U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 6296433

Date: JULY 22, 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 the Beneficiary would perform services in 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 Subsequently, U.S. Citizenship and Immigration Services (USCIS) rescinded previously-issued policy guidance relating to H-1B petitions filed for workers who will be employed at one or more third-party worksites.[2] The matter is now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.

Because this case is affected by the new policy guidance, we find it appropriate to remand the matter for the Director to consider the basis for denial anew. Regardless of whether there would be sufficient work available for the Beneficiary to perform, we question additionally whether the Petitioner has demonstrated the actual, substantive nature of the proffered position. In particular, we observe that the Petitioner stated that the Beneficiary would work in-house on its [redacted] system project as a software developer quality tester. The Petitioner provided a job description for the proffered position and stated that the position requires a bachelor's degree in computer science or engineering.

We acknowledge the Petitioner's job description and claims of in-house employment, however, the record undermines these claims, which calls into question the actual, substantive nature of the work of the position. For instance, according to the Petitioner's employment offer letter, it appears that the Beneficiary may be placed at a third-party location. Specifically, the employment offer letter states that the Beneficiary's "offer is subject to change upon confirmation of the assignment." Further, the letter states:

---

[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.

> [The Beneficiary] understand[s] and agree[s] that during the term of any Purchase order signed with client and for a period of one (1) year after completion of any project at client's location, [the Beneficiary] will not call upon, cause to be called upon, solicit, or assist in the solicitation of any person or services, firm, government, or corporation, where [the Petitioner] have presented you to its Clients, end clients directly or indirectly in regards to [the Beneficiary] providing consulting services on behalf of [the Petitioner].

In addition, in response to the Director's request for evidence (RFE), the Petitioner stated that it "will be the direct contact with the end client on this project." Moreover, the Petitioner stated that "[n]either the end-client nor the mid-vendor has any ability to assign beneficiary to a different employer or to different work locations." As previously noted, the Petitioner stated the Beneficiary would work on an in-house project. The record does not provide an explanation for this discrepancy.

Moreover, we observe the Petitioner mistakenly and repeatedly references the Beneficiary in the masculine pronoun case in its RFE response, and on appeal. The Petitioner also references another individual in its appeal brief. The record provides no explanation for these inconsistencies. Thus, we must question the accuracy of the letters and whether the information provided is correctly attributed to this particular Beneficiary and position.

The record further includes other discrepancies, inconsistencies, and unanswered questions that collectively serve to cast doubt on the reliability of the Petitioner's statements, which further calls into question the actual, substantive nature of the proffered position.[3] For instance, the Petitioner has provided inconsistent information regarding the Beneficiary's job title. In the Form I-129, the Petitioner asserted the Beneficiary will serve as a software developer quality tester. However, in the labor condition application (LCA), the Petitioner indicated the Beneficiary's job title as software developer. Moreover, the Petitioner references the proffered position as a software quality tester in its letter of support, RFE response, employment offer letter, and on appeal.

In addition, the Petitioner classified the proffered position under the occupational title "Software Developers, Applications," corresponding to the Standard Occupational Classification (SOC) code 15-1132, on the LCA. However, in its letter of support and business plan, we observe that the job duties provided by the Petitioner are recited virtually verbatim from the U.S. Department of Labor's (DOL) Occupational Information Network (O*NET) Summary Report's list of duties for "Software Quality Assurance Engineers and Testers" - SOC code 15-1199.01.[4] Further, it must be noted that providing job duties for a proffered position from O*NET is generally not sufficient for establishing H-1B eligibility. That is, while this type of description may be appropriate when defining the range of duties that may be performed within an occupational category, it cannot be relied upon by the Petitioner when discussing the duties attached to specific employment for H-1B approval as this type of generic description does not adequately convey the substantive work that the Beneficiary will perform on a day-to-day basis. In establishing a position as qualifying as a specialty occupation, a petitioner must

[3] The Petitioner must resolve these inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

[4] *See* O*NET OnLine at https://www.onetonline.org/link/summary/15-1199.01.

describe the specific duties and responsibilities to be performed by a beneficiary in the context of its business operations, demonstrate that a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

Moreover, the evidence submitted in response to the RFE and on appeal raise additional questions regarding the reliability of the Petitioner's assertions. For instance, upon review of the Business Requirement Documents, we note that the one submitted in response to the Director's RFE is dated "@ 2017," and the one submitted on appeal is dated "@ 2016." Further, the Business Requirements Document submitted on appeal was changed to include the dates "02/25/2017" and "04/03/2018" on pages two and three but bears the later date of "@ 2016." In addition, we observe that the business plan includes grammar and punctuation errors, inconsistent spacing, and awkward turns of phrase, which undermines its credibility.

For all of these reasons, we question whether the Petitioner has established the substantive nature of the work to be performed by the Beneficiary. This would appear to consequently preclude a conclusion that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (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.

Because this case is affected by the new policy guidance, we find it appropriate to remand the matter for the Director to consider these questions 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.