U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28153497

Date: AUG. 4, 2023

Appeal of California 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.

The Director of the California Service Center denied the petition, concluding that the record did not establish that the Petitioner was exempt from paying the required fee imposed by the Consolidated Appropriations Act, Pub. L. No. 114-113, § 411(b), 129 Stat. 2242, 3006 (2015). The matter is now before us on appeal. 8 C.F.R. § 103.3.

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 dismiss the appeal.

The Petitioner initially indicated it had 48 employees in the United States at the time of filing and certified under penalty of perjury that it had confirmed "all information contained in the petition, including all responses to the specific question, and in the supporting documents, is complete, true, and correct." As the Director discussed in her decision, Public Law 114-113 requires an additional $4,000 fee for petitioners that employ 50 or more employees in the United States if more than 50% of those employees are in H-1B, L-1A, or L-1B status. The Director searched U.S. Citizenship and Immigration Services (USCIS) records and found that the Petitioner "obtained 86 H-1B or L-1 approvals in the last three years compared to the [stated] 48 U.S. employees." Therefore, the Director issued a request for evidence (RFE), providing an opportunity for the Petitioner to submit evidence to establish it was exempt from the additional fee.

In response, the Petitioner submitted an unsworn letter from its president stating that it had 49 employees at the time of filing, along with a list of employees it stated were currently on their payroll and concluded that "the petitioner ( ) is [only] required to pay $1500

towards [the] ACWIA Fee." Not only does the letter inexplicably indicate that a different company is the petitioning entity, but a list of employees currently on payroll in December 2022 does not address the number of employees it had at the time of filing in June 2022. The Petitioner also stated that there were individuals who had approved H-1B petitions in the prior 12 months who had not yet onboarded, but did not provide any additional information, such as a list of names and receipt numbers for these individuals. While we acknowledge that the list includes information regarding six individuals who left the company between February 2022 and May 2022, the Petitioner did not provide information regarding the more than 30 remaining individuals for whom they have approved H-1B petitions. Further, although the Petitioner stated that it included a copy of its Form 941, Employer's Quarterly Tax Return, payroll reports, and paystubs for each employee, it did not submit these documents with its RFE response.

The Director denied the petition, concluding that the Petitioner did not establish that it is exempt from the fee imposed by Public Law 114-113. On appeal, the Petitioner provides a new unsworn letter, a list of employees, and a "payroll summary."

The evidence, however, is insufficient to establish the actual number of the Petitioner's employees at the time of filing the petition and, thus, whether the Petitioner is exempt from the fee required by Public Law 114-113. For example, contrary to the Petitioner's claim that the list includes 1) their "H-1[B] employees who have been approved in the past 3 years," 2) "the employees who have been terminated or resigned from the company," and 3) "the beneficiaries who have not reported to the company and hence were never onboarded to the company," only 47 "active" H-1B employees are actually listed. Notably, two individuals who appeared on the list provided in response to the RFE are not included in the list on appeal. Not only does the Petitioner not provide any explanation for this discrepancy, but again it has not sufficiently addressed the absence of the individuals for whom they have received H-1B approvals but are not listed as employees.

We also have concerns regarding the payroll summary. In addition to not providing accompanying information as to who prepared the report, it lists 49 employees (as opposed to the 48 indicated in the initial petition and the 47 listed on appeal) and is for the month of April 2022, which does not cover the filing date of June 23, 2022. The Petitioner does not provide an explanation for these discrepancies.

The Petitioner must resolve the above discrepancies and ambiguities in the record regarding the number of employees it had at the time of filing with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Here, the Petitioner has not overcome the Director's conclusion and established that it is exempt from the fee required by Public Law 114-113. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.