U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N- INC.

DATE: MAR. 14, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a software development and IT operations company, seeks to temporarily employ the Beneficiary as a team leader at its new office[1] under the L-1B nonimmigrant classification for intracompany transferees. Immigration and Nationality Act (the Act) section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The L-1B classification allows a corporation or other legal entity (including its affiliate or subsidiary) to transfer a qualifying foreign employee with "specialized knowledge" to work temporarily in the United States.

The Director of the California Service Center denied the petition, concluding that the record did not establish, as required, that: the Beneficiary possesses specialized knowledge; has been employed abroad as a manager, executive, or in a specialized knowledge capacity; and will be employed in the United States, in a specialized knowledge capacity.

On appeal, the Petitioner asserts that the Director erred by disregarding credible evidence of eligibility.

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

I. LEGAL FRAMEWORK

To establish eligibility for the L-1B nonimmigrant visa classification, a qualifying organization must have employed the beneficiary "in a capacity that is managerial, executive, or involves specialized knowledge," for one continuous year within three years preceding the beneficiary's application for admission into the United States. Section 101(a)(15)(L) of the Act. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a specialized knowledge capacity. *Id.* The petitioner must also establish that the beneficiary's prior education, training, and employment qualify him or her to perform the intended services in the United States. 8 C.F.R. § 214.2(l)(3).

[1] The term "new office" refers to an organization that has been doing business in the United States for less than one year. 8 C.F.R. § 214.2(l)(1)(ii)(F).

If a beneficiary is coming in a specialized knowledge capacity to open a new office, the petitioner must submit evidence that it secured sufficient physical premises to house its operation, evidence that the new business entity is or will be a qualifying organization, and evidence that it has the financial ability to remunerate the beneficiary and to commence doing business in the United States. *See generally*, 8 C.F.R. § 214.2(l)(3)(vi).

II. BACKGROUND

The Petitioner described itself as "a start-up company . . . specializing in telecommunications systems and software development for collaborative communications and network operations," using Web Real-Time Communication (WebRTC) technology, "which enables voice and video communications to take place inside webpages through Internet connection without installing any plugins in browsers or mobile applications."

The Petitioner stated that, since March 2014, the Beneficiary has worked "as a Software Developer, responsible for building application servers for multimedia communications over Internet networks and designing complex WebRTC video conferencing software," taking on additional responsibilities with his February 2018 promotion to team leader. The Petitioner has offered the Beneficiary the position of team leader, at a salary of $132,000 per year, in which capacity "the Beneficiary will be responsible for developing and designing complex software and applications to enhance WebRTC voice and video conferencing services." The Petitioner asserted that the Beneficiary has "expert knowledge" and "extensive experience working with [the Petitioner's] specialized WebRTC technology."

III. SPECIALIZED KNOWLEDGE

The Director determined that the Petitioner did not establish that the Beneficiary possesses knowledge that is special or advanced compared to others in the same field. The Director also found that the record did not establish that the Beneficiary had previously been employed in a position that was managerial, executive, or involved specialized knowledge, and that the U.S. position involves a special or advanced level of knowledge.

As a threshold issue, we must determine whether the Petitioner established that the Beneficiary possesses specialized knowledge. If the evidence is insufficient to establish that he possesses specialized knowledge, then we cannot conclude that the Beneficiary's past and intended future employment involve specialized knowledge.[2]

Under the statute, specialized knowledge consists of either: (1) a "special" knowledge of the company product and its application in international markets; or (2) an "advanced" level of knowledge of the processes and procedures of the company. Section 214(c)(2)(B) of the Act.

[2] The Petitioner does not claim, in the alternative, that the Beneficiary was employed abroad in an executive or managerial capacity.

Specialized knowledge is also defined as knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures. 8 C.F.R. § 214.2(l)(1)(ii)(D).

As both "special" and "advanced" are relative terms, determining whether a given beneficiary's knowledge is "special" or "advanced" inherently requires a comparison of the beneficiary's knowledge against that of others. With respect to either special or advanced knowledge, the petitioner ordinarily must demonstrate that the beneficiary's knowledge is not commonly held throughout the particular industry and cannot be easily imparted from one person to another. The ultimate question is whether the petitioner has met its burden of demonstrating by a preponderance of the evidence that the beneficiary's knowledge or expertise is special or advanced, and that the beneficiary's position requires such knowledge.

Once a petitioner articulates the nature of the claimed specialized knowledge, it is the weight and type of evidence which establishes whether or not the beneficiary actually possesses specialized knowledge. We cannot make a factual determination regarding a beneficiary's specialized knowledge if the petitioner does not, at a minimum, articulate with specificity the nature of its products and services or processes and procedures, the nature of the specific industry or field involved, and the nature of the beneficiary's knowledge. The petitioner should also describe how such knowledge is typically gained within the organization, and explain how and when the beneficiary gained such knowledge.

Special knowledge concerns knowledge of the petitioning organization's products or services and its application in international markets. To establish that a beneficiary has special knowledge, the petitioner may meet its burden through evidence that the beneficiary has knowledge that is distinct or uncommon in comparison to the knowledge of other similarly employed workers in the particular industry.

Because "advanced knowledge" concerns knowledge of an organization's processes and procedures, the petitioner may meet its burden through evidence that the beneficiary has knowledge of or an expertise in the organization's processes and procedures that is greatly developed or further along in progress, complexity, and understanding in comparison to other workers in the employer's operations. The petitioner must support its claims with evidence setting that knowledge apart from the elementary or basic knowledge possessed by others.

The Petitioner contended that the Beneficiary "is the primary individual responsible for advancing [the company's] WebRTC technologies," and "has played a crucial role in creating several key technologies." The Petitioner also stated that the Beneficiary's "extensive experience working with [multiple] programming languages and platforms . . . makes him an anomaly in the industry" because "most Software Developers specialize by using one (1) or two (2) programming languages and platforms."

The Director requested further corroboration, including a comparison between the Beneficiary and others performing similar work. In response, the Petitioner's foreign parent company stated it chose "only a select few" employees to transfer to the United States, and asserted: "The very fact that [the Beneficiary] was chosen for such an important role . . . is evidence that he possesses specialized knowledge and skills that are not possessed by others in his field." The foreign parent company repeated prior assertions that the Beneficiary was "essential to the development of new, innovative software technology," but did not provide any new information about the nature of the Beneficiary's claimed specialized knowledge.

The Petitioner submitted copies of technical documents relating to the Beneficiary's projects, but these materials do not intrinsically show laypersons how the Beneficiary's work and knowledge differ from those of other qualified workers in the same field.

The Petitioner also submitted what it called "[a]rticles from objective media outlets discussing WebRTC solutions, evidencing that these solutions have not been widely used in the past by companies but are beginning to be used." The Petitioner asserted that these articles show that "experience working with WebRTC technology would be extremely difficult to find in a new employee."

The articles themselves do not appear to support the Petitioner's interpretation. One article, an opinion piece published in November 2015, stated that "WebRTC . . . is taking the telecommunications industry by storm . . . , because it is so easy to use." It also stated: "Since WebRTC is so easy to use and deploy, there's no need for software integrators or training sessions."

The second article, from February 2018, bears the subtitle "A variety of factors have inhibited WebRTC's adoption . . . or have they?" A similarly ambiguous statement appears in the body of the article: "it's fair to say that WebRTC hasn't lived up to the hype . . . or has it?" The article went on to say that, despite some issues with compatibility and competing platforms, "WebRTC is all around us," and that "[d]evelopers often use WebRTC libraries within dedicated desktop and mobile apps." The article referred to "the now-widespread adoption of WebRTC" and cited a recent study showing that "28% of participants were already supporting, or planning to support, voice chat through the Web and via mobile applications. In almost all these cases, developers are using WebRTC libraries in browsers or mobile apps to enable easy, plugin-free communications capabilities." The Petitioner disregarded these assertions, instead highlighting passages such as "[m]ore work remains to be done to ensure performance and security." The Petitioner did not establish that the Beneficiary is working on WebRTC itself to resolve these performance and security issues; instead, the Beneficiary uses the platform to create software for the Petitioner's client.

The Director denied the petition, stating that the Petitioner did not establish that the Beneficiary's education, training, and experience had imparted specialized knowledge. The Director acknowledged the Beneficiary's familiarity with the Petitioner's products, but found that this familiarity does not necessarily represent specialized knowledge. The Director also made findings

about the Beneficiary's past and intended future duties, which we need not address unless and until the Petitioner establishes that the Beneficiary possesses specialized knowledge.

On appeal, the Petitioner states that the Beneficiary is not merely familiar with the company's proprietary products; "he actually played a key role in creating them." The Petitioner states: "The logical conclusion . . . is that the individual who will be responsible for developing, improving and building upon that technology should have specialized and advanced knowledge of the current technology." The Petitioner asserts that the Director selectively quoted from the Petitioner's statements, choosing only the most generic assertions while disregarding the most relevant information about the Beneficiary's specialized knowledge.

The Petitioner asserts that, because the Beneficiary created the technology in question, he obviously has special and advanced knowledge of it; and because the technology originated within the petitioning organization, the knowledge is exclusive to that organization's employees. The Petitioner, here, suggests a standard by which anyone centrally involved in the creation of original, proprietary work possesses specialized knowledge. This understanding of the term is untenably broad and loose; it presumes that knowledge used to create a product must be, by definition, specialized.

In this instance, the Petitioner stated that the Beneficiary "devoted his specialized knowledge of [the Petitioner's] proprietary WebRTC technology to developing" the product. The Petitioner does not explain this assertion; WebRTC, itself, is not proprietary to the Petitioner. Mastery of tools that are available throughout the industry is not specialized knowledge. The Petitioner has provided little information about its claimed "proprietary WebRTC technologies and processes," except to say that the Beneficiary used WebRTC technology in his work.

The Petitioner states that "the Beneficiary's knowledge is significantly different than that possessed by others in the field," but the Petitioner cannot meet this threshold simply by showing that the Beneficiary worked on projects that others did not work on. No two employees will have exactly the same portfolio of past projects, and other employees have worked on projects in which the Beneficiary did not participate. It appears to be characteristic of the occupation that different workers will have different projects, but this diversity of tasks does not inherently demonstrate specialized knowledge.

The Petitioner also states:

> Moreover, [the Beneficiary's] successful use of WebRTC technology . . . is rare in this industry, as evidenced by the articles discussing other companies' struggles with utilizing it effectively. Additionally, because [the company] had created its own proprietary WebRTC-based technologies, experience with these solutions and tools can only be gained through prior experience with the company. It would also be difficult to teach use of this technology to others in the industry, as it is not common that other companies are using, or at least effectively using, these types of solutions.

As discussed above, the submitted articles indicated that the use of WebRTC is widespread and popular, owing in part to its ease of use; there is no objective evidence that the Beneficiary's work removed any barriers to its adoption, or that the Beneficiary's use of WebRTC is more effective than the work of others who have used it. The record does not indicate the degree or duration of training that the Beneficiary received relating to WebRTC before he was able to begin using it and adapting it to the client's needs. Also, while the petitioning organization's own WebRTC products are necessarily exclusive to the organization, the Petitioner has not compared them with products from other companies, or compared the Beneficiary's knowledge of WebRTC technology with that of others in the field. This last omission is particularly relevant, given the Petitioner's submission of an article that indicated: "Since WebRTC is so easy to use and deploy, there's no need for software integrators or training sessions." WebRTC itself is an open-source software, not exclusive to the petitioning organization, and the Petitioner has not shown that the Beneficiary in particular, or the company in general, have been able to do things with WebRTC that others have been unable to do.

The current statutory and regulatory definitions of "specialized knowledge" do not include a requirement that a beneficiary's knowledge be proprietary. Thus, whether the knowledge is proprietary or not, a petitioner must still establish that the knowledge utilized in the proposed position and possessed by the beneficiary is in fact specific to the petitioning organization, and somehow different from that possessed by similarly-employed personnel in the industry. It is reasonable to believe that all software developers create products for their clients that are unique in some way. Without a substantive explanation or evidence, the Petitioner has not established that the petitioning organization's products are particularly complex or uncommon compared to other software development and IT operations companies. The Petitioner has not sufficiently explained how the Beneficiary gained knowledge specific to only its organization, and has not supported a claim that it would take a significant amount of time to train an experienced developer to perform the duties required of the proposed position.

IV. CONCLUSION

The appeal will be dismissed for the above stated reason. 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.

Cite as *Matter of N- Inc.*, ID# 2339848 (AAO Mar. 14, 2019)