U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF RSMT-S-, INC.

DATE: JUNE 14, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, an information technology staffing company, seeks to extend the Beneficiary's temporary employment as a "software developer" 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 had not established sufficient specialty occupation work available for the entire validity period requested.

On appeal, the Petitioner submits a brief and asserts that the Director did not fully consider all the evidence submitted.

Upon *de novo* review, we will dismiss the appeal.

I. PROCEDURAL BACKGROUND

The Petitioner, located in Texas, stated on the H-1B petition that the Beneficiary will work full-time as a software developer at an off-site location in [redacted] California.[1] On the labor condition application (LCA) submitted in support of the H-1B petition, the Petitioner confirmed the Beneficiary's off-site placement in [redacted] California. According to these documents, the Beneficiary will be paid $72,000 per year.

In the letter of support, the Petitioner stated that, as a software developer, the Beneficiary "will be responsible for full life cycle software application development." The Petitioner described the Beneficiary's job duties as including: analyzing user needs; designing each piece of an application or system and planning how the pieces work together; recommending software upgrades; software

[1] While the Petitioner indicated that the Beneficiary will also be employed at its location in Texas, the record does not contain evidence of in-house employment for the Beneficiary.

maintenance and testing; project planning; and project management. The itinerary submitted with the petition identified the end-client as [redacted] (Client M) through the following succession of contracts:

The Petitioner ➔ [redacted] (Vendor S) ➔ [redacted] (Vendor I) ➔ Client M

In response to the Director's request for evidence, the Petitioner affirmed that "[t]he instant petition was filed to extend the Beneficiary's status in order for her to continue the placement at [Client M] from 10/01/2016 to 09/30/2019 with an increased salary of $72,000 per year." The Petitioner then advised that, after the filing of this petition, it learned that the task order extending the Beneficiary's assignment with Client M was not renewed. Because the expected renewal did not occur, the Petitioner "instead moved the Beneficiary to a new job location within the same area of intended employment under the same terms and conditions. The Beneficiary is now placed at the third-party worksite of [redacted] [(Client E)] in [redacted] California." The Petitioner further claimed that it did not need to file an amended H-1B petition because the Beneficiary's new assignment is in the same metropolitan statistical area (MSA) as the certified LCA, and "because there are no changes in the terms and conditions of the Beneficiary's employment."

The Petitioner submitted an amended itinerary which identified the new end-client as Client E and the new succession of contracts as follows:

The Petitioner ➔ [redacted] (Vendor P) ➔ Client E

The Director denied the petition, concluding that there was not sufficient specialty occupation work with Client M for the entire validity period pursuant to the original terms of the H-1B petition. The Director additionally noted that the Petitioner was not exempt from filing an amended petition pursuant to recent guidance under *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015).

On appeal, the Petitioner claims that there still is specialty occupation work available for the Beneficiary. The Petitioner maintains that, even though the end-client has changed, there has been no material change to the proposed employment. Accordingly, the Petitioner claims that it was not required to file an amended petition, and that the Director should have considered the submitted evidence regarding the Beneficiary's new assignment with Client E with this petition.

II. LEGAL FRAMEWORK

With the filing of any H-1B petition, the petitioner shall submit, among other evidence, "[a] statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay." 8 C.F.R. 214.2(h)(4)(iii)(B)(*2*).

If and when there is any material change to the terms and conditions of H-1B employment, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(E) requires a new or amended petition and LCA to be filed. Specifically, this regulation states:

> *Amended or new petition.* The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition . . . . In the case of an H-1B petition, this requirement includes a new labor condition application.

Additionally, 8 C.F.R. § 214.2(h)(11)(i)(A) states that the petitioner "shall immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility under section 101(a)(15)(H) of the Act and paragraph (h) of this section," and that "[a]n amended petition on Form I-129 should be filed when the petitioner continues to employ the beneficiary."

III. ANALYSIS

Upon review of the record in its totality and for the reasons set out below, we determine that the Petitioner has not overcome the Director's decision to deny the petition.

A. Availability of Specialty Occupation Work Pursuant to H-1B Petition and LCA

First, we find that the Petitioner has not demonstrated the availability of specialty occupation work pursuant to the original terms and conditions of the H-1B petition and LCA. *See* 8 C.F.R. 214.2(h)(4)(iii)(B)(*2*); 8 C.F.R. § 103.2(b)(1) (the petitioner must establish eligibility at the time of filing its petition); *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978) (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).

Simply stated, the Beneficiary will not be employed in the same, original capacity specified on the H-1B petition and LCA: to work for Client M for the entire validity period requested at a salary of $72,000 per year. As the Petitioner admits, the most recent task order authorizing the Beneficiary's assignment with Client M was not issued. The viability of the instant H-1B petition ended with the termination of the Beneficiary's assignment with Client M.

We acknowledge the Petitioner's statements and documents regarding the Beneficiary's new assignment with Client E. However, we find that this evidence was not properly presented in pursuit of this petition. As will be discussed below, the Petitioner has not demonstrated that there has not been any material change to the Beneficiary's employment. In the absence of such a showing, the Petitioner has not demonstrated that an amended petition was not necessary.

B. Amended Petition

As indicated earlier, a petitioner must "immediately" file an amended petition whenever there are any "material changes" in the terms and conditions of a beneficiary's H-1B employment. 8 C.F.R. § 214.2(h)(2)(i)(E); 8 C.F.R. § 215.2(h)(11)(i)(A). *See Simeio*, 26 I&N Dec. 542.

Here, although the Petitioner claims that no material changes in the terms and conditions of the Beneficiary's employment resulted from this "simple end-client change," the record is insufficient to support this claim. As evidence of the Beneficiary's new assignment, the Petitioner submitted, *inter alia,* a letter from Vendor P, a letter from Client E, and the contractor services agreement between the Petitioner and Vendor P.[2] However, the submitted evidence does not address all material elements of the terms and conditions of the Beneficiary's employment.

For instance, the Beneficiary was supposed to be paid $72,000 per year for her prior assignment with Client M. But none of the submitted documents specify the Beneficiary's new rate of pay with Client E. The contractor services agreement between the Petitioner and Vendor P specifically states that "[t]he specific fees for each person staffed will be separately detailed in a Task Order." Nevertheless, the Petitioner did not submit a copy of the task order which authorized the Beneficiary's assignment with Client E and detailed her specific fees and services to be performed. Without more, the record does not demonstrate that the Petitioner will continue to pay the Beneficiary the same (or greater) rate of pay, as required.[3]

Further, none of the documents specify the duration of the Beneficiary's new assignment. While Client E's letter states that "[t]his is an ongoing project with expected extensions," it provides no additional, relevant information such as the length of the project or anticipated timelines. Notably, the Petitioner and Vendor P only recently executed the contractor services agreement in October 2016. The record does not contain evidence of prior contracts or other ongoing contracts between the Petitioner and Vendor P to demonstrate the likelihood that the Beneficiary's assignment to Client E would cover the entire validity period or would be extended to cover the entire validity period.

Further still, the record does not contain sufficiently reliable documentation directly from Client E and Client M detailing the Beneficiary's actual job duties. We again note the lack of the actual task order describing the services to be performed for Client E. While the Petitioner submitted a letter from Client E which briefly listed the Beneficiary's job duties in generally similar terms as the job duties listed in Vendor S's letter, the Petitioner did not submit a letter or other documentation directly from Client M to corroborate Vendor S's job description.[4]

Moreover, upon closer review of Client E's letter, we find language which calls into question the reliability of this letter, and consequently, the nature of the Beneficiary's assignment with Client E. In particular, Client E's letter states:

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[2] The Petitioner redacted information from this contractor services agreement, but did not explain the nature of the redacted information. The Petitioner similarly redacted information from its contractor agreement with Vendor S without further explanation.

[3] The required rate of pay is 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 experience and qualifications who are performing the same services. *See Simeio*, 26 I&N Dec. at 545-546.

[4] We will withdraw the Director's statement that the Petitioner submitted sufficient evidence to establish that the proffered position qualifies as a specialty occupation.

> [Vendor P] has reported to [Client E] that it has subcontracted with [the Petitioner] to provide certain services on this database project. [Vendor P] has also reported that [the Beneficiary] is a full-time employee of [the Petitioner] and that [the Beneficiary] will be providing services on our database project as a Software Developer pursuant to the subcontract between [Vendor P] and [the Petitioner]. [Vendor P] requires the continuing services of [the Beneficiary] on this database project. Throughout her time on this database project, [the Beneficiary] will be based and work out of our headquarters located at . . . CA

As evident from the above, Client E describes the proffered position *as reported by* Vendor P. Client E does not claim to have direct knowledge of the Beneficiary's job duties and other relevant information about the proffered position. Client E's letter does not indicate that the Beneficiary will be responsible for the "full life cycle software application development" or will perform job duties such as designing each piece of an application or system and planning how the pieces work together, as the Petitioner initially described the Beneficiary's assignment with Client M.

Also, Client E's letter is silent with respect to the proffered position's minimum educational requirement, if any. As recognized by the court in *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000), where a beneficiary is to perform work for an entity other than the petitioner, evidence of the client company's job requirements is critical. The record is missing this critical evidence.

Finally, Client E's letter lacks detailed information about the Beneficiary's employment relationship with the Petitioner. Client E's letter vaguely states that the Petitioner is the Beneficiary's "actual employer" and has "responsibilities includ[ing] paying, supervising, controlling the daily duties, setting their reporting restructure, and monitoring [her] conduct." However, the letter does not provide sufficient critical details as to *how* the Petitioner, which is located in Texas, would actually provide such direction, supervision, and control over the Beneficiary's daily duties, which are performed at Client E's worksite in California.

In this respect, the Petitioner stated that it "previously established by a preponderance of the evidence that a valid employer-employee relationship existed during the placement at [Client M]. We can also document our company's right to control when, where, and how the beneficiary performs the job at [Client E]." But upon review of the task orders assigning the Beneficiary to Client M, we find that the Petitioner did not have an employer-employee relationship with the Beneficiary. These task orders state, for example, that the Beneficiary "will take direction from an [Vendor I] designated representative with regards to assigned activities and deliverables" and "will comply with the process for project defined by [Vendor I] representative." Accordingly, if it is true that there have been no material changes to the way the Beneficiary's daily work with Client E is supervised and controlled, then we would affirmatively find that the Petitioner does not have an

employer-employee relationship with the Beneficiary as her actual employer, as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii).[5]

Overall, we are not persuaded by the Petitioner's assertion that there have been no material changes to the terms and conditions of the Beneficiary's employment.

IV. CONCLUSION

Because the Beneficiary's original assignment with Client M terminated, and the record does not demonstrate that no material changes in the terms and conditions of the Beneficiary's employment resulted from her new assignment with Client E, we find that the Petitioner has not demonstrated that there is specialty occupation work available for the Beneficiary pursuant to the original terms of the H-1B petition and LCA.

ORDER: The appeal is dismissed.

Cite as *Matter of RSMT-S-, Inc.*, ID# 394596 (AAO June 14, 2017)

[5] We will also withdraw the Director's statement that the Petitioner submitted sufficient evidence to establish that a valid employer-employee relationship will exist for the requested validity period.

Further, since the identified basis of the Director's denial is dispositive of the appeal, we will not address other grounds of ineligibility we observe in the record of proceedings.