U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11040173

Date: JULY 10, 2020

Appeal of Vermont Service Center Decision

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

The Petitioner, an information technology staffing services provider, seeks to temporarily employ the Beneficiary under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality 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 Vermont Service Center denied the petition, concluding that the Petitioner did not establish an employer-employee relationship with the Beneficiary. The Director also concluded that the record did not establish there would be sufficient specialty occupation work available for the Beneficiary. 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 Subsequently, U.S. Citizenship and Immigration Services (USCIS) rescinded previously issued policy guidance. USCIS Policy Memorandum PM-602-0114, *Rescission of Policy Memoranda* at 2 (June 17, 2020), http://www.uscis.gov/legal-resources/policy-memoranda.

After the Petitioner filed this appeal, another employer filed a new petition to employ the Beneficiary, casting doubt on whether the Beneficiary currently intends to work for the Petitioner.

Additionally, we note that, regardless of whether the Petitioner would have an employer-employee relationship with the Beneficiary and whether sufficient work would be available, the record does not establish the services that the Beneficiary will ultimately provide through the Petitioner, mid-vendor, prime vendor and vendor management company, and end-client.

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant as a foreign national "who is coming temporarily to the United States to perform *services . . . in a specialty occupation* described in section 214(i)(1) . . . " (emphasis added). To determine whether the Beneficiary will be employed in a specialty occupation, we review the record to ascertain the services the Beneficiary will perform and whether such services require the theoretical and practical application of a body of highly specialized knowledge attained through at least a bachelor's degree or higher in a specific specialty or its

equivalent. Without sufficient evidence regarding the duties the Beneficiary will perform, we are unable to determine whether the Beneficiary will be employed in an occupation that meets the statutory and regulatory definitions of a specialty occupation and a position that also satisfies at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). The services the Beneficiary will perform in the position determine: (1) the normal minimum educational requirement for entry into 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. 8 C.F.R. § 214.2(h)(4)(iii)(A).

Further, as recognized by the court in *Defensor v. Meissner*, 201 F.3d 384, 387-88 (5th Cir. 2000), where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The court held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

Although the record contains a service agreement between the Petitioner and the mid-vendor, it does not identify the Beneficiary, the end-client, or specific services to be provided.[1] In turn, although the Petitioner submitted a supplemental work statement (WS) between the Petitioner and the mid-vendor in response to the Director's request for evidence, the parties signed and dated it "9/23/2019," after the petition filing date. The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). Because the parties signed and dated the WS after the petition filing date, it may not establish eligibility. *Id.*

The record also contains a master services agreement (MSA) between the prime vendor and the vendor management company. However, the MSA is almost entirely redacted and, in its redacted form, it does not identify the client for which the vendor management company would manage the prime vendor and any sub-vendor's services, or what those services are.[2] Instead, the MSA identifies the

[1] Although a petitioner is not required by existing regulation to submit contracts or legal agreements between the petitioner and third parties to establish an employer-employee relationship, "the petitioner must demonstrate eligibility for the benefit sought" and "if a petitioner provides contracts or legal agreements, [an] officer is not precluded from evaluating that evidence in the adjudication of other eligibility criteria." USCIS Policy Memorandum PM-602-0114, *Rescission of Policy Memoranda* at 3.

[2] Although a petitioner may always refuse to submit confidential commercial information if it is deemed too sensitive, the Petitioner must also satisfy the burden of proof and runs the risk of a denial. *Cf Matter of Marques*, 16 I&N Dec. 314 (BIA 1977) (holding the "respondent had every right to assert his claim under the Fifth Amendment[; however], in so doing he runs the risk that he may fail to carry his burden of persuasion with respect to his application."). Both the Freedom of Information Act and the Trade Secrets Act provide for the protection of a petitioner's confidential business information

prime vendor as the client. The record also contains a supplemental description of services (DOS); however, the DOS states that it "describes the MSP Services to be provided to [the prime vendor] ('Client') by [the vendor management company]." The DOS does not identify the end-client or otherwise indicate that the client is not the prime vendor. Accordingly, the probative value of the MSA and the DOS for a proposed assignment at the end-client location is minimal. Like the MSA, the DOS is almost entirely redacted and, in its redacted form, the extent of the "Scope of Services" provided in the DOS is as follows:

Region	Country	Skills	Service Offering
All States	USA	IT, Billable	Staff Aug – Contingent Workers for both Production and Opportunity Workflows

The DOS does not further elaborate on the services to be managed by the vendor management company either "to be provided to [the prime vendor]" or to the end-client identified elsewhere in the record. The DOS also does not identify the Beneficiary as a worker to provide such services, or reference the Petitioner or the mid-vendor.

Furthermore, the record does not contain similar contractual documents between the mid-vendor and either the prime vendor or the vendor management company, and between the end-client and any other party, in order to establish the services for which the parties contracted, as of the petition filing date, for the Beneficiary to perform. *See* Section 101(a)(15)(H)(i)(b) of the Act. Likewise, the record does not contain evidence of the end-client's requirements. *See Defensor v. Meissner*, 201 F.3d at 387-88.

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.

when it is submitted to USCIS. *See* 5 U.S.C. § 552(b)(4), 18 U.S.C. § 1905. Additionally, the petitioner may request pre-disclosure notification pursuant to Executive Order No. 12,600, "Predisclosure Notification Procedures for Confidential Commercial Information." Exec. Order No. 12,600, 52 Fed. Reg. 23,781 (June 23, 1987).