U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21700459

Date: MAY 19, 2022

Appeal of Texas Service Center Decision

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

The Petitioner seeks to 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.

After issuing a request for evidence and a notice of intent to deny (NOID), the Texas Service Center Director denied the Form I-129, Petition for a Nonimmigrant Worker. The matter is now before us on appeal. 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*. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will remand the matter to the Director for further review of the record and issuance of a new decision.

I. LEGAL FRAMEWORK

The regulation at 8 C.F.R. § 103.2(b)(16)(i) provides that:

> If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered . . . ."

II. ANALYSIS

The Petitioner initially stated that the Beneficiary will be responsible for software development duties associated with a type of application software designed to run on a mobile device. The Petitioner provided a functional and technical document relating to the application. The Petitioner indicated it changed the name of the application. Within the NOID, the Director noted that after the agency

performed a site visit to two of its business locations, no work was being performed at those offices as claimed. The Director also expressed doubt that the Petitioner owned the rights to the application, and as a result, if the organization did not own the application it did not have *bona fide* work for the Beneficiary to perform. The Director's NOID also noted that an investigation revealed that the application ceased to exist in 2016. After the Petitioner responded to the NOID, the Director concluded that the Petitioner plagiarized the material relating to the application from internet sources and based on the other allegations within the NOID, the Director found that the Petitioner did not establish the substantive nature of the work the Beneficiary would perform for the organization.

On appeal, the Petitioner claims that they own the application and they allege that the Director did not follow the regulation at 8 C.F.R. § 103.2(b)(16)(i) relating to notifying the organization of the adverse information the agency was relying on to come to their conclusion. The Petitioner alleges that the Director did not provide their reasoning or analysis to inform the Petitioner of how they concluded that the project material was plagiarized and belonged to a different company.

A review of the record reveals that the Director did not inform the Petitioner of how it determined the Petitioner plagiarized material from the internet. The Director did not identify the internet resources from which it compared to the material the Petitioner provided. The Director also did not specify how it decided the application ceased to exist in 2016. As a result, we agree that the Director did not sufficiently inform the Petitioner of the derogatory information it was considering to make the adverse decision.

The Petitioner has not presented probative evidence demonstrating that it created, purchased, or gained ownership to the rights of the application in question. It appears that the application was developed and was in use in 2014.[1] If the Petitioner is able to demonstrate ownership or creation over the application, the Director may elect to have them explain the precise work the Beneficiary would perform for it as the application appears to already exist and was in use more than eight years ago. The Director may also determine whether the Petitioner sufficiently documented and specified the process of purchasing the application, migrating the data, and implementing the new application. Included within that could be contracts documenting not only the purchase of the application, but also whether that purchase included existing client data, how they migrated the existing client data to the new system, and whether they were going to utilize the existing legacy application's basic framework or were they going to start over from the ground up and build a completely new application utilizing the same concept, among other questions.

We conclude that the Director did not properly deny the petition because they did not sufficiently inform the Petitioner of the derogatory information upon which the denial was based. This did not afford the Petitioner the opportunity of addressing the issues presented in the final decision. We will remand the matter to the Director to issue a new NOID in accordance with the applicable regulation.

[1] Engaget (May 19, 2022), https://www.engadget.com; ELLE (May 19, 2022), https://www.elle.com/culture/tech/news/a14941/

III. CONCLUSION

As the Petitioner was not previously accorded the opportunity to address the above, we will remand the record for further review of these issues. If the Director determines it is necessary, they may request any additional evidence considered pertinent to the new determination.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.