U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21035226

Date: SEP. 1, 2022

Appeal of Nebraska Service Center Decision

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

The Petitioner seeks to continue 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 Director of the Nebraska Service Center denied the Form I-129, Petition for a Nonimmigrant Worker, concluding that the Petitioner did not establish that: (1) it submitted a certified labor condition application (LCA) for the occupational classification for which the Beneficiary will be employed; and (2) the Beneficiary does not possess the appropriate license to practice civil engineering or is exempt from the license requirement. On appeal, the Petitioner submits a brief and additional evidence, and asserts that the Director erred in denying the petition.

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*. *See 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 consideration of the record—including the arguments made on appeal—we adopt and affirm the Director's ultimate determination as it relates to the regulatory criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*)–(*4*). *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 Chen v. INS*, 87 F.3d 5, 7–8 (1st Cir. 1996) ("[I]f a reviewing tribunal decides that the facts and evaluative judgments prescinding from them have been adequately confronted and correctly resolved by a trial judge or hearing officer, then the tribunal is free simply to adopt those findings" provided the tribunal's order reflects individualized attention to the case).

Before filing a petition for H-1B classification, the regulation requires petitioners to obtain certification from the DOL that the organization has filed an LCA in the occupational specialty in which its foreign national personnel will be employed. 8 C.F.R. § 214.2(h)(4)(i)(B)(*1*). United States Citizenship and Immigration Services (USCIS) possesses the authority to evaluate whether the proffered position's duties are in accordance with the occupational classification on the LCA, and if not, to determine under which occupational titles the responsibilities correspond. *See GCCG Inc v. Holder*, 999 F. Supp. 2d 1161, 1167–68 (N.D. Cal. 2013) (in which the court agreed with USCIS that a large portion of the beneficiary's duties were most similar to those found within the Bookkeeping, Accounting, and Auditing Clerks occupation, rather than within the Accountants Standard Occupational Classificational (SOC) code.) Effectively, this reiterates the USCIS' ability to determine whether the LCA corresponds with and supports the petition.

Here, the Petitioner obtained an LCA certified under the SOC code, 17-2051 relating to "Civil Engineers" and identified the position's title as civil engineer. As noted by the Director, the Petitioner submitted two different job descriptions with the initial petition and in response to the Director's request for evidence (RFE). On appeal, the Petitioner reiterates that the Beneficiary was originally hired as a civil engineer/project manager with the responsibilities to support a service project but due to scope change, the contract was not executed, and the Beneficiary instead works as an in-house civil engineer/project manager "to support the Petitioner's pursuit of engineering projects" and provide in-house engineering services.

The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to an RFE, the Petitioner cannot offer a new position to the Beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, its associated job responsibilities, or the requirements of the position. The Petitioner must establish that the position offered to the Beneficiary when the petition was filed merits classification for the benefit sought. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). If significant changes are made to the initial request for approval, the Petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the Petitioner in its response to the Director's RFE did not clarify or provide more specificity to the original duties of the position, but rather significantly changed the responsibilities and duties of the Beneficiary.

On appeal, the Petitioner explains how the new job duties submitted in response to the RFE are consistent with the Occupational Information Network (O*NET) tasks for the Civil Engineers SOC code the Petitioner identified on the LCA. The Petitioner stated that the Beneficiary's duties are similar to three tasks and four work activities as outlined for the position of civil engineer in the O*NET. However, three out of 15 tasks, and four out of 31 work activities, does not indicate that the Beneficiary's duties are closely aligned with the duties of a civil engineer. It is the Petitioner's burden to submit evidence that sufficiently corroborates its claims. Statements made without supporting documentation are of limited probative value and are insufficient to satisfy the Petitioner's burden of proof. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998).

Further, the Petitioner submits on appeal documentation evidencing the duties performed by the Beneficiary as an in-house civil engineer including a list of projects researched and screened by the Beneficiary, a list of proposals prepared by the Beneficiary; and a list of outreach in the form of events

and pre-proposal conferences attended by the Beneficiary. However, the Petitioner did not submit supporting documentation of the work performed by the Beneficiary as outlined in these lists such as the completed proposals, receipts for submission of proposals, and the outcomes of the proposal submissions such as acceptance or loss of the proposal. On appeal, the Petitioner submitted two sample proposals but they provide very general information and there is no evidence that these proposals were actually submitted and accepted.

In addition, upon review on the response from the Director's Notice of Intent to deny, the Petitioner explained that the Beneficiary is the sole employee. In the same response, the Petitioner stated that it has been serving Federal and state government agencies by providing information technology services and consultants, but since the Beneficiary is the only employee, it is not clear if he is providing the information technology services. Furthermore, the Petitioner stated that the Beneficiary contributed to the Petitioner's information technology division project bidding, leading to more than $440,000 in sales in information technology projects. Again, since the Beneficiary is the sole employee, it is not clear how the Petitioner has an information technology division and how it sold information technology projects without any information technology employees. The various inconsistencies throughout the record regarding the business operations and the duties to be performed by the Beneficiary undermines the Petitioner's claim that the occupational classification for the Beneficiary is accurate.

The record of proceeding is not sufficiently developed to allow us to determine whether the proffered position is actually located within the occupational category for which the LCA was certified. With these ambiguities in the record regarding the duties of the position, we cannot ascertain the Beneficiary's proffered position and thus, it is impossible to determine if the Beneficiary requires a license or is exempt from the license requirement. The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

Additionally, it is important for USCIS to ensure the employer has selected the SOC code on the LCA that most closely matches the proffered position for reasons that affect H-1B statutory and regulatory requirements. First, the wrong SOC code can direct USCIS to evaluate an inapplicable occupational title or occupation. It is the occupation itself that we evaluate to decide if it 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." Section 214(i)(1) of the Act. Therefore, an incorrect SOC code could mean we would not be able to properly evaluate whether a petitioner has satisfied the statute's definition of a specialty occupation.

Here, the Petitioner does not sufficiently develop the duties in the record and explain the nature of the duties within the context of its business operations so that we are able to ascertain the nature of the proffered position and that it actually requires the theoretical and practical application of a body of a highly specialized knowledge attained through at least a baccalaureate degree in a specific discipline. As discussed, the Petitioner has not consistently reflected the nature of the duties and the level of responsibility of the position on the LCA. Without definitive evidence of the nature of the position within the context of the Petitioner's business we cannot conclude that the position requires a

bachelor's degree in a specific discipline, or its equivalent. In other words, without providing probative, consistent evidence demonstrating the substantive nature and requirements of the position, the Petitioner has not shown 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 has not established that the proffered position qualifies as a specialty occupation.

II. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each 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. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.