U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28510915

Date: OCT. 02, 2023

Appeal of Vermont Service Center Decision

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

The Petitioner 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.

Although the Director of the Vermont Service Center initially approved the petition for the full validity period requested, she issued a subsequent approval notice for a shorter time period. On appeal, the Petitioner submits a brief and additional evidence, and asserts the Director should have approved the petition for the full period requested as well as provided 30 days' notice to the Petitioner prior to approving the petition with limited validity. The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Matter of Chawathe, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's*, Inc., 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

Section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), sets a six-year limitation on the period of authorized admission or stay for an H-1B nonimmigrant. As provided by 8 C.F.R. § 214.2(h)(13)(iii)(A), an individual "who has spent six years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under section 101(a)(15) (H) or (L) of the Act unless the [individual] has resided and been physically present outside the United States . . . for the immediate prior year."

The Beneficiary previously worked for a different petitioner as an L-1 nonimmigrant in the United States. The Petitioner filed the instant H-1B petition on June 30, 2022. Pursuant to section 214(g)(4) of the Act, the Director limited the petition validity period to less time than requested, accounting for the Beneficiary's time already spent in the United States as an L-1 nonimmigrant. We remand the matter to the Director for two unrelated reasons, as explained below.

The Petitioner asserts the Beneficiary departed the United States on January 6, 2021, and as such, had resided and been physically present outside the United States for the immediate year prior to filing the instant H-1B petition. On appeal, the Petitioner provides evidence of the Beneficiary's employment activities outside the United States, as well as additional documentation to corroborate the Beneficiary's departure on January 6, 2021. The Director's approval of the petition for a limited validity period does not reflect a consideration of the Beneficiary's departure from and duration of time spent outside the United States. Additionally, the Director did not have the opportunity to review evidence of the Beneficiary's physical presence outside of the United States during the year prior to filing the instant petition. We remand the matter for review of this evidence, as well as a consideration of when the Beneficiary departed the United States and whether the Beneficiary is entitled to the full validity period requested.

We also remand the matter because the Director's decision does not indicate whether the proffered position is a specialty occupation. The Petitioner provided a one-page list of duties for the OMS-WMS Developer position. It is not apparent how these duties function within the context of the end client's project or business. Our concern is that there are technology positions with duties that may be performed with a general degree (either at the bachelor or associate's level) and certifications, or even with undefined experience in a particular program or third-party software. There are also technology positions with duties that may require special skills, specific certifications, advanced knowledge, or that incorporate the duties of more than one occupation, but do not qualify as a specialty occupation. The record includes only a broad overview of the proffered position's duties. Given the limited information, we question whether the petition before us might involve a position that is not a specialty occupation. Therefore, the Director may wish to review whether the Petitioner has met its burden of establishing that the proffered position is a specialty occupation as defined by section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), and 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation"). We will therefore remand the matter for the Director to determine whether the proffered position is a specialty occupation.

We remand the matter to the Director to determine whether: (1) the Beneficiary resided and was physically present outside the United States in the immediate year prior to filing the petition, and if so, whether the Petitioner is entitled to approval of the petition for the full period requested; and (2) whether the proffered position is a specialty occupation. The Director may request any additional evidence considered pertinent to the new determination and any other issue.[1] We express no opinion regarding the ultimate resolution of this case on remand.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

[1] The Petitioner asserts the Director erred in not providing 30 days' notice to the Petitioner prior to issuing the limited validity period approval. The Petitioner relies upon 8 C.F.R. § 103.5(a)(5)(ii) regarding service motions with decisions that may be unfavorable to affected party, contending that a limited validity approval constitutes an "unfavorable" decision. Given our remand of the matter, we need not reach this issue and hereby reserve it. See INS v. Bagamasbad, 429 U.S. 24, 25 (1976) (stating that "courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); see also Matter of L-A-C-, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).