U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23353336

Date: JAN. 27, 2023

Appeal of Texas Service Center Decision

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

The Petitioner seeks to extend the Beneficiary's temporary employment 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 Texas Service Center Director initially approved the Form I-129, Petition for a Nonimmigrant Worker (petition), then revoked the approval after issuing a notice of intent to revoke (NOIR). The Director revoked the approval on two bases: (1) the Petitioner did not establish the Beneficiary was working within the scope of the approved petition; and (2) the Petitioner did not provide an LCA that covered the Beneficiary's work location. 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 Cheung*, 12 I&N Dec. 715, 720 (BIA 1968); *Matter of Estime*, 19 I&N Dec. 450, 452, n.1 (BIA 1987). 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.

I. LEGAL FRAMEWORK

A. Revocation Authority

U.S. Citizenship and Immigration Services (USCIS) may revoke the approval of an H-1B petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii), which states the following:

> (A) *Grounds for revocation*. The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:
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> > (*1*) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition . . . ; or

(*2*) The statement of facts contained in the petition or on the application for a temporary labor certification was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or

(*3*) The petitioner violated terms and conditions of the approved petition; or

(*4*) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or

(*5*) The approval of the petition violated paragraph (h) of this section or involved gross error.

(B) *Notice and decision*. The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part . . . .

B. Specialty Occupation

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant as a foreign national "who is coming temporarily to the United States to perform *services . . . in a specialty occupation* described in section 214(i)(1) . . . " (emphasis added). Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), defines the term "specialty occupation" as an occupation that requires "theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." The regulation at 8 C.F.R. § 214.2(h)(4)(ii) largely restates section 214(i)(l) of the Act but adds a non-exhaustive list of fields of endeavor.

Accordingly, to determine whether the Beneficiary will be employed in a specialty occupation, we look to the record to ascertain the services the Beneficiary will perform and whether such services require the theoretical and practical application of a body of highly specialized knowledge attained through at least a bachelor's degree or higher in a specific specialty or its equivalent. Without sufficient evidence regarding the duties the Beneficiary will perform, we are unable to determine whether the Beneficiary will be employed in an occupation that meets the statutory and regulatory definitions of a specialty occupation and is a position that also satisfies at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The services the Beneficiary will perform in the position determine: (1) the normal minimum educational requirement for entry into the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion

2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. *See* 8 C.F.R. § 214.2(h)(4)(iii)(A).

II. BACKGROUND

When it filed the petition, the Petitioner was located in [redacted], Georgia and subsequently moved to another location. The petitioner stated that the beneficiary will be responsible for working on "the company's IT applications in a highly dynamic and fast-paced environment." It listed his duties as the following:

- Development of Software Code for Internal Cloud Applications
- Review of existing code and review of peer code
- Refinement of team processes
- Adhere to Agile Scrum Principles
- Use of industry tools to develop, deploy, maintain, and test software developed
- Work with developers to design and deliver high quality software for Cloud platform
- Troubleshoot problem/bugs and develop appropriate fix/patch
- Participate in design and code reviews
- Create appropriate technical documentation related to development and support of new releases
- Collaborate with other team members to provide input on how QA testing and Support of new releases can be accomplished and providing support when necessary
- Integrate software with off the shelf solutions
- Attend and actively participate in Agile Scrum meetings
- Backlog grooming
- Sprint Review
- Sprint Planning
- Daily Scrum

Subsequent to the petition's approval, USCIS performed a site visit, and when the Petitioner's representative was inadequately cooperative, agency officers requested the representative and the Beneficiary appear at a local USCIS office for an in-person interview. During this process, the Petitioner's representative indicated the Beneficiary was working on multiple products.

III. ANALYSIS

During the in-person interview, the Beneficiary and the signatory on the petition described the foreign national's job duties. The Director determined that during this interview they were unable to provide sufficient evidence to support the projects the beneficiary was engaged in to support the job duties described in the petition, the Petitioner did not provide evidence of contracts or client agreements relating to the work the Beneficiary was then engaged in, and the Beneficiary was unable to articulate sufficient details to support the contention that he was serving as a software engineer for the project to which he was then assigned. These vagaries left the Director unable to make a favorable determination that the Beneficiary was working within the scope of the petition as a senior systems engineer.

We note on appeal the Petitioner submits a contract the Director indicated was absent from the record in the form of a Master Services Agreement (MSA) between itself and another employer (Employer 2). As to what work would result from the MSA, Section 6.4 defines a "work product" as "any programming, documentation, data compilations, reports, and any other media, materials, or other objects produced as a result of Sub-Contractor's [a.k.a. the Petitioner's] work or delivered by Sub-Contractor in the course of performing that work." Exhibit A attached to the MSA is the Scope of Work (SOW). That exhibit reflects that the Petitioner will provide services to a third party (Employer 3) and not to Employer 2.

Although the SOW contains the Beneficiary's name, it lacks sufficient detail to establish that the work he would perform for Employer 3 adequately aligns with the duties the Petitioner stated he would perform when it filed the petition. The SOW only reflects the Petitioner "will provide software development and consulting services to [Employer 3] and/or its customers." Notably, this content appears to indicate that the Beneficiary might not perform work for Employer 3, and instead would be assigned to provide services to additional unnamed entities that are not parties to this contract. This scenario appears to be too "watered-down" for the Petitioner to preponderantly demonstrate the Beneficiary would perform the work it listed when it filed the petition as his actual day-to-day duties. It is unclear from the record what exact work the Beneficiary would perform.

In the Petitioner's statement from the initial filing quoted above, they stated he would be working on the petitioning organization's own "IT applications." However, after the Petitioner has been afforded numerous opportunities—within the initial filing, during the site visit and the in-person interview, when they responded to the Director's NOIR, and now on appeal—to show it has its own software applications that it markets to organizations requiring such services, it has not shown that the Beneficiary is working on the petitioning organization's own information technology applications. As an example, an application programming interface that allows one software product or service to communicate with other similar products or services without the need for a significant amount of customization. This is an additional factor that supports the Director's decision to revoke the petition's approval.

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); *also see* the definition of burden of proof from *Black's Law Dictionary* (11th ed. 2019) (reflecting the burden of proof includes both the burden of production and the burden of persuasion). First, a petitioner must satisfy the burden of production. As the term suggests, this burden requires a filing party to produce evidence in the form of documents, testimony, etc. that adheres the governing statutory, regulatory, and policy provisions sufficient to have the issue decided on the merits.

Second, 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 is able to show that a particular fact or event is more likely than

not to occur is the determinant of whether they have met the preponderance of the evidence standard of proof. The Petitioner has not met that standard here.

Even if the Petitioner had overcome all the above adverse aspects, we would still remand the matter to the Director to allow the organization to address why it was compensating the Beneficiary with an annual salary of $65,000 when the LCA calls for at least $85,509 and on the petition the Petitioner stated it would pay him $90,000. This deficit in pay would also appear to preclude the reinstatement of this petition's approval.

Because the identified basis for the petition's revocation of its approval is dispositive of this appeal, we will not address and we reserve the Petitioner's remaining appellate arguments. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (finding it unnecessary to analyze additional grounds when another independent issue is dispositive of the appeal); *see also Matter of D-L-S-*, 28 I&N Dec. 568, 576–77 n.10 (BIA 2022) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

III. CONCLUSION

The revocation of the previously approved petition is affirmed for the above stated reasons, with each considered an independent and alternative basis for the decision. The burden of proof to establish eligibility for the benefit sought remains with a petitioner in revocation proceedings. Section 291 of the Act; *Cheung*, 12 I&N Dec. at 720; *Estime*, 19 I&N Dec. at 452, n.1. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.