U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-G- LLP

DATE: SEPT. 19, 2019

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a software development and IT consulting company, seeks to temporarily employ the Beneficiary as an "IT consultant" or "database 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 that it will have and maintain an employer-employee relationship with the Beneficiary,

On appeal, the Petitioner submits a brief and previously submitted evidence, asserting that the Director's decision was erroneous.

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

I. LAW

A petitioner seeking to file for an H-1B beneficiary must meet the definition of a "United States employer." 8 C.F.R. § 214.2(h)(2)(i)(A). *See* section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act) (referring to the "intending employer"). According to the regulation at 8 C.F.R. § 214.2(h)(4)(ii), the term "United States employer" means a person, firm, corporation, contractor, organization, or other association in the United States which:

(*1*) Engages a person to work within the United States;

(*2*) *Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee*; and

(*3*) Has an Internal Revenue Service Tax identification number.

(Emphasis added.)

For purposes of the H-1B visa classification, the terms "employer-employee relationship" and "employee" are undefined. The United States Supreme Court determined that, where federal law does not helpfully define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (quoting *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). Thus, to interpret these terms, U.S. Citizenship and Immigration Services (USCIS) will apply common law agency principles which focus on the touchstone of control.

The Supreme Court stated:

> "In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

Darden, 503 U.S. 318, 322-23.[1] *See Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 445 (2003) (quoting *Darden*). *See also Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (even though a medical staffing agency is the petitioner, the hospitals receiving the beneficiaries' services are the "true employers" because they ultimately hire, pay, fire, supervise, or otherwise control the work of the H-1B beneficiaries). We will assess and weigh all of the incidents of the relationship, with no one factor being decisive.

II. ANALYSIS

Applying the *Darden* and *Clackamas* tests to this matter, we find that the evidence of record does not establish that the Petitioner will be a "United States employer" having an "employer-employee relationship" with the Beneficiary as an H-1B temporary "employee." Specifically, the key issue of who has control over the Beneficiary has not been substantiated.

The Petitioner seeks to continue the Beneficiary's assignment to an end-client at the end-client's facility, where she has been placed since February 2017.[2] The Beneficiary's assignment was arranged through a mid-vendor which we will identify as Company T. To support the petition the Petitioner submitted, *inter alia*: a statement of work (SOW) dated April 2017 between Company T and the Petitioner; an updated SOW dated July 2018 between Company T and the Petitioner; the vendor

[1] When examining the factors relevant to determining control, we must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. *See Darden*, 503 U.S. at 323-24.

[2] The Beneficiary was assigned to this end-client on the basis of her post-completion optional practical training.

consulting agreement between Company T and the Petitioner; a letter from Company T confirming the Beneficiary's assignment to the end-client; and a letter from the end-client also confirming the Beneficiary's assignment.

As indicated above, the submitted SOWs and the consulting agreement are between Company T and the Petitioner. The record does not contain an SOW, purchase order[3], master service agreement, or any other contractual agreement directly from or endorsed by the end-client. Without this evidence, we cannot determine what conditions, restrictions, or limitations the end-client may have imposed on the Petitioner's right to control the Beneficiary's work. For example, the vendor consulting agreement states that the Petitioner "shall retain full direction and control of the means and methods by which [the Petitioner] performs the Services." But without the relevant contractual agreement(s) between Company T and the end-client, we cannot determine what the end-client actually agreed to with respect to the direction and control of staff provided by Company T.

Notably, the end-client's letter identifies one of its employees as the Beneficiary's "work-site supervisor." While the end-client's letter states that this work-site supervisor provides "supervision at work site . . . only for purposes of immediate consultation about the project," it does not further explain what "immediate consultation about the project" entails. Similarly, the end-client's letter states that "[o]nly her H1B employer, [the Petitioner], will have the legal right to control the work of [the Beneficiary] as well as the right to assign her to this, or any, work site location, and has the legal right to control her activities," but does not further detail how the Petitioner will exercise these rights while the Beneficiary works at the end-client's facility.

In fact, the Petitioner has yet to identify which of its employees (if any) supervises the Beneficiary. The Director specifically noted this deficiency in her decision. We further note the Petitioner's ambiguous statements that the Beneficiary "will be personally responsible for the deliverables and client satisfaction ('customer delight') issues" and "[a]s a professional, she will work with minimal supervision." The Petitioner has not explained how the Beneficiary receives instructions, or who gives these instructions, with respect to the end-client's deliverables and "customer delight" issues. There is no explanation of who the Beneficiary reports to within the Petitioner's organization, and the relationship between this individual and the Beneficiary's worksite supervisor employed by the end-client.

Another important consideration is that the Beneficiary has been assigned to the same end-client since early 2017. Although the Petitioner has been able to submit the Beneficiary's pay statements from 2017, it has not submitted any objective evidence that it has actually supervised her, assigned her work activities, assessed her work performance, or otherwise controlled her substantive work during this time frame. Given the above, it appears that the Petitioner's role and responsibilities are essentially limited to the administration of the Beneficiary's payroll and other related benefits, including the filing of immigration benefits. This limited role is not sufficient to demonstrate the requisite employer-employee relationship between the Petitioner and the Beneficiary. *See Defensor*, 201 F.3d at 388 (with the petitioner's role limited to essentially the functions of a payroll administrator, the beneficiary is even paid, in the end, by the end-client).

[3] The end-client's letter specifically references a purchase order.

III. CONCLUSION

The record does not demonstrate that the Petitioner will have and maintain the requisite employer-employee relationship with the Beneficiary.[4]

ORDER: The appeal is dismissed.

Cite as *Matter of T-G- LLP*, ID# 4742588 (AAO Sept. 19, 2019)

[4] Because this issue is dispositive, we need not further address the Director's observation that "the record lacks sufficient evidence that the position is a specialty occupation."