U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10106678

Date: JULY 16, 2020

Appeal of California Service Center Decision

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

The Petitioner, a software development and consulting organization, seeks to employ the Beneficiary temporarily under the H-1B nonimmigrant classification for specialty occupations.[1] 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 Petitioner did not establish that the Beneficiary would perform services in a specialty occupation for the requested period of intended employment. While this appeal was pending, the U.S. District Court for the District of Columbia issued a decision in *Itserve Alliance, Inc. v. Cissna*, --- F.Supp.3d ---, 2020 WL 1150186 (D.D.C. 2020). Subsequently, U.S. Citizenship and Immigration Services (USCIS) rescinded previously issued policy guidance relating to H-1B petitions filed for workers who will be employed at one or more third-party worksites.[2] The matter is now before us on appeal.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence.[3] We review the questions in this matter *de novo*.[4] While we conduct *de novo* review on appeal, we conclude that a remand is warranted in this case in part based on the new USCIS policy guidance.

Within her new decision, the Director may wish to further address the following issues. In the proceedings before the Director, the Petitioner offered a letter from the end-client. First, although the duties within that letter appear somewhat related to the Software Developers, Applications occupational category, the Director may wish to consider whether the duties listed within that letter are sufficiently detailed to support the Petitioner's claims that those functions are specialized and complex. The Director should decide whether the duties comprise a position that is so complex or

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[1] *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

[2] USCIS Policy Memorandum PM-602-0114, *Rescission of Policy Memoranda* at 2 (June 17, 2020), http://www.uscis.gov/legal-resources/policy-memoranda.

[3] Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

[4] *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015).

unique, that one must attain a bachelor's degree in a specific specialty in order to perform them.[5] The Petitioner should ensure the material duties sufficiently convey the Beneficiary's regular activities at the end-client location, which allows a person without a great familiarity with the technical nature of these functions to be able to grasp what the position consists of, and why it and the duties are so complex, unique, or specialized.[6] And ultimately whether the Petitioner demonstrated a sufficient nexus between an established course of study leading to a specialty degree, while establishing how such a curriculum is necessary to perform the duties it claims are so specialized and complex.

Additionally, the Director may elect to have the Petitioner explain why the end-client letter it submitted in response to the request for evidence provides nearly identical information as the Petitioner's initial filing statement. As a general concept, when a petitioner has provided correspondence from different persons, but the language and structure contained within the material is strikingly similar, the trier of fact may treat those similarities as a basis for questioning the claims within the documentation.[7] The Director may wish to consider more than just the identical language, but also the order in which the Petitioner presented it. As the first version originated with the Petitioner, the Director may elect to deduce that the petitioning organization is the probable source of the specific language and therefore, not attribute the job description to the end-client's representative.

The Director's decision referenced to *Defensor v. Meissner*, 201 F.3d 384, 387–88 (5th Cir. 2000), in which it is necessary *for the end-client to provide* sufficient information regarding the proposed job duties to be performed at its location in order to properly ascertain the minimum educational requirements necessary to perform those duties. In other words, as the employees in that case would provide services to the end-client and not to the petitioning staffing company, the petitioner-provided job duties and alleged requirements to perform those duties were much less relevant to a specialty occupation determination than the end-client requirements. The Director may wish to have the Petitioner demonstrate the position requirements actually originated with the end-client.

Because this case is affected by the new policy guidance, we find it appropriate to remand the matter for the Director to consider the question anew and to adjudicate in the first instance any additional issues as may be necessary and appropriate. Accordingly, the following order shall be issued.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing analysis and entry of a new decision.

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[5] *Cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm'r 1988) (indicating USCIS must evaluate the actual tasks, demands, and duties to determine whether a petitioner has established the position realistically requires the specialized knowledge—both theoretical and applied—which is almost exclusively obtained at the baccalaureate level). A broad and generalized presentation of a position's responsibilities could prevent USCIS from making such a determination. *See also Sagarwala v. Cissna*, 387 F. Supp. 3d 56, 68 (D.D.C. 2019).

[6] *See Sagarwala*, 387 F. Supp. 3d at 68–70.

[7] *See Matter of R-K-K-*, 26 I&N Dec. 658, 665 (BIA 2015); *Surinder Singh v. Board of Immigration Appeals*, 438 F.3d 145, 148 (2d Cir. 2006); *Wang v. Lynch*, 824 F.3d 587, 592 (6th Cir. 2016); *Dehonzai v. Holder*, 650 F.3d 1, 8 (1st Cir. 2011). When correspondence contains such similarities, it is reasonable to infer that the person or entity who submitted the strikingly similar documents is the actual source from where the suspicious similarities derive. *See Mei Chai Ye v. U.S. Dept. of Justice*, 489 F.3d 517, 519 (2d Cir. 2007).