U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 24423930

Date: JAN. 25, 2023

Appeal of California Service Center Decision

Form I-129, Petition for a Nonimmigrant Worker (CNMI)

The Petitioner, a manpower services company, seeks to temporarily employ the Beneficiary as a maid and housecleaner under the CNMI-Only Transitional Worker (CW-1) nonimmigrant classification. *See* 48 U.S.C. § 1806(d). The CW-1 visa classification allows employers in the Commonwealth of the Northern Mariana Islands (CNMI) to apply for permission to temporarily employ foreign workers who are otherwise ineligible to work under other nonimmigrant worker categories.

The Director of the California Service Center denied the petition, concluding the Petitioner did not establish it would have an employer and employee relationship with the Beneficiary. On appeal, the Petitioner asserts that it has established eligibility for the benefit sought.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We review the questions in this matter de novo. *See 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.

Under 8 C.F.R. § 214.2(w)(1)(iv), the term "employer-employee relationship" is defined as follows:

> Employer-employee relationship means that the employer will hire, pay, fire, supervise, and control the work of the employee.

U.S. Citizenship and Immigration Services (USCIS) does not define the term "employee" by regulation for purposes of the CW-1 visa classification, even though the regulation describes CW-1 beneficiaries as being "employees" who must have an "employer-employee relationship." 8 C.F.R. § 214.2(w)(1)(iii). Therefore, for purposes of this classification, the term is undefined.

The United States Supreme Court determined that where federal law does not clearly 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)). 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."

Id.; *see also Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 445 (2003) (quoting *Darden*, 503 U.S. at 323). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968)).

The Petitioner stated on the Form I-129CW, Petition for a CNMI-Only Nonimmigrant Transitional Worker, that it is a manpower services company, and the Beneficiary would work as a maid and housekeeping cleaner. The Petitioner submitted an employment contract with the Beneficiary indicating that the Beneficiary will work as a maid and housekeeping cleaner and listing the job duties. The Petitioner also submitted a commercial cleaner services agreement between the Petitioner and a customer indicating the Petitioner will provide cleaning services for the customer. The Director determined that the Petitioner did not provide sufficient documentation to establish the employee-employer relationship since it was not clear where the Beneficiary will work, who will supervise her work at the customer site, and the nature of her work when working at the customer site.

On appeal, the Petitioner provides further clarification of the submitted service agreement executed between the Petitioner and the customer and states that its "employees are provided to the businesses for certain work activities" and an invoice is generated to that business reflecting the manhours for that pay period. The Petitioner also explains that the customer will pay for the Petitioner's services, but the Petitioner will perform the payroll accounting, tax deductions and payroll. The Petitioner also submits paystubs issued to the Beneficiary. Since the Petitioner provides further clarification on appeal, a remand is warranted in this case because it is material to the claim of whether the Petitioner sufficiently demonstrates that it is an eligible employer as required by 8 C.F.R. § 214.2(w)(4)(i) and as defined by 8 C.F.R. § 214.2(w)(1)(vi).

We are also remanding the matter to determine whether the Petitioner filed semiannual reports for previously approved CW-1 cases. According to 8 C.F.R. § 214.2(w)(26)(i), an employer of a CW-1 nonimmigrant worker whose petition has been approved for an employment start date on or after October 1, 2019 and for a validity period of six months or more is required to file a semiannual report verifying the continuing employment and payment of the beneficiary under the terms and conditions of the approved petition within a 60-day window surrounding the six month anniversary of the petition validity start date. Furthermore, per 8 C.F.R. § 214.2(w)(26)(ii), failure to comply with this requirement may be a basis for revocation of an approved petition or for denial of subsequent petitions filed by the employer.

Accordingly, the matter will be remanded to the Director to consider the new evidence and determine whether the record establishes that the Petitioner is an eligible employer as required by 8 C.F.R. § 214.2(w)(4)(i). In addition, the Director can review the record to determine if the Petitioner properly filed the semiannual reports as required under 8 C.F.R. § 214.2(w)(26)(i). The Director may request any additional evidence considered pertinent to the new determination and any other issues. We express no opinion regarding the ultimate resolution of this case on remand.

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