U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25018518

Date: FEB. 22, 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 for entry into the position.

The Director of the California Service Center denied the petition concluding that the record did not establish that the Beneficiary has education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States bachelor's or higher degree in the specialty occupation and has recognition of expertise in the specialty through progressively responsible position directly related to the specialty. 8 C.F.R. § 214.2(h)(4)(iii)(C)(4). 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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following legal and factual analysis.

I. LEGAL FRAMEWORK

Long standing legal standards require that the Director first determine whether the proffered position qualifies for classification as a specialty occupation and then move to determine whether the Beneficiary was qualified for the position at the time the nonimmigrant petition was filed. *Cf. Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm'r 1988). The Director appears to have concluded that the proffered position here is a specialty occupation, and we see no error in that apparent determination.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an individual applying for classification as an H-1B nonimmigrant worker must possess a license if it is required for the occupation, have

earned a bachelor's or higher degree in a specific specialty related to the job duties, or have earned the equivalent of a bachelor's or higher degree in a specific specialty related to the job duties based on having experiences in the specialty equivalent to the completion of the degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The supplementing regulations at 8 C.F.R. § 214.2(h)(4)(iii)(C) require meeting one of four criteria in order to qualify to perform services in a specialty occupation. 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*) states that a beneficiary must:

> have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

There are five methods by which to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*). The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*) permits the Petitioner to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*) if they submit:

> An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

II. ANALYSIS

The Director concluded that the proffered position would require at least a bachelor's degree or its equivalent in a specific specialty related to the proffered job's duties. The sole issue for us to examine is whether the Director erred in concluding that the Beneficiary does not have the required education to qualify for the Petitioner's proffered position.

We agree with the Director that the Petitioner has not established the Beneficiary's qualifications for the proffered specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*1*)-(*3*). The Beneficiary does not hold a United States bachelor's or higher degree required by the specialty occupation from an accredited college or university. They likewise do not hold a foreign degree determined to be equivalent to a United States bachelor's or higher degree required for the specialty occupation from an accredited college or university. The Petitioner has also not demonstrated that the Beneficiary holds an unrestricted State license, registration, or certification which authorizes them to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment.

When the occupation does not require a license and the Beneficiary does not have the required U.S. degree or its foreign degree equivalent in the field required for entry to the specialty occupation, our analysis revolves around whether the Petitioner established that the Beneficiary possesses the education, specialized training and/or progressively responsible experience in the specialty equivalent to the completion of the required U.S. degree or its foreign degree equivalent and has progressively

responsible experience in job position in the specialty constituting a recognition of expertise as required by 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*).

The Director based their decision on the insufficiency of the evaluations of the Beneficiary's education and work experience provided by the Petitioner. Most relevantly, the record of proceeding contains:

- An evaluation by [redacted], a college professor at [redacted] University, concluding that the Beneficiary's education, training and/or experience was equivalent to a United States baccalaureate degree in computer information systems;
- An evaluation by [redacted] a college professor at [redacted] University, concluding that the Beneficiary's education, training and/or experience was equivalent to a United States baccalaureate degree in computer science; and
- Letters from the Beneficiary's former employers.

Each evaluation was accompanied by the writer's curriculum vitae, letter(s) from their employing institutions attesting to their authorization to grant college-level credit or training and/or work experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience, and documentation either from an internal policy document or printed from publicly available internet sources describing the institutions' policy for granting academic credit.

The Director discounted [redacted] opinion because they concluded the record of proceeding did not contain the evidence containing the description of the Beneficiary's prior job responsibilities that [redacted] would have evaluated in making his opinion. But the Petitioner did provide the Beneficiary's previous employer letters, albeit in conjunction with a different evaluation and separately from [redacted] opinion with the RFE response.

The Director expressed dissatisfaction with [redacted] opinion because the opinion stated that the Beneficiary has seven years of work experience and training when in fact the Beneficiary has demonstrated that he has five years of relevant work experience and training. We agree that a writer's conclusions unsupported by the record should be afforded less value. We also observe, as noted by the Director in their decision, that [redacted] opinion listed the Beneficiary's five years of relevant previous work experience and training previous accurately. The Petitioner notes in their counsel's brief that [redacted] committed a computation error in the amount of experience the Beneficiary had but based their opinion of the Beneficiary's qualifications on the evidence as listed. Assertions of counsel are not evidence.[1] However, the record of proceedings reflects that the Beneficiary provided evidence of five years of previous work experience and that the writer examined that specific evidence in rendering their opinion. The Director's decision will therefore be withdrawn, and the matter remanded for further action, so that the Director may conduct a first-line adjudication of that evidence.

[1] *See INS v. Phinpathya*, 464 U.S.183, 188 n.6 (1984); *see also Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As the Director conducts that first-line adjudication, they may wish to also take into account the following concerns we have identified that cast doubt on the Beneficiary's qualifications for the specialty occupation.

For example, 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*) requires that an evaluation of education and work experience be written by an official who has the authority to grant college-level credit for training and/or experience in the specialty at an accredited college for university which has a program for granting such credit based on an individual's training and/or work experience. [redacted] opinion is accompanied by two letters from officials from his employer, [redacted] University, attesting to [redacted] authority to issue credit for relevant work experience where appropriate. The letters are identical in every way other than the letterhead and signature block. Most specifically, the content of the submitted letters conflicts with public information from [redacted] University which makes no provision for credit to be authorized based on work experience. [redacted] University per their public transfer credit policy only awards credit for academic work completed at other academic institutions and not for work experience or training. Examples of sources listed in the policy from which [redacted] University may accept credit are accredited institutions, foreign universities, U.S. military credit for approved job and educational experience and miscellaneous sources such as internships, and nontraditional learning experiences. Work experience is not mentioned or provided for. Moreover, the policy states that the credit may or may not apply for the purposes of graduation from [redacted] University, regardless of the number of credits transferred. This conflict raises doubt about whether the writer is authorized to grant credit based on training and/or work experience. The record of proceeding does not contain material, relevant or probative evidence addressing this discrepancy.

Furthermore, the very evidence that the Petitioner submitted to the evaluators regarding the Beneficiary's previous work experience raises a significant concern. Specifically, the "Employment offer" prepared by the Beneficiary's previous employer, [redacted] purports to offer the Beneficiary employment commencing September 30, 2019. But it is dated September 23, 2021, an almost full two years later.

Doubt cast on any aspect of a petitioner's evidence may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

So the record should be further developed to evaluate the Beneficiary's qualifications to perform the duties of the specialty occupation consistent with the foregoing legal and factual analysis. Specifically, the Director should conduct a first-line review of the above-referenced evidence regarding the Beneficiary's five years of claimed work experience. And as they do so, the Director may also wish to consider the deficiencies we identified above. We express no opinion regarding the ultimate disposition of this petition.

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