U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20486762

Date: OCT. 31, 2022

Appeal of California 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.

The California Service Center Director denied the petition, in part determining the Petitioner did not demonstrate the Beneficiary was qualified for the position. The matter is now before us on appeal. Upon *de novo* review, we will dismiss the appeal as the matter is now moot. We will further dismiss the appeal on two additional bases.

A review of U.S. Citizenship and Immigration Services (USCIS) records indicate that on a date subsequent to the denial of this petition, a U.S. employer submitted a new Form I-129, Petition for a Nonimmigrant Worker, on behalf of the Beneficiary. USCIS records further indicate that this new Form I-129 was approved. Because the Beneficiary in this petition has been approved for H-1B employment based upon the filing of another petition, further pursuit of the matter at hand is moot.

Furthermore, the Petitioner included incorrect dates of intended employment on the petition, the Director issued a request for evidence (RFE) informing the petitioning organization the dates must be adjusted, and they did not make the requested changes. The dates of intended employment the Petitioner provided on the petition were October 1, 2020, through September 30, 2020, making the ending date one day before the starting date. The Petitioner is required to provide accurate dates not only to set up the framework for USCIS to designate parameters for an approval, but also because every petition must be executed in accordance with the instructions on the form, which are incorporated into the regulation requiring its submission. 8 C.F.R. § 103.2(a)(1). Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1) that provides: "Each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions. Any evidence submitted in connection with a benefit request is incorporated into and considered part of the request." Now on appeal, the Petitioner

indicates its lack of response to the incorrect dates issue in its RFE response was an oversight and they provide an amended Form I-129 page with an adjusted ending date of September 30, 2023.

In *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988), the Board of Immigration Appeals held that if a petitioner was put on notice of an evidentiary requirement (by statute, regulation, form instructions, RFE, etc.) and was given a reasonable opportunity to provide the evidence, then any new evidence submitted on appeal pertaining to that requirement would not be considered, and the appeal would be adjudicated based on the evidentiary record before the director.[1]

Conversely, if the Petitioner had not been put on notice of the deficiency or given a reasonable opportunity to address it before the denial, and on appeal it submits additional evidence addressing the deficiency, the record would generally be remanded to allow the Director to initially consider and address the newly submitted evidence. *Id.*[2] Despite the Director's inaccurate reference to licensing requirements in the denial instead of the ending employment date, the fact remains that the Petitioner provided an incorrect ending date, was informed of the issue and afforded the opportunity to remedy the shortcoming, did not do so before the Director, and now submits new evidence at the appellate stage. As a result, we will not accept the new evidence on appeal. This issue is also dispositive of the appeal.

Even if the above two topics were not present, we would not find in the Petitioner's favor on the Beneficiary qualifications issue because it did not preponderantly establish what its prerequisite qualifications were for the position. We note that even though they mentioned what the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*) provides for the expected education requirements of the Computer Systems Analysts profile—which is the same standard occupational classificational code the Petitioner designated for this position on the DOL ETA Form 9035 & 9035E, Labor Condition Application for Nonimmigrant Workers submitted with this petition—they did not state that the information in the *Handbook* was the same as their position requirements as it relates to the educational mandates to prepare to be a Computer Systems Analyst. So based on those shortcomings, it seemingly caused the Director to presume that the *Handbook* education requirements were the same as the Petitioner's, and that was an incorrect assumption on the Director's part.

A petitioner's burden of proof comprises both the initial burden of production, as well as the ultimate burden of persuasion. *Matter of Y-B-*, 21 I&N Dec. 1136, 1142 n.3 (BIA 1998). A petitioner must satisfy the burden of persuasion, meaning they must establish the degree to which their arguments and evidence should persuade or convince USCIS that the requisite eligibility parameters have been met (i.e., the obligation to persuade the trier of fact of the truth of a proposition). *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 274 (1994). The level at which petitioners must persuade in the present context is the preponderance of the evidence. Whether a petitioner can show that a particular fact or event is more likely than not present, or established, is

[1] This finding is reiterated in numerous cases since *Soriano*: *Matter of Izaguirre*, 27 I&N Dec. 67, 71 (BIA 2017); *Matter of Patino*, 23 I&N Dec. 74, 77 (BIA 2001); *Matter of Adeniji*, 22 I&N Dec. 1102, 1126 (BIA 1999); *Matter of Xiu Hong Li*, 21 I&N Dec. 13, 18 (BIA 1995); *Matter of Cuello*, 20 I&N Dec. 94, 96 (BIA 1989).

[2] A remand to a previous trier of fact for new claims or evidence occurs within other appellate venues, as well. *See Jander v. Ret. Plans Comm. of IBM*, 910 F.3d 620 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 2667 (2019), and *vacated and remanded*, 140 S. Ct. 592 (2020); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 175 (2004).

the determinant of whether they have met the preponderance of the evidence standard of proof. Ultimately, the Petitioner has not preponderantly established what its position requirements were for this position.

Based on that failure, we cannot even make a determination of whether the Beneficiary is qualified for their position or not. A beneficiary's credentials to perform a particular job are relevant only after the position is found to be a specialty occupation. And the record does not establish that the Petitioner requires a baccalaureate or higher degree in a specific specialty, or its equivalent for the offered position. As a result, we withdraw the Director's decision as it relates to whether the Beneficiary is qualified to occupy the position and we conclude the petition should remain denied for not demonstrating it qualifies as a specialty occupation.

ORDER: The appeal is dismissed.