U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10449000

Date: JULY 23, 2020

Appeal of Vermont Service Center Decision

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

The Petitioner 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 Vermont Service Center denied the petition, concluding that the evidence of record does not establish that: (1) the Petitioner will have an employer-employee relationship with the Beneficiary; and (2) the proffered position qualifies as a specialty occupation. 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 Subsequently, U.S. Citizenship and Immigration Services (USCIS) rescinded previously issued policy guidance relating to H-1B petitions filed for workers who will be employed at one or more third-party worksites.[2] The matter is now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 decide whether the Petitioner has demonstrated the substantive nature of the work the Beneficiary would perform during the intended period of employment. In particular, the Petitioner stated that the Beneficiary would work as a "Java developer" at an end-client location in Virginia. With the initial petition and in response to the Director's request for evidence, the Petitioner provided work orders and letters from the end-client and vendor that state that the Beneficiary's services will be needed until September 2019, approximately one month prior

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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).

to the requested H-1B start date. Thus, the referenced documents do not establish that the Beneficiary will serve as a Java developer in Virginia for the duration of the requested H-1B period.

On appeal, the Petitioner submits a third work order extending the Beneficiary's services through September 2020; however, this document also does not demonstrate the Petitioner's eligibility at the time of filing because it was executed in December 2019, nearly eight months after the petition was filed. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(l). A visa petition may not be approved based on speculation of future eligibility or 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). The agency made clear long ago that speculative employment is not permitted in the H-1B program. *See, e.g.,* 63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998).

Moreover, we observe an additional deficiency that would also appear to preclude approval of this petition, and the Director may wish to explore it on remand as well. For instance, the end-client does not state the educational requirements for this position. As recognized by the court in *Defensor v. Meissner,* 201 F.3d 384, 387 (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.

It is also noteworthy that the Petitioner, vendor, and end-client mistakenly and repeatedly reference the Beneficiary in the masculine pronoun case. The record lacks an explanation for these inconsistencies. Thus, we must question the accuracy of the documents and whether the information provided is correctly attributed to this particular Beneficiary and position.

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.