery schedule, as indicated in the master agreement.

Moreover, the "Annexure B" listed the following resources assigned to the project: (1) (2) an unidentified "project coordinator/analyst (on shore)"; (3) an unidentified "senior

[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 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). 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).

developer"; (4) an unidentified "QA engineer/developer"; and (5) unidentified "data entry personnel." But the Petitioner has not explained which of these positions, if any, refer to the Beneficiary, whose title is a "software developer." "[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)). Therefore, the EPN project documentation is not sufficient to satisfy the Petitioner's burden of proof that it has an in-house project for the Beneficiary for the period requested in the petition.

The record of proceedings contains an agreement between the Petitioner and indicating that the Petitioner has been retained to develop software for the and projects. First, we note that even though the agreement states that it is effective as of October 15, 2015, the document was not executed until December 16, 2015. Nevertheless, this agreement was not in effect when the Petitioner filed the petition on April 1, 2015. Nor was it effective on the beginning day of the requested period, which is October 1, 2015. Furthermore, the agreement states the "initial term of the contract shall be a period of 24 months." The record of proceedings contains no documentation demonstrating that the contract has been extended beyond the 24-month period.

This agreement states that the Petitioner would provide "services as defined in specific work orders specified in exhibit signed for each work assignment." However, the Petitioner submitted only one work order dated January 14, 2016. According to this work order the Petitioner would develop "Web applications that is intended for mobile users." The work order is silent as to when the project would begin and how long it would last. Moreover, this work order lists the following assigned resources: (1) an unidentified "senior developer"; (2) an unidentified "project coordinator/business analyst"; (3) an unidentified "developer (offshore)"; (4) an unidentified UI designer; and (5) unidentified "QA (offshore)" personnel. The Petitioner has not explained which of these positions, if any, refer to the Beneficiary, whose title is a "software developer." Notably, the "developer" position listed in this work order is specifically identified as an *offshore* position.

In this vein, the Petitioner submitted a letter from of confirming the Petitioner's development of the and projects, and stating that "[w]hen the contract is awarded," the Beneficiary "may be allocated to any of these projects." But this letter falls short of confirming that the Beneficiary would actually be allocated to these projects, and if so, what his role would be with respect to each project. Overall, the record is insufficient to demonstrate that the Petitioner would assign the Beneficiary to the projects during the entire period requested in the petition.

The Petitioner also states that it has two in-house products – and – currently being developed. We first note that neither of these projects was listed in the Petitioner's support letter (which was submitted with the petition's filing) as in-house projects on which the Beneficiary would work. Again, USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed, 8 C.F.R. 103.2(b)(1), and a visa petition may

not be approved at a future date after the Petitioner or Beneficiary becomes eligible under a new set of facts, *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 249.

In its RFE response, the Petitioner listed these two projects as its in-house projects and included several screen shots as evidence. On appeal, the Petitioner submits a letter from from stating that has agreed to be a beta customer for the Petitioner's product, which is "planned for a Q1, 2016 launch." The Petitioner also submits a few email printouts from regarding the Petitioner's demonstration of the tool. But the Petitioner does not further explain in detail the Beneficiary's proposed role within these projects. Nor does the Petitioner provide sufficient information regarding when these projects were initiated, how long would they last, and what work remains to be done on these projects, for example. We find that the Petitioner has provided insufficient evidence demonstrating that these projects were in fact available at the time it filed the petition, and that they would continue to exist for the requested period.

On appeal, the president of the Petitioner lists several of the Petitioner's other clients to demonstrate that it has ample projects.[2] However, without properly executed agreements and work orders, service authorizations, or other similar documentation required by such agreements encompassing the period requested in the petition, we cannot find that the Petitioner has demonstrated availability of in-house projects for the Beneficiary at the time the petition was filed that would last for the entire period requested.

Finally, we observe that the Petitioner's offer letter to the Beneficiary states that he "will start by working at the [Petitioner's] offices located [in Virginia]." The Petitioner's letter then goes on to explain the scope of his job duties, and to state: "This work requires travel and relocation." The Petitioner has not explained why the Beneficiary's duties would require travel and relocation, especially when the Petitioner maintains on appeal that the Beneficiary would only be assigned to internal projects. "[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.

Without additional information and documentation establishing what projects have been secured for the Beneficiary, and accordingly, the specific duties the Beneficiary would perform on these projects, we are unable to discern the substantive nature of the position and whether the position indeed qualifies as a specialty occupation.

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[2] Among others, the Petitioner lists and However, the record of proceedings does not contain agreements with these companies. With regards to although the Petitioner submitted a master service agreement it has with it has not submitted a service authorization as required by the agreement demonstrating that it has an enforceable work order.

Consequently, we are precluded from 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. As the Petitioner has not established that it satisfies 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. Therefore, the appeal must be dismissed and the petition must be denied for this reason.

IV. 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 A- Corp.*, ID# 10300 (AAO Oct. 5, 2016)