



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

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

In Re: 5440304

Date: FEB. 25, 2020

Appeal of California Service Center Decision

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

The Petitioner seeks to temporarily employ the Beneficiary 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 California Service Center denied the petition, concluding that the evidence of record does not establish that: (1) the Petitioner will have an employer-employee relationship with the Beneficiary; and (2) the proffered position qualifies as a specialty occupation.

In these proceedings, it is the Petitioner’s burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Upon *de novo* review, we will dismiss the appeal.

I. PROCEDURAL BACKGROUND

The Petitioner stated on the H-1B petition that the Beneficiary will provide services as a software developer for [redacted] (Client G) from the Petitioner’s offices in [redacted] Michigan via an agreement with Client G. On the labor condition application (LCA) submitted in support of the H-1B petition, the Petitioner confirmed the Beneficiary’s in-house placement in [redacted] Michigan. According to these documents, the Beneficiary will be paid \$33.03 per hour.

In response to the Director’s request for evidence, the Petitioner affirmed that “the Beneficiary was scheduled to work at the Petitioner’s office on the [Client G] project,” however, “the project ended abruptly.” The Petitioner therefore assigned the Beneficiary to a new project and placed him at a third-party worksite for a new client, [redacted] (Client C), located in [redacted] Michigan. The Petitioner stated that the services being provided to Client C “are arranged through a direct contract between the Petitioner and [Client C].” 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 “therefore subject to the same wage requirements.” The Petitioner also stated that the Beneficiary would be “performing the same duties” as indicated in the initial 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 have determined that the Petitioner has not established eligibility for the benefit sought.

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

First, 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 provide services for Client G, at the Petitioner’s own place of business, for the entire validity period requested. As the Petitioner admits, the project for Client G ended abruptly. The viability of the instant H-1B petition ended with the termination of the Beneficiary’s assignment with Client G.

We acknowledge the Petitioner's statements and documents regarding the Beneficiary's new offsite assignment to Client C. However, 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.

Although the Petitioner claims that no material changes in the terms and conditions of the Beneficiary's employment resulted from this end-client change, the record is insufficient to support that claim. As evidence of the Beneficiary's new assignment, the Petitioner submitted, *inter alia*, a letter from Client C and a statement of work (SOW) executed between the Petitioner and Client C. However, the submitted evidence does not address all material elements of the terms and conditions of the Beneficiary's employment.

For instance, none of the documents specify the duration of the Beneficiary's new assignment. We note that Client C's letter states that it will need the Beneficiary's services "at least for the next three years." However, the letter also states that "this statement is merely an expression of intent and is not a contractually or equitably binding commitment." Moreover, the SOW, which was executed in August 2015, does not reference the Beneficiary; the job title of the proffered position; or the job duties and tasks to be performed by a software developer, the proffered position. In fact, the SOW shows that the services needed for the project are "Liferay Consultants" and "UI/UX Consultant." Thus, the record does not contain sufficient evidence regarding the Beneficiary's assignment to Client C.

Further still, the record does not demonstrate that the Beneficiary's initial job duties with Client G will be the same in the new assignment with Client C. In Client G's letter, it states the Beneficiary's job duties as follows:

- Collect, understanding, and transmitting the business requirements for the project.
- Developing user friendly web pages by using .Net Framework (ASP .Net MVCS) and markup languages like HTML.
- Designing framework for user apps that grows with the needs of the company.
- Using cutting edge technologies like Ember, AngularJS, React, etc.
- Creating quality mockups and prototypes.
- Monitor website performance, watch for traffic drops related to site usability problems and rectify the issues.
- Collaborate with back-end developers and web designers to improve usability.
- Recommend any improvements in development of applications and features that will be put on the website and in internal functions as well.

However, Client C's letter states that the Beneficiary will be responsible for the following:

- Performing gathering and elicitation of business requirements.
- Preparing technical documentation, flow-charts and UML diagrams for new and existing business processes.
- Creating custom workflow processes and business services for future enhancements of all the portals and augmenting the content management, work flow features.
- Developing new features for future enhancements of portal services based on OSGI based architecture, Java 8 and latest trends in functional and object oriented programming.
- Designing the existing content of portals used by customers, dealers and public users using Content Management Interoperability Services, Java Content Repository and WebDAV so that the marketing team can edit the content using WYSIWYG editor.
- Decoupling existing and future applications with modular, fast and responsive features.
- Integrating existing applications into SAML and OAuth in a secure manner.
- Working on relational databases (Oracle 12c), object oriented programming (Java 8, React JS) and concepts of Software systems architectures; Software design patterns to integrate cutting edge technologies like Spring, Hibernate, Elastic search, and Ehcache into existing applications to make them more robust, secure and easy to maintain. These applications are in turn utilized to interact and interface with the rest of the teams at [the end-client].
- Designing the front-end of multiple applications using mobile-first, best UI / UX standards.
- Conducting code reviews for developed features and gathering feedback.
- Using CICD (continuous integration and continuous deployment) techniques, tools like Jenkins and Bamboo to make sure the changes made make it all the way to production along with proper rollback plans.
- Deploying developed features for different enhancements on to the production server and taking responsibility for root cause analysis if any issues are raised related to them.
- Developing secure, real-time alerts for Splunk and other alerting tools using proper proactive programming techniques.

As evident from the above, Client C's letter does not mention that the Beneficiary will work with the following technologies: .Net Framework (ASP .Net MVCS), HTML, Ember, AngularJS, and React. In addition, Client C's letter does not state that he will collaborate with back-end developers and web designers. Thus, the Petitioner has not established that the Beneficiary will be performing the same duties as indicated in the initial petition when working at Client C's location.

On appeal, the Petitioner provides a second, more detailed, SOW with a description of deliverables (products/services). Notably, the documents were executed after the H-1B petition was submitted. The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 8 C.F.R. § 103.2(b)(1). A visa petition

may not be approved at a future date after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). Even if we were to consider the second SOW, we note that it shows the effective project date as January 2019, but the SOW was not executed by the Petitioner and Client C until two months later in March 2019. The Petitioner does not provide an explanation for this discrepancy.

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 G terminated, and the record does not demonstrate that no material changes in the terms and conditions of the Beneficiary's employment resulted from his new assignment with Client C, we observe that the Petitioner has not demonstrated eligibility for the benefit sought.

ORDER: The appeal is dismissed.