



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 8283363

Date: JULY 21, 2020

Appeal of California Service Center Decision

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

The Petitioner, an information technology solutions provider, 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 Petitioner did not establish an employer-employee relationship with 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 Subsequently, U.S. Citizenship and Immigration Services (USCIS) rescinded previously issued policy guidance and directed its officers to apply the existing regulatory definition at 8 C.F.R. § 214.2(h)(4)(ii) to assess whether a petitioner and a beneficiary have an employer-employee relationship. USCIS Policy Memorandum PM-602-0114, *Rescission of Policy Memoranda* at 2 (June 17, 2020), <http://www.uscis.gov/legal-resources/policy-memoranda>.

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.

Moreover, we observe other issues the Director may wish to address. Namely, the Director should consider whether the Petitioner sufficiently demonstrated that the Beneficiary will be employed in a specialty occupation should this petition be approved. The Petitioner indicated that it will assign the Beneficiary through a mid-vendor to work as a “mulesoft developer” for an end-client for the duration of the validity period requested. The claimed contractual chain is as follows: Petitioner → V- (mid-vendor) → H- (end-client). It submitted a March 2019 letter from the end-client which referenced its contractual relationship with the mid-vendor, and stated that the Beneficiary will “provide software consulting services on an internal project for the [end-client]. . . . as a full-time employee of [the Petitioner].” The end-client described the project that requires the Beneficiary's services, as follows:

[The end-client] signaled a major IT transformation in its most recent business update and indicated an IT overhaul that would touch both front-end technology and back-office systems and embrace cloud computing.

The Petitioner also provided pages one and seven of a seven-page 2016 services agreement between the end-client and mid-vendor. Notably, the contract's start and termination dates are redacted. While page seven contains the signatures of officials for the end-client and the mid-vendor, the Director should consider whether the document, with its omitted pages and redacted text sufficiently establishes what the parties actually agreed to. The Petitioner also submitted the end-client's partially redacted "statement of work number 2" [SOW 2] with the mid-vendor, which identifies the assignment of the mid-vendor's staff to the end-client's projects, to include software developers. However, the position duties as described in this SOW differ from the generic job duties proffered by the Petitioner, which were also reiterated by the end-client in its letter. Further, the software development positions are designated within the SOW as "on-shore" and "off-shore." The Petitioner has not presented evidence to show the specific position in SOW 2, if any, which encompasses the Beneficiary's proposed position. The Petitioner also presented the first page of three-page partially redacted purchase orders for "capital projects – internally developed software" and "professional services expensed," which identified expenditure categories for such services to be delivered to the end-client by the mid-vendor.

While this material indicates that the mid-vendor and the end-client share a contractual relationship, the Director should consider whether the Petitioner has substantiated the relevant terms and conditions of the end-client's contractual arrangements with the mid-vendor through the submission of the end-client's contractual documents in which much of the material agreed to by the parties was omitted or substantially redacted. This is important because the Petitioner asserts that the Beneficiary is to be hired as a contingent worker for the end-client pursuant to these contractual arrangements.¹ The Director should consider whether the Petitioner's submission of these partial, heavily redacted documents diminishes their evidentiary value, as it deprives the Director of the remaining portions that may reveal information either advantageous or detrimental to the petitioning organization's claims, and therefore, are of little probative value. It is the Petitioner's burden to prove by a preponderance of evidence that it is qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. at 376. In evaluating the evidence, eligibility is to be determined not by the quantity of evidence alone but by its quality. *Id.*

Additionally, the Director should consider whether the correspondence from the Petitioner's ultimate end-client is in accord with the type of material as noted by the court in *Defensor v. Meissner*, 201 F.3d 384, 387-88 (5th Cir. 2000). As a central holding, the *Defensor* court determined that the former Immigration and Naturalization Service acted appropriately in interpreting the statute and the regulations as requiring petitioning companies to provide probative evidence that the outside entities actually utilizing the Beneficiary's services (i.e. end-clients) required candidates to possess a

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.

qualifying degree.² The *Defensor* court reasoned that the position requirements from the entity where the beneficiary would actually work—be it the required degree or the position’s actual duties a candidate would perform—should serve as the more relevant characteristics we should consider under our specialty occupation determination. The court further concluded that absurd outcomes could result from granting greater credence to the position requirements as represented by an outsourcing agency, rather than to those from its clients where a beneficiary would perform the work.³ Similar to the *Defensor* case, the duties and education details the Petitioner provided would appear to be less probative to this analysis than the end-client’s requirements. The Director should determine whether the end-client letters and contractual material, as presented in the record, are sufficient to demonstrate eligibility in this matter.⁴

The Petitioner also provided a February 2019 sub-contractor agreement between the Petitioner and the mid-vendor for the Petitioner’s provision of staffing services for the mid-vendor’s clients at locations identified as “TBD” [to be determined]. The mid-vendor’s “Attachment A identifies the Beneficiary and states that the duration of his end-client assignment will commence in March 2019 for “a duration of 18 months. The job title of the Beneficiary’s position, the nature of the services to be provided by him, the requirements of the position, and the specific project(s) to which he will be assigned at the end-client location are not specified therein. The Director should determine whether the Petitioner has provided sufficient evidence of the contractual relationships between the mid-vendor and the Petitioner regarding the Beneficiary’s proposed off-site employment, and the scope and nature of his role within the end-client projects to which he will be assigned should the petition be approved.

The Director should also decide whether the Petitioner has presented consistent, probative evidence regarding the duties that the Beneficiary will perform in conjunction with the specific project(s) to which the Beneficiary will be assigned, in order to ascertain whether those duties require at least a baccalaureate degree in a specific specialty, or its equivalent, as required for classification as a specialty occupation.⁵ We note for example that the Beneficiary’s performance evaluation in the record – which covers April through June 2019 - indicates that the tasks that the Beneficiary was rated on were “analyzing existing software, engineer modifications and solutions to software problems, develop maps and business processes, and designing new software.” Notably, the approved end-client time sheets for the Beneficiary in the record - which cover the time period from March 2019 through July 2019 - each list his only work task as “assistance in creation of Test cases with QA testing team and/or business,” which is a task the Petitioner indicates will comprise just 15% of his work time in the position description submitted in response to the Director’s RFE. The Petitioner did not include

² *Defensor*, 201 F.3d at 388.

³ *Id.*

⁴ A petitioner must establish eligibility at the time it files the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1), (12). USCIS may not approve a visa petition at a future date after a petitioner or a beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg’l Comm’r 1978) (finding that nonimmigrant eligibility criteria must be met at the time a petitioner files the petition). Nor should eligibility be heavily based on evidence a petitioner revises after USCIS points out the deficiencies in the petition, as such material is not necessarily independent and objective evidence. See *Baldwin Dairy, Inc. v. United States*, 122 F.Supp.3d 809, 816 (W.D. Wis. 2015) (concluding we were justified in questioning a petitioner’s motives and whether the company simply amended its evidence so that it could demonstrate eligibility).

⁵ To allow otherwise, results in generic descriptions of duties that, while they may appear (in some instances) to comprise the duties of a specialty occupation, are not related to any actual services the Beneficiary is expected to provide.

the tasks the end-client reviewed in approving the Beneficiary's time sheets within its own contemporaneous review of the Beneficiary's performance at the end-client location. The Petitioner provides no explanation for the differing job duties identified in (1) the Beneficiary's end-client approved time sheets, (2) the Beneficiary's performance evaluation, and (3) its own narrative explanations of the job duties of the proffered position. The Director may consider asking the Petitioner to provide evidence to resolve this inconsistency if she requests additional evidence relevant to a new determination. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Accordingly, we will remand the matter to the Director to consider these issues and enter a new decision. The Director may request any additional evidence considered pertinent to the new determination and any other issue. As such, we express no opinion regarding the ultimate resolution of this case on remand.

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