U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27192332

Date: AUG. 30, 2023

Appeal of California Service Center Decision

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

The Petitioner seeks to temporarily 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 California Service Center denied the petition, concluding that the record did not establish that the Beneficiary was qualified to perform the duties of the proffered position. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (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. SPECIALTY OCCUPATION

At the outset we will withdraw the Director's determination that the proffered position is a specialty occupation. The Petitioner filed its petition to seek to employ the Beneficiary as a business analyst and it submitted a labor condition application (LCA) certified for a position in the business intelligence analysts occupational category.[1] The Director may request additional evidence when determining eligibility for the requested benefit. 8 C.F.R. § 103.2(b)(8). In addition, a petitioner must establish eligibility at the time of filing the petition and must continue to be eligible through adjudication. 8 C.F.R. § 103.2(b)(1).

Upon review of the record in its totality, we conclude the evidence does not support the Director's conclusion that the position would require at least a bachelor's degree or its equivalent in business

[1] After the filing of the petition, the Department of Labor's Bureau of Labor Statistics (BLS) advised that the business intelligence analyst entry contained at Standard Occupational Code (SOC) 15-1199.08 had been discontinued. BLS replaced the business intelligence analyst entry with the data scientist entry described at SOC 15-2051.01.

analysis or directly related fields(s). The Petitioner has not established that the proffered position qualifies as a specialty occupation. The petition, RFE, and appeal do not contain any description of the position's duties, rendering it impossible to evaluate whether the proffered job is a specialty occupation and the job duties require an educational background, or its equivalent, commensurate with a specialty occupation. So the record does not sufficiently establish the substantive nature of the proffered position, which precludes us from determining that the proffered position qualifies as a specialty occupation under sections 101(a)(15)(H)(i)(b), 214(i)(1) of the Act, 8 C.F.R. § 214.2(h)(4)(i)(A)(1), 8 C.F.R. § 214.2(h)(4)(ii) and (iii)(A). And the record also contains a noncorresponding labor condition application (LCA).

A. Legal Framework

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires: (A) the 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) adds a non-exhaustive list of fields of endeavor to the statutory definition. And the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the proffered position must also 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.

The statute and regulations must be read together to make sure the proffered position meets the definition of a specialty occupation. *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 statue 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). Considering the statute and the regulations separately could lead to scenarios where a petitioner satisfies a regulatory factor but not the definition of specialty occupation contained in the statute. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). The regulatory criteria read together with the statute gives effect to the statutory intent. *See* Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991).

So we construe the term "degree" in 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 supporting the statutory definition of specialty occupation. *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"). USCIS' application of

this standard has resulted in the orderly approval of H-1B petitions for engineers, certified public accountants, information technology professionals, and other occupations commensurate with what Congress intended when it created the H-1B category.

And job title or broad occupational category alone does not determine whether a particular job is a specialty occupation under the regulations and statute. The nature of a petitioner's business operations along with the specific duties of the proffered job are also considered. We must evaluate the employment of the individual and determine whether the position qualifies as a specialty occupation. *See Defensor*, 201 F.3d 384. So a petitioner's self-imposed requirements are not as critical as whether the nature of the position the petitioner offers requires the application of a theoretical and practical body of knowledge gained after earning the required baccalaureate or higher degree in the specific specialty required to accomplish the duties of the job.

B. Analysis

The Petitioner, founded in 2007, describes itself as a "full-service firm – offering the flexibility of contingency, contract, retained and/or outsourced solutions." This description does not shed any meaningful light on the Petitioner's business and whether it requires the services of an individual performing the duties of a specialty occupation. The record does not illustrate the nature of the Petitioner's business operations. The evidence in the record is unable to illuminate what specific business the Petitioner operates and the services it offers. Whilst it can be inferred from the record that the Petitioner's business may have some connection to information technology and staff augmentation, it is wholly unclear what the nature of the service provided by the Petitioner to its clients is. When it is unclear as to what exactly the Petitioner does, it is equally unclear whether work of a specialty nature is required to accomplish the Petitioner's services for client IT organizations.

If we are unable to assess, categorize, and comprehend the Petitioner's business, we cannot conclusively determine the type and complexity of the work described in the proffered job duties. And this is made especially more difficult when a petitioner does not provide any job description, job duties, or indication of the position's minimum educational requirements as is the case here. These omissions obscure whether the proffered job is a specialty occupation.

The inconsistencies in the petition and certified LCA also raise concerns. Whilst the U.S. Department of Labor (DOL) is responsible for certifying that the Petitioner has made the required LCA attestations, USCIS evaluates whether the submitted LCA corresponds with the Petitioner's H-1B petition. 20 C.F.R. § 655.705(b) ("DHS determines whether the petition is supported by an LCA which corresponds with the petition...."); *Matter of Simeio Solutions*, 26 I&N Dec. 542, 546 n.6 (AAO 2015). *See also ITServe Alliance, Inc. v. DHS*, 590 F. Supp. 3d 27, 40 (D.D.C. 2022) (noting 20 C.F.R. § 655.705 requires USCIS "to check that the [H-1B] petition matches the LCA"); *see also United States v. Narang*, No. 19-4850, 2021 WL 3484683, at *1 (4th Cir. Aug. 9, 2021)(per curiam)("[USCIS] adjudicators look for whether [the] employment [listed in the H-1B petition] will conform to the wage and location specifications in the LCA"). The Petitioner states in their petition that the position's offered salary is $45 per hour. But the LCA indicates that the salary is $34 per hour. And the LCA and the petition list the work location for the proffered job as the Petitioner's principal place of business. But the subcontractor agreement the Petitioner submitted between itself and [redacted] contemplates placement of the Petitioner's personnel at client work sites. So the Petitioner's

inconsistent expressions of offered salary and work location viewed together with the omission of the proffered position's job description, job duties, and minimum educational and experiential requirements raises doubts as to whether the LCA corresponds to the petition. Doubt cast on any aspect of a petitioner's proof may lead to doubts about the reliability and sufficiency of the remaining evidence in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

In summary, we are unable to ascertain the proffered position's substantive nature due to the deficiencies outlined above. And since we cannot determine its substantive nature, we cannot conclude whether the position qualifies as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*)-(*4*).

II. PUBLIC LAW 114-113

The Director issued a request for evidence (RFE) informing the Petitioner that it did not appear exempt from the fee mandated by the Consolidated Appropriations Act, Pub. L. No. 114-113, § 411(b), 129 Stat. 2242, 3006 (2015). Public Law 114-113 requires an additional $4,000 fee for petitioners that employ 50 or more employees in the United States if more than 50% of those employees are in H-1B, L-1A, or L-1B status. The Petitioner claimed to have had 80 employees in the United States at the time of filing and certified under penalty of perjury that it had confirmed "all information contained in the petition, including all responses to the specific question, and in the supporting documents, is complete, true, and correct." The Director performed a search of U.S. Citizenship and Immigration Services (USCIS) records and found that the Petitioner "obtained at least 77 Form I-129 approvals in the last three years compared to [its] claimed 80 U.S. employees." This appeared to exceed the 50% threshold for the fee.

The Director provided an opportunity for the Petitioner to provide specific evidence to establish it was exempt from the additional fee. In response to the RFE, the Petitioner provided a table containing the name, status and USCIS receipt number as applicable for its current employees. But, despite the Director's specific request, the Petitioner neglected to submit payroll records for all employees for the pay period in effect when they filed the petition and the one preceding. So, the record does not establish, through any reliable evidence, the actual number of the Petitioner's employees at the time of filing the petition and the percentage of which were in H-1B, L-1A, or L-1B status to determine whether the Petitioner is exempt from the fee required by Public Law 114-113.

III. BENEFICIARY QUALIFICATIONS

We now turn to the Petitioner's appeal of the Director's decision that the Beneficiary did not possess the qualifications required for a specialty occupation.[2] On appeal, the Petitioner asserts that the Beneficiary is qualified to perform the duties of the position. But the Petitioner has not provided

[2] A beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. *Cf. Matter of Michael Herts Assocs.*, 19 I&N Dec. 558, 56 (Comm'r 1988). As discussed above, the Petitioner has not established that the proffered job's duties are of the substantive nature of a specialty occupation requiring the application of a theoretical and practical body of highly specialized knowledge attained after earning a bachelor's degree or higher or its equivalent in the specific specialty minimally mandated for entry into position. *See* section 291 of the Act, 8 U.S.C. § 1361.

material, relevant, or probative evidence of the Beneficiary's qualifications to perform the duties of a specialty occupation.

A. Legal Framework

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an individual applying for classification as an H-1B nonimmigrant worker must possess a license if it is required for the occupation, have earned a bachelor's or higher degree in a specific specialty related to the job duties, or have earned the equivalent of a bachelor's or higher degree in a specific specialty related to the job duties based on having experiences in the specialty equivalent to the completion of the degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The supplementing regulations at 8 C.F.R. § 214.2(h)(4)(iii)(C) restate the statute and require meeting one of four criteria to qualify to perform services in a specialty occupation:

(1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
(2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
(3) Hold an unrestricted state license, registration or certificate which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
(4) have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D) provides five methods by which a petitioner can satisfy 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*):

(1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
(2) The result of recognized college-level equivalency examinations or special credit programs such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
(3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
(4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training and/or work experiences in areas related to the specialty and that the noncitizen has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

B. Unqualified Beneficiary

The Beneficiary earned a master of computer applications degree from [redacted] University in [redacted] India. They also earned a three-year bachelor of science degree from [redacted] University in [redacted] India. We agree with the Director that the Petitioner has not established the Beneficiary's qualifications for the proffered specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*1*)-(*3*). The Beneficiary does not hold a United States bachelor's or higher degree required by the specialty occupation from an accredited college or university. They likewise do not hold a foreign degree determined to be equivalent to a United States bachelor's or higher degree required for the specialty occupation from an accredited college or university. The Petitioner has also not demonstrated that the Beneficiary holds an unrestricted State license, registration, or certification which authorizes them to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment.

When the occupation does not require a license and the Beneficiary does not have the required U.S. degree or its foreign degree equivalent in the field required for entry to the specialty occupation, our analysis revolves around whether the Petitioner established that the Beneficiary possesses the education, specialized training and/or progressively responsible experience in the specialty equivalent to the completion of the required U.S. degree or its foreign degree equivalent and has progressively responsible experience in job position in the specialty constituting a recognition of expertise as required by 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*).

The Petitioner supported their contention that the Beneficiary was qualified to undertake a specialty occupation with the following:

- A credential evaluation report submitted with the RFE response from [redacted] Professor at the Universidad [redacted], concluding that the Beneficiary's education and work experience is equivalent to a U.S. bachelor of science with a major in business analysis;
- An expert opinion and educational evaluation submitted with the RFE response from [redacted] Professor at the Universidad [redacted] concluding that the Beneficiary's education and work experience is equivalent to a U.S. bachelor of science with a major in business analysis;

As we have stated before, we may exercise our discretion and consider opinion statements submitted by the Petitioner as advisory. *Matter of Sea, Inc.*, 19 I&N Dec. 817, 820 (Comm'r 1988). The evaluations submitted by the Petitioner are also accompanied by either the writer's curriculum vitae; a self-authored statement of "expertise," letter(s) from their employing institutions attesting to their authorization to grant college-level credit or training and/or work experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training/work experience, and/or documentation either from an internal policy document or printed from publicly available internet sources describing the institution's policy for granting academic credit.

The Director based their decision on the insufficiency of the evaluations of the Beneficiary's education and work experience provided by the Petitioner. Specifically, the Director correctly concluded that the advisory opinions were insufficient because the individual who issued the opinion is authorized to

grant college level credit for training and/or experience at an institution which is not accredited in the United States. The Petitioner encourages us without authority to expand our interpretation of 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*) to include evaluations issued by individuals with authorization to granted college level credit for training and/or experience at any accredited institution of higher education, foreign or domestic. We decline to do so.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D) sets forth the requirements to establish equivalency to a *United States* baccalaureate or higher degree under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*). The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*) requires that an evaluation to document eligibility under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*) be issued by an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit. We interpret the term "accredited college or university" as encompassing solely accredited colleges or universities located within the United States. The Department of Education (DOE), which oversees the accreditation process through which a college or university becomes "accredited" can only recognize accreditors whose accreditation activities are limited in geographic scope to a State, a region of the United States (as further defined), or the United States. 20 U.S.C. § 1099b; 34 C.F.R. § 602.11. DOE's recognition of accrediting agencies is limited by statute to accreditation activities within the United States. *See* Dep't of Education, Office of Postsecondary Education, *Database of Accredited Postsecondary Institutions and Programs*, https://ope.ed.gov/dapip/#/home. And "[a]lthough many recognized agencies carry out accrediting activities outside the United States, these actions are not within the legal authority of the Department of Education to recognize, are not reviewed by the Department, and the Department does not exercise any oversight over them." *Id.* Moreover the DOE's "recognition of accreditors does not extend to the approval or accreditation any accreditor may grant to foreign institutions or programs." *See* Dep't of Education, *Overview of Accreditation in United States*, https://www2.ed.gov/admins/finaid/accred/accreditation.html#Overview.

Both Professor [redacted] and Professor [redacted] are authorized to provide credit only at the Universidad [redacted] The Petitioner has not demonstrated how Universidad [redacted] constitutes an "accredited college or university" within the meaning of 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*). As the credits that Professor [redacted] and/or Professor [redacted] are authorized to provide would be applied towards a degree from a foreign accredited non-U.S. institution of higher education, it follows that they cannot evaluate the Beneficiary's education and work experience to equate to a bachelor's or higher degree from an accredited U.S. institution of higher education. And the record does not illustrate how officials with authority to grant college-level credit for training and/or experience at Universidad [redacted] or any non-US accredited foreign institution of higher education, could credibly equate training and/or experience to the regulatorily required United States baccalaureate degree in a specialty related to the duties required to be performed in a specialty occupation.

And there is insufficient evidence in the record to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(D)(*2*), (*3*), or (*4*). So we will turn to 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) which grants USCIS the authority to make our own determination on the Beneficiary's qualifications. Specifically, we can evaluate that an individual has earned the equivalent of the degree required by the specialty occupation through a combination of education, specialized training and/or work experiences in areas related to the specialty and that the noncitizen has achieved recognition of expertise in the specialty occupation as a result of such training

and experience. We may determine equivalency by accepting three years of specialized training and or work experience demonstrated by the individual for each year of college level training the noncitizen lacks. Additionally, the noncitizen must demonstrate recognition of expertise by one of the following:

> (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;
>
> (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
>
> (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
>
> (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
>
> (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The record is not sufficient to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) either. The record of proceedings provides no evidence of work-experience for us to reasonably conclude that the Petitioner has satisfied any one of the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*)(*i*)-(*v*). So we cannot conclude that the evidence of the Beneficiary's work experience qualifies for recognition of any years of college-level credit by correct application of the H-1B beneficiary-qualification regulations' "three-for-one" standard. Based upon the findings articulated above, we conclude that the totality of the evidence regarding the Beneficiary's foreign education and work experience does not satisfy any criterion at 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (h)(4)(iii)(D).

III. CONCLUSION

It is the Petitioner's burden to provide competent and credible evidence of the nature of its proffered specialty occupation and the Beneficiary's qualification for the proffered position. The Petitioner has not met their burden for the reasons set forth above.

ORDER: The appeal is dismissed.