



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

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

In Re: 8911521

Date: JULY 17, 2020

Appeal of Vermont 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 Vermont 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 Subsequently, U.S. Citizenship and Immigration Services (USCIS) rescinded previously issued policy guidance and directed its officers to apply the existing regulatory definition at 8 C.F.R. § 214.2(h)(4)(ii) to assess whether a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 the Director's decision did not include a discussion of the substantive nature of the proffered position, the Director may wish to consider whether the Petitioner has met its burden in establishing that the "software developer" position is a specialty occupation.¹ We observe several discrepancies and inconsistencies within the record, in addition to position descriptions that do not support a finding that the proffered position requires a bachelor's degree or higher in a specific specialty.

Preliminarily, we note that the Petitioner, which is located in New Jersey, has outsourced the Beneficiary to work at an end-client location in Texas, pursuant to a series of contracts. The contractual path appears to flow from the Petitioner to [REDACTED] (first-vendor), between

¹ The Petitioner designated the proffered position under the SOC code and title 15-1132, "Software Developers, Applications." For more information, visit the Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook*, <https://www.bls.gov/OOH/computer-and-information-technology/software-developers.htm#tab-2> and Dep't of Labor's O*NET summary report at <https://www.onetonline.org/link/summary/15-1132.00> (last visited July 16, 2020).

the first-vendor and [redacted] (second-vendor), and between the second-vendor and [redacted] end-client). As such, the contractual path of succession between the actors in this case may be summarized as: Petitioner → First-Vendor → Second-Vendor → End-Client.

In its initial filing, the Petitioner submitted a support letter describing its position using six numbered duties. The Petitioner also submitted the Beneficiary's employment offer letter, which contains a list of six duties that differ from the six numbered duties articulated in the Petitioner's support letter. The Petitioner has not explained or acknowledged the differences in the two lists of duties, and we cannot determine which list is accurate or whether both lists should be read together.

We also question the organizational structure of the Petitioner and the claims it has made as an employer. The petition, certified labor condition application (LCA), and appeal all bear a signature from [redacted] CEO. Many of the contracts, letters, and supporting documents in the record are signed by "[redacted] President" or "[redacted] CEO." It is unclear whether these names represent the same person or different people and which individual, if any, has the legal authority to sign for the Petitioner. Furthermore, it should be noted that the Petitioner's organizational chart features [redacted] in three different positions, while [redacted] is not in the organizational chart at all.

The Petitioner submitted a letter from [redacted] which purports to contain the end-client's educational qualifications and a list of position duties. This letter contains significant discrepancies that raise questions as to its credibility and probative value. First, the letter is unsigned and appears on another entity's letterhead, that of [redacted]. Neither the Petitioner nor [redacted] has explained what relationship this entity has with the end-client. In the signature block area, we read that [redacted] is a [redacted] program manager and may be located in [redacted] Arizona. The Petitioner describes [redacted] as the Beneficiary's "direct manager," which is relevant as the Petitioner has stated the Beneficiary will be placed at an end-client site in [redacted] Texas, not in Arizona. The Petitioner has not explained how [redacted] will directly manage the Beneficiary if they are not located in the same state. Moreover, [redacted]'s letter states that the Petitioner maintains "full control and supervisory powers over [the Beneficiary's] duty and performance," which appears to contradict the Petitioner's claims that [redacted] directly manages the Beneficiary. The Director may wish to clarify these issues.

In examining the contents of [redacted]'s letter, we read about a "database software developer" position, which slightly differs from the title of the proffered position. We do not know if these two differently-titled positions have the same or similar duties or why the titles are different. According to the letter, the minimum qualifications for the position are "at least a master's degree in Information Technology and Management, Computer Information Systems or related field." The Petitioner stated in its initial support letter that the requirements of the position are a minimum of a bachelor's degree in computer science or a related field. Neither the Petitioner nor the end-client has acknowledged or explained the discrepancy, which the Director may wish to address, along with whether the payment of a Level I wage is consistent with the requirements of a master's degree.²

² A petitioner submits the LCA to DOL to demonstrate that it will pay an H-1B worker the higher of either the prevailing wage for the occupational classification in the area of employment or the actual wage paid by the employer to other employees with similar duties, experience, and qualifications. Section 212(n)(1) of the Act;

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.

If we assume without deciding that the [] letter contains the end-client's position requirements, including the duties the Beneficiary will perform at the end-client location, we would question whether the position, as described, is a specialty occupation. Many duties are described in vague and general terms, which do not assist in our understanding of the position. Examples of such descriptions include the following verbatim duties:

- Using normalized and/or Star schemas to load data for Data Marts and Data Warehouses and developing different data models;
- Performing OLAP cube development SSAS;
- Designing SSIS Packages for importing and exporting the data from various databases to Excels and flat files by making use of BCP, Bulk Insert; and
- Improving existing procedures and data flows based on users' requests.

From these descriptions, it is unclear what the Beneficiary will do to carry out these undefined duties. For instance, neither the Petitioner nor the end-client has defined what various terms mean, including Star schemas, Data Marts, Data Warehouses, and Bulk Insert, to name a few. Further, we have little information concerning what "existing procedures" includes or how the Beneficiary will improve them. The Petitioner must ensure the material duties sufficiently convey the Beneficiary's activities at the end-client location in such a manner that a person without a great familiarity with the technical nature of these functions would be able to grasp what the position consists of, and why it and the duties are so complex.³ Neither the Petitioner nor the end-client have done so here.⁴ Furthermore, the Petitioner has not explained how the duties, as articulated in its support letter and the Beneficiary's employment offer letter, relate to the duties listed in the [] letter. Specifically, we question whether the database duties in the [] letter indicate that the position is more properly categorized as falling within the occupational category of "Database Architects," corresponding to SOC code 15-1199.06.⁵

Because this case is affected by the new policy guidance, we find it appropriate to remand the matter for the Director to consider the employer-employee question anew and to adjudicate in the first

20 C.F.R. § 655.731(a). *See also* U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://flcdcenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf.

³ *See Sagarwala v. Cissna*, No. CV 18-2860 (RC), 2019 WL 3084309, at *8-10 (D.D.C. July 15, 2019).

⁴ The Beneficiary's work product samples do not assist in our understanding of the position. The Petitioner does not explain what the samples represent. Further, it is not apparent how use of Excel, a third-party resource for which proficiency courses and trainings are widely available, would require specialized knowledge.

⁵ For more information, visit the O*NET summary report for "Database Architects" at <https://www.onetonline.org/link/summary/15-1199.06> (last visited July 16, 2020).

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.