U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21761560

Date: JULY 20, 2022

Appeal of Vermont Service Center Decision

Form I-129, Petition for Nonimmigrant Worker (H-1B)

The Petitioner seeks to employ the Beneficiary 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 Vermont Service Center Director denied the Form I-129, Petition for a Nonimmigrant Worker, concluding the record did not establish that the proffered position qualified as a specialty occupation. The matter is now before us on appeal. The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We review the questions in this matter *de novo*. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

I. ANALYSIS

Upon review of the entire record, for the reasons set out below, we have determined that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation. The Director concluded that the Petitioner did not establish that the offered position qualifies as a specialty occupation. In their decision, the Director thoroughly discussed the Petitioner's failure to meet any of the four regulatory criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*)–(*4*). Upon consideration of the entire record, including the evidence submitted and arguments made on appeal, we adopt and affirm the Director's ultimate determination with the comments below. *See Matter of P. Singh, Attorney*, 26 I&N Dec. 623, 624 (BIA 2015) (citing *Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994)); *see also Giday v. INS*, 113 F.3d 230, 234 (D.C. Cir. 1997) (finding the practice of adopting and affirming an underlying decision, for the reasons stated in that decision, is "not only common practice, but is universally accepted").

Even if we were not adopting and affirming the Director's ultimate determination, we would not decide in the Petitioner's favor. The record contains material inconsistencies and other deficiencies and after

reviewing the record, we conclude that those shortcomings are collectively so detrimental to the Petitioner's eligibility claims that we would not issue a favorable decision.

First, the inconsistencies. The Petitioner initially stated its Regulatory Specialist I position required at least a bachelor's degree in biomedical engineering or a related field. Although it also indicated that "[i]n some instances, additional requirements such as an advanced degree and/or prior work experience are required due to the sophistication of a specific project or job duties," it did not specify that the position in this petition was one of those instances. It designated this position as a Level I wage rate on the U.S. Department of Labor's ETA Form 9035 & 9035E, Labor Condition Application for Nonimmigrant Workers (LCA) and an advanced degree or any more than two years of work experience would require the employer to increase the wage rate on the LCA to at least a Level II.

However, in response to the Director's request for evidence (RFE) the Petitioner provided its job posting for the same position in the petition, Regulatory Specialist I, where it now required a bachelor's degree without any discipline specified, "2–3 years' experience in Regulatory with a good understanding of regulatory requirements," and "[e]xperience with software and/or medical device product preferred." As we noted above, these prerequisites were not included in the petition's initial filing and the Petitioner has not offered an explanation for its inconsistent position requirements.

Now, the Petitioner has amended the requirements in its appeal brief providing that "to respond to the Service's contentions, counsel submits an updated job requisition from [the Petitioner] for a Regulatory Specialist I position that more closely mirrors the role's true minimum requirements of a bachelor's degree in 'related engineering, biomedical engineering, science, regulatory or medical disciplines.'" A review of that "job requisition" on appeal reflects the same information detailed in the brief with the exception that for the degree, the amended degree requirement is as follows: "Minimum BS degree required. Related engineering, biomedical engineering, science, regulatory or medical disciplines preferred."

Here, the Petitioner has not only offered different details than it previously provided, but it also appears to indicate that it is making those amendments because U.S. Citizenship and Immigration Services (USCIS) did not find its former requirements sufficient to satisfy the mandates in the H-1B program. If that is the case, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Assoc. Comm'r 1998). *Cf. Baldwin Dairy, Inc. v. United States*, 122 F.Supp.3d 809, 816 (W.D. Wis. 2015) (concluding we were justified in questioning a petitioner's motives and whether the company simply amended submitted evidence for the sole purpose of establishing eligibility).

We further note shortcomings associated with the industry's job announcements the Petitioner provided before the Director and on appeal. Regarding the material before the Director, the Petitioner offered a job announcement from ExploreHealthCareer.org. In the appeal brief, counsel asserts information is contained within that evidence, but the claimed content is not present in the job announcement. Counsel claims the job announcement states: "that the role requires a bachelor's

degree with majors such as 'biochemistry, biological science, chemistry, pharmacy, pharmacology, toxicology, medicine, and engineering.'"

Even though the document in the record makes reference to a section relating to "Academic Requirements," the evidence does not provide any information relating to such requirements nor does it contain the text claimed within counsel's brief. As a result, we will not consider the Petitioner's claims as it relates to this evidence. Without documentary evidence to support the claims, counsel's assertions in a brief do not constitute evidence nor will they satisfy the Petitioner's burden of proof. *Matter of Arambula-Bravo*, 28 I&N Dec. 388, 396 (BIA 2021); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Regarding the material from newscientist.com, this evidence appears to be applicable to positions in the United Kingdom as it gives the monetary symbol for the British pound sterling (£) and utilizes the British English spelling for several words such as "globalisation" and "organisations." External job announcements should be for U.S.-based positions and their attendant requirements. Also, within the appeal the Petitioner provides additional job advertisements from other companies in the industry, but the advertisements are not dated and it is not apparent whether they pre- or post-date the petition's filing date. As a result, the Petitioner has not demonstrated this is probative evidence that will sufficiently support its claims. The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). Therefore, these postings hold little probative value.

We further note that some of the supporting material the Petitioner provides on appeal was already requested by the Director in the RFE and they failed to supply the requested documents. For instance, the Petitioner provides an article relating to the complexities of a regulatory specialist position and an opinion letter from a professor regarding the position in the petition. Where, as here, a petitioner was put on notice of an evidentiary requirement (by statute, regulation, form instructions, RFE, NOID, etc.) and was given a reasonable opportunity to provide the evidence—except in exigent circumstances and at USCIS discretion—any new evidence submitted on appeal pertaining to that requirement will not be considered, and the appeal on that issue will be adjudicated based on the evidence in the record as it existed before the Director. *See Matter of Izaguirre*, 27 I&N Dec. 67, 71 (BIA 2017) (citing *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988)); *see also Obaigbena*, 19 I&N Dec. at 537.

II. SPECIALTY OCCUPATION DEFINITIONAL REQUIREMENT

The process of demonstrating that a proffered position is sufficient to meet the requirements under the H-1B program includes more than satisfying one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). The regulation also requires a petitioner to demonstrate that a petition "involves a specialty occupation as defined in section 214(i)(1) of the Act." 8 C.F.R. § 214.2(h)(4)(i)(B)(*2*); *see also* 8 C.F.R. § 214.2(h)(1)(ii)(B)(*1*). This statutory definition states: "the term 'specialty occupation' means an occupation that requires . . . [a] theoretical and practical application of a body of highly specialized knowledge, and . . . 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." (Emphasis added).

First, both the statutory and regulatory definitions mandate that the broader occupation as a whole requires a bachelor's degree in a specific specialty (or an equivalent), at the entry level. *See Itserve All., Inc. v. Cissna*, 443 F. Supp. 3d 14, 39 (D.D.C. 2020) (recognizing that a specialty occupation would encompass a host of jobs, beginning at the trainee level and extending to an expert along with concomitant but differing personal job duties). Consequently, an H-1B approval demands more than simply demonstrating that the particular position a petitioner is offering normally requires a specialized bachelor's degree or its equivalent as the minimum for entry under criterion one. A petitioner must also establish that one cannot even enter the broader occupation if they do not possess the qualifying degree (or its equivalent).

Second, we reason that the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) should be read logically as being necessary—but not necessarily sufficient—to meet the statutory and regulatory definition of a specialty occupation. To otherwise interpret the regulatory criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) as stating the necessary, but not necessarily sufficient conditions as being adequate to qualify would result in some positions meeting a condition under the criteria, but not under the statutory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000); *Sagarwala v. Cissna*, 387 F. Supp. 3d 56, 64 (D.D.C. 2019).

To avoid this erroneous 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 definition of a specialty occupation. *Vision Builders, LLC v. USCIS*, No. CV 19-3159 (TJK), 2020 WL 5891546, at *1–2 (D.D.C. Oct. 5, 2020) (finding that an employer must satisfy both the definition of a specialty occupation as well as one of the four regulatory criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)). This results in a multi-part analysis to determine whether a particular position qualifies as a specialty occupation. As a result, an H-1B petition cannot be approved unless a petitioner demonstrates that a proffered position satisfies this statutory definition; not even if it demonstrates it has satisfied one of the four regulatory criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Accordingly, were a petitioner to submit sufficient evidence to satisfy one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), we would still have to evaluate whether it had also demonstrated that the broader occupation as a whole requires a bachelor's degree in a specific specialty (or an equivalent), even at the entry level. Although the Petitioner discussed the specialty occupation definition in its RFE response, it did so in the context of the H-1B program not requiring a degree in a single specialty and it did not present its arguments or identify its evidence that the regulatory affairs specialist occupation requires a bachelor's degree in a specific specialty simply to enter into the broader occupation, even at the entry level. We note that we found the arguments under criterion one at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*) relating to the Occupational Information Network (O*NET) to be unpersuasive.

First, O*NET assigns these positions a "Job Zone Four" rating, which groups it among occupations for which "most . . . require a four-year bachelor's degree, but some do not." It is therefore not clear that a bachelor's degree is even required. Further, as indicated above a requirement for a bachelor's degree alone is not sufficient. Instead, 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); *Defensor*, 201 F.3d at 387. O*NET does not indicate that when a four-year bachelor's degree is required, that it

must be in a specific specialty directly related to the occupation, or the equivalent. For both reasons, this information does not establish the proffered position as a specialty occupation.

We conclude that in addition to not meeting any of the regulatory criteria, the Petitioner has not demonstrated the position in this petition qualifies as a specialty occupation under the statutory definition.

III. ADDITIONAL CONSIDERATIONS

If the above deficiencies were not present, there appear to be other issues with this filing. It appears the Petitioner may have selected the incorrect Standard Occupational Classificational (SOC) code on the LCA and the more appropriate SOC code was the Regulatory Affairs Managers 11-9199.01 with significantly higher wages. And even if the selected SOC code was the best option, it appears the Level I wage rate designation on the LCA was not appropriate as they required two to three years of experience as well as "experience with software and/or medical device product preferred." This combination of amount of experience and the preference for a specific type of experience that is not listed in the O*NET Tasks, Work Activities, Knowledge, and Job Zone examples for the selected SOC code. Additionally, these requirements appear to be indicators of skills that are beyond those of an entry level worker and seem to necessitate an increase in the wage level from a Level I. We note several Board of Alien Labor Certification Appeals decisions generally recognize that an employer's preferences are actually its job requirements. *Cf. Matter of Oracle America, Inc.*, 2012-PER-02194 (BALCA Sept. 7, 2016) (citing *CCG Metamedia, Inc.*, 2010-PER-00236 (BALCA Mar. 2, 2011); *The Frenchway, Inc.*, 1995-INA-451 (BALCA Dec. 8, 1997); *see also East Tenn. State Univ.*, 2010-PER-00038, slip op. at 11 (BALCA Apr. 18, 2011).

IV. CONCLUSION

The appeal will be dismissed for the above stated reasons, with the reasons stated in sections I and II considered 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. The Petitioner has not met that burden here, and the petition will remain denied.

ORDER: The appeal is dismissed.